



## SUFFICIENCY OF AN INVESTIGATION AND THE FOURTH AMENDMENT

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On February 15, 2017, the Eleventh Circuit Court of Appeals decided *Smith v. City of Fairburn et al.*, in which the court discussed the sufficiency of an investigation as it relates to establishing probable cause to arrest. This case arose over the arrest of Ms. Smith, who lived in the City of Fairburn, Georgia. Ms. Smith had a history with the city and characterized herself as a “citizen watchdog.” In 2013, she repeatedly questioned the legality of the purchase of police vehicles, and argued that Chief McCarthy had not followed the proper procurement procedures. Around this same time, she was also involved in a dispute with one of her neighbors, Mr. Jordan. The remaining relevant facts of *Smith*, taken directly from the case, are as follows:

Jordan had moved in next to Smith approximately five years before the events giving rise to this case. Although their relationship was initially amicable, it later became hostile. Jordan “began to have people in and out and noise and music,” and Smith began calling the police department “over and over and over.”

Around 11:00 p.m. on July 23 — one day after Smith complained for the second time at a city council meeting about the improper purchase of police vehicles — one of Smith's neighbors called the police to report that loud music was coming from Jordan's home. Officer Jacob Crawford responded to this 911 call and told Jordan that his music was too loud. Jordan agreed to turn the music down.

But before long the music was loud again and Smith called the police to make a noise complaint. Officer Crawford, as well as Officers Kenneth Hammock and Jason Pridemore, responded. They located Jordan in a shed behind his house; he was drunk, angry, and belligerent. He blamed Smith for always calling the police on him and Officer Hammock overhead him say: “It was Nell Smith who called, wasn't it? She has been harassing me for five years now and I am miserable living next to her. That's okay. We can play that.” With the assistance of two unidentified women who were present at the scene, the officers were able to calm Jordan down. The officers issued Jordan a citation and departed.

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Later the same night, Smith called the police again, this time because she had heard something strike her house. During the course of that 911 call, she stated: "I don't know if the neighbors are doing this or what. I don't want these people to put me to the test."

Several officers returned to Smith's house. Officer Hammock walked around the house to see if he could locate the cause of the noise. He found a puncture mark in the siding under Smith's bedroom window. A piece of concrete about the same size as the hole was on the ground nearby. Officer Hammock allegedly told Smith: "We know who did it but we can't prove it." According to Smith, none of the officers even went to Jordan's house to speak with him about the incident. But Officer Hammock did say he would take the piece of concrete back to the station.

In his incident report, Officer Hammock wrote that: "Ms. Smith stated that she has put up with her neighbor's issues way too long and that she was going to kill him when she got the chance. Ms. Smith said to me 'I am going to kill him and you can put that in your report.'" Smith vigorously denies that she made this statement, though she admits that she told the officers that she would do what she had to do to defend herself and her property. Officer Hammock did not arrest Smith that night based on the statements he claims she made. But he did note those statements in his report.

The following morning, Chief McCarthy reviewed Officer Hammock's incident report. He then spoke to the captain of the Criminal Investigation Division and Detective Israel about following up on the incident. According to Smith, there is circumstantial evidence to suggest that during this conversation Chief McCarthy ordered Detective Israel to arrest Smith. The defendants contend that he simply directed his subordinates to investigate both Smith and Jordan.

Detective Israel reviewed Officer Hammock's report and interviewed Smith about the incident. During the interview, Smith denied making the threats described in the report. She did say that: "I just told them, I said I got a pistol waiting in there and I . . . hope that nothing happens." She also stated that, "I might have said I, you know, I . . . I feel like killing him or . . . I don't know what . . . I don't know." And she said: "I mean, I'm going to protect myself."

Detective Israel then contacted Officer Crawford (who was present for at least some part of the investigation into the noise Smith heard outside her home) to discuss the incident. Officer Crawford told Detective Israel that he did not hear the threat that Officer Hammock reported, but that he did hear Smith make a conditional threat. Officer Crawford claims Smith threatened to shoot Jordan if there was damage to her car.

