



To: City Commission

From: Craig E. Leen, City Attorney for the City of Coral Gables 

RE: Legal Opinion Regarding Police Officer Conduct Arrest On Probable Cause

Date: August 26, 2014

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I have been asked to analyze and provide an opinion related to when a police officer may conduct an arrest based on probable cause that a burglary has been committed. It is my opinion, based on a review of Florida law, and case law interpreting the Fourth Amendment to the United States Constitution, that evidence of entry into an occupied structure at night without permission, particularly through a back door, is generally legally sufficient to support an arrest for burglary based on probable cause. Of course, each case must be viewed on its own facts, and a legal opinion should be sought where appropriate. Florida law defines a burglary as follows:

Entering a dwelling, a structure, or a conveyance with the intent to commit an offense therein, unless the premises are at the time open to the public or the defendant is licensed or invited to enter

§ 810.02, Fla. Stat.

In a situation where adult suspects enter into an occupied residence at night without permission, it is clear that (1) an entry into a dwelling has occurred where (2) the premises are not open to the public and where there is no license or invitation to enter. The only question then is whether there is probable cause to believe that the entry is done "with the intent to commit an offense therein." In determining whether there is probable cause of such intent, section 810.07 of the Florida Statutes, entitled "Prima facie evidence of intent" must be considered:

- (1) In a trial on the charge of burglary, proof of the entering of such structure or conveyance at any time stealthily and without consent of the owner or occupant thereof is prima facie evidence of entering with intent to commit an offense.
- (2) In a trial on the charge of attempted burglary, proof of the attempt to enter such structure or conveyance at any time stealthily and without the consent of the owner

or occupant thereof is prima facie evidence of attempting to enter with intent to commit an offense.

§ 810.07, Fla. Stat.

Accordingly, on a charge of burglary, Florida law permits the proof of entry into a structure stealthily and without consent to be "prima facie evidence of entering with intent to commit an offense" at trial. *Baker*, 622 So. 2d at 1333 ("Appellant's intent to commit an offense, which is an essential element of burglary, may be inferred from /tis stea/tlty entry.") (emphasis added). It is my opinion, based on this language in section 810.07, as well as analysis of case law interpreting that section, that a police officer may find probable cause that a burglary has been committed where adults enter into an occupied residence at night, particularly where such entry is done through a back door. *See Baker v. State*, 622 So. 2d 1333, 1335-36 (Fla. 1st DCA 1993) (determining that entry through rear window constituted stealthy entry supporting burglary conviction); *Irvin v. State*, 590 So. 2d 9 (Fla. 3d DCA 1991) (determining that entry into van in parking lot where nobody was near could constitute stealthy entry for purposes of burglary statutes). In other words, a police officer may lawfully assume the intent to commit an offense through the stealthy and unlawful entry itself.

In the leading case of *Rankin v. Evans*, the U.S. Court of Appeals for the Eleventh Circuit defined probable cause as follows under both federal and Florida law:

As has been discussed, the standard for determining whether probable cause exists is the same under Florida and federal law. In order for probable cause to exist, an arrest [must] be objectively reasonable under the totality of the circumstances. This standard is met when the facts and circumstances within the officer's knowledge, of which he or she has reasonably trustworthy information, would cause a prudent person to believe, under the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense. Probable cause requires more than mere suspicion, but does not require convincing proof ....

***Probable cause is judged not with clinical detachment but with a common sense view to the realities of normal life.***

*Rankin v. Evans*, 133 F.3d 1425, 1435 (11th Cir. 1998) (emphasis added) (internal citations and quotation marks omitted); accord *Holland v. State*, 696 So. 2d 757, 759 (Fla. 1997) (holding that Article I Section 12 of the Florida Constitution binds Florida courts to follow the U.S. Supreme Court's interpretation of the Fourth Amendment.).

In particular situations, suspects may raise excuses or defenses that would indicate that they did not intend to commit an offense. These explanations are self-serving and need not be

credited by the officers. *See Rankin*, 133 F.3d at 1436 (citing *State v. Riehl*, 504 So. 2d 798, 800 (Fin. 2d DCA 1987) for proposition that "in order to establish the probable cause necessary to make a valid arrest, ... it is not necessary to eliminate all possible defenses"); *see also Staco v. Miami-Dade County*, 536 F. Supp. 2d 1301, 1305-06 (S.D. Fla. 2008) (determining that officers could rely on victim's complaint to conduct an arrest for residential burglary and need not investigate alibi of suspects); *Christman v. Kick*, 342 F. Supp. 2d 82, 86 (D. Corm. 2004) ("[T]he law does 'not impose a duty on an arresting officer to investigate exculpatory defenses offered by the person being arrested or to assess the credibility of unverified claims ... before making an arrest.'" (citation omitted).

Indeed, the Eleventh Circuit has held that there is no need for the police to consider possible evidentiary support for a defense or alibi when determining whether probable cause existed for arrest. *Williams v. City of Homestead*, 206 Fed. Appx. 886, 889 (11th Cir. 2006) ("He was under no obligation to credit Williams' explanation or alibi. The tape recording Williams offered (which may have been made in violation of Florida law) was more appropriate for use by her defense attorney than by the arresting officer, and Schwartz reasonably declined to listen to it.").