Detective Israel prepared a warrant for Smith's arrest. The affidavit in support of that warrant request, in its pertinent part, reads:

Personally came Charles Israel who on oath says that, to the best of his/her knowledge and belief, Jessie Nell Smith, the Accused, did on or about 7-24-13 within the jurisdiction of this Court, commit the offense of Terroristic Threats in violation of O.C.G.A. 16-11-37, in that the accused did: threaten

to kill Ronny [sic] Jordan when she got the chance[.] The threat was heard by Ofc Hammock.

The warrant application was reviewed by Judge Ewing of the Municipal Court of Fairburn. In addition to the information contained in the affidavit, Detective Israel told Judge Ewing that Smith had told the officers they could put her threat in their report. Detective Israel also told the judge about his conversation with Officer Crawford and suggested that he had spoken to Officer Hammock, even though he hadn't. Smith was arrested by several of Detective Israel's fellow officers.

Following Smith's arrest, Detective Israel asked Officers Crawford, Hammock, Glantz, and Pridemore — all of whom responded to the final 911 call — to prepare supplemental witness statements describing their interactions with Smith. Their accounts differed as to precisely what Smith said and whether they heard her make any threat at all.

A grand jury declined to return a bill of indictment against Smith and the charges against her were dropped.<sup>ii</sup>

Smith subsequently sued the Detective Israel for violating her Fourth Amendment rights by obtaining an arrest warrant and arresting her when there was not probable cause. She also sued the detective and Chief McCarthy for retaliating against her for her criticism in violation of her First Amendment rights. She also sued for state law false arrest and sued the city for a policy or practice that caused the alleged violations against her.

The district court found that probable cause existed to arrest her and dismissed all claims. Smith appealed to the Eleventh Circuit Court of Appeals.

The first issue before the court was whether the warrant and arrest violated the Fourth Amendment. The court first examined the law related to this issue and stated

**"The Constitution does not guarantee that only the guilty will be arrested." Baker v. McCollan, 443 U.S. 137, 145, 99 S. Ct. 2689, 2695 (1979). Instead, it requires only that there be probable cause to support an arrest. See Madiwale v. Savaiko, 117 F.3d 1321, 1325 (11th Cir. 1997). And even "officers who make an arrest without probable cause are entitled to qualified immunity if there was arguable probable cause for the arrest." Kingsland, 382 F.3d at 1232. In order to determine that, "we must inquire whether reasonable officers in the same circumstances and possessing the same knowledge as the Defendants could have believed that probable cause existed to arrest" Smith. Id.<sup>iii</sup> [emphasis added]**

Thus, even if Detective Israel did not have probable cause, he is still entitled to qualified immunity if he had "arguable probable cause." Arguable probable cause exists when another reasonable officer in the same situation could have believed that probable cause existed to arrest Smith.

The court then discussed probable cause and stated

The probable cause standard requires only that there be a "fair probability" or "substantial chance" that criminal activity is afoot. See Illinois v. Gates, 462 U.S. 213, 238, 243 n.13, 103 S. Ct. 2317, 2332, 2335 n.13 (1983). **That standard "is met when the facts and circumstances within the officer's knowledge . . . 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."** Morris v. Town of Lexington Alabama, 748 F.3d 1316, 1324 (11th Cir. 2014)<sup>iv</sup> [emphasis added]

In Smith's case, Detective Israel charged her with the crime of Terroristic Threats (OCGA 16-11-37) under Georgia law. This crime occurs when a person threatens to commit a crime of violence with intent to terrorize another person.

The court noted that during the investigation, Detective Israel reviewed Officer Hammock's report which documented the threat which was the basis of the warrant, spoke with Officer Crawford, who heard a conditional threat, but not the threat documented by Officer Hammock, and interviewed Smith. In the interview, Smith denied making the threat. The detective then completed a warrant affidavit, testified before the magistrate and may have given the judge the impression that he spoke to Officer Hammock, when, in fact, he reviewed Officer Hammock's report. He obtained the warrant for Smith and subsequently, she was arrested.