A police officer is not the judge, the jury, nor the prosecuting authority, and need not evaluate whether the suspect's explanation is true or not. For example, the Eleventh Circuit has found probable cause exists against someone for passing a counterfeit note when the individual is identified and there is evidence that the note was passed. *U.S. v. Everett*, 719 F.2d 1119, 1120 (11th Cir. 1983). As the Court in *Everett* observed, "[w]hile intent is an element of the crime which must be proved at trial, *it is not necessary in order to establish probable cause to arrest.*" *Id.* (emphasis added). Indeed, in analyzing the concept of "arguable probable cause" under federal qualified immunity law, the Eleventh Circuit continues to emphasize this exact point. *See Scarbrough v. Myles*, 245 F.3d 1299, 1302-03 (11th Cir. 2001) ("[a]rguable probable cause does not require an arresting officer to prove every element of a crime or to obtain a confession before making an arrest, *which would negate the concept of probable cause and transform arresting officers into prosecutors.*") (emphasis added); *Jordan v. Mosley*, 487 F.3d 1350, 1355 (11th Cir. 2007) (observing that "no police officer can truly know another person's subjective intent," and finding that evidence that the plaintiff damaged a piece of equipment provided arguable probable cause to arrest the plaintiff for intentionally damaging the equipment).

In conclusion, it is my opinion that evidence of the entry into an occupied structure at night without permission, particularly through a back door, is generally legally sufficient to support an arrest for burglary based on probable cause. If the prosecuting authority ultimately determines that there was no "intent to commit an offense therein" based on further investigation, the matter could then proceed on a charge of trespass of an occupied dwelling. Such a determination in no way undermines the original arrest, as probable cause for arrest is evaluated

from what is known at the moment of the arrest, not from the results of a later investigation. Once again, each individual case should ultimately be evaluated on its own facts, and a legal opinion should be sought where appropriate.

CITY OF CORAL GABLES  
OFFICE OF THE CITY ATTORNEY

-MEMORANDUM AND OPINION-

TO: CITY COMMISSION

DATE: AUGUST 26, 2014

FROM:

  
CRAIG E. LEEN  
CITY ATTORNEY

SUBJECT: PROBABLE CAUSE

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(1) In a trial on the charge of burglary, proof of the entering of such structure or conveyance at any time stealthily and without consent of the owner or occupant thereof is prima facie evidence of entering with intent to commit an offense.

(2) In a trial on the charge of attempted burglary, proof of the attempt to enter such structure or conveyance at any time stealthily and without the consent of the owner or occupant thereof is prima facie evidence of attempting to enter with intent to commit an offense.

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Accordingly, on a charge of burglary, Florida law permits the proof of entry into a structure stealthily and without consent to be “prima facie evidence of entering with intent to commit an offense” at trial. *Baker*, 622 So. 2d at 1333 (“Appellant’s intent to commit an offense, which is an essential element of burglary, *may be inferred from his stealthy entry.*”) (emphasis added). It is my opinion, based on this language in section 810.07, as well as analysis of case law interpreting that section, that a police officer may find probable cause that a burglary has been committed where adults enter into an occupied residence at night, particularly where such entry is done through a back door. *See Baker v. State*, 622 So. 2d 1333, 1335-36 (Fla. 1st DCA 1993) (determining that entry through rear window constituted stealthy entry supporting burglary conviction); *Irvin v. State*, 590 So. 2d 9 (Fla. 3d DCA 1991) (determining that entry into van in parking lot where nobody was near could constitute stealthy entry for purposes of burglary statutes). In other words, a police officer may lawfully assume the intent to commit an offense through the stealthy and unlawful entry itself.

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requires more than mere suspicion, but does not require convincing proof. . . .  
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A police officer is not the judge, the jury, nor the prosecuting authority, and need not evaluate whether the suspect's explanation is true or not. For example, the Eleventh Circuit has found probable cause exists against someone for passing a counterfeit note when the individual is identified and there is evidence that the note was passed. *U.S. v. Everett*, 719 F.2d 1119, 1120 (11th Cir. 1983). As the Court in *Everett* observed, "[w]hile intent is an element of the crime which must be proved at trial, *it is not necessary in order to establish probable cause to arrest.*" *Id.* (emphasis added). Indeed, in analyzing the concept of "arguable probable cause" under federal qualified immunity law, the Eleventh Circuit continues to emphasize this exact point. See *Scarborough v. Myles*, 245 F.3d 1299, 1302-03 (11th Cir. 2001) ("[a]rguable probable cause does not require an arresting officer to prove every element of a crime or to obtain a confession before making an arrest, *which would negate the concept of probable cause and transform arresting officers into prosecutors.*") (emphasis added); *Jordan v. Mosley*, 487 F.3d 1350, 1355 (11th Cir. 2007) (observing that "no police officer can truly know another person's subjective intent," and finding that evidence that the plaintiff damaged a piece of equipment provided arguable probable cause to arrest the plaintiff for intentionally damaging the equipment).

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