The court of appeals then stated

Because Detective Israel was not present when officers responded to Smith's house after she heard a noise outside her bedroom, he had no personal knowledge of what was said that night. Instead, he based his probable cause determination on Officer Hammock's incident report and his own follow up investigation of the matter. **It is well established that "[o]bservations of fellow officers of the Government engaged in a common investigation are plainly a reliable basis for a warrant applied for by one of their number."** United States v. Ventresca, 380 U.S. 102, 111, 85 S. Ct. 741, 747 (1965). **That Smith denies making the threat that Officer Hammock put in his report doesn't matter, because Detective Israel was not required to believe her.** See Beauchamp, 320 F.3d at 744 ("**[C]riminal suspects frequently protest their innocence, and a suspect's denial of guilt generally is not enough to trigger a duty to investigate in the face of a reasonably believable witness and readily observable events.**"); Glenn v. City of Tyler, 242 F.3d 307, 313 n.3 (5th Cir. 2001) ("**[P]robable cause is not destroyed by a suspect's denial.**").

Having concluded that Detective Israel could rely on Officer Hammock's report (as well as his conversation with Officer Crawford), it is obvious that he had probable cause to believe that Smith made a threat against Jordan.<sup>v</sup> [emphasis added]

Thus, the court held that the detective had probable cause to believe that Smith made the threat that formed the basis of the warrant and her arrest. However, Smith also argued that there was no evidence that, in making the threatening statement, she had the required intent that the threat be communicated to Jordan. She argued that telling the officer that he could put it in his report was not enough to show that she intended Jordan to actually hear the threat.

The court of appeals looked to Georgia precedent to determine whether Smith's conduct satisfied the required intent to communicate the threat to the victim. The court found no case exactly on point but did find several cases similar, but with some distinguishing facts. These cases fell on both sides of the issue and the court of appeals concluded

In short, some cases (which could be distinguished) suggest that Smith's statement to Officer Hammock could support a terroristic threats charge and some cases (which could be distinguished) suggest that it could not. A reasonable officer could come to either conclusion. **As a result, even if Detective Israel was wrong to conclude that Smith's statement demonstrated intent to communicate under Georgia's terroristic threats statute, his error was a reasonable mistake of law. And a reasonable mistake of law does not destroy probable cause.** Cahaly v. Larosa, 796 F.3d 399, 408 (4th Cir. 2015) ("[O]fficers may have probable cause based on reasonable mistakes of law."). Cf. Heien v. North Carolina, 574 U.S. \_\_\_, 135 S. Ct. 530, 536-540 (2014) (holding that an officer has reasonable suspicion to conduct traffic stop even when his suspicion that a law has been violated is based on a reasonable mistake of law). As a result, Smith's alleged statements would support a finding of probable cause.

Smith also argued that the detective should have done additional investigation to look for exculpatory evidence before obtaining the warrant. The court of appeals disagreed and stated

We also reject Smith's argument that Detective Israel should have investigated further before seeking a warrant for her arrest. **"An arresting officer is required to conduct a reasonable investigation to establish probable cause."** Rankin v. Evans, 133 F.3d 1425, 1435 (11th Cir. 1998). **But officers do not have "an affirmative obligation to seek out exculpatory information of which the officer is not aware" or "track down every lead" before making a probable cause determination.** Kelly v. Curtis, 21 F.3d 1544, 1551-52 (11th Cir. 1994). Here Detective Israel interviewed Smith, heard her side of the story, and simply determined that it was not credible. He also talked to Officer Crawford in addition to reviewing Officer Hammock's incident report. While Officer Crawford did say that he only heard Smith make a conditional threat, Detective Israel was not required to assume that he was correct and Officer Hammock was mistaken. Nor was Detective Israel required to track down every other officer on the scene or explore every possible path of investigation before deciding to get an arrest warrant for Smith. **"Once probable cause is established, an officer is under no duty to investigate further or to look for additional evidence which may exculpate the accused."** Ahlers v. Schebil, 188 F.3d 365, 371 (6th Cir. 1999).<sup>vi</sup>

Therefore, the court of appeals held that Detective Israel had probable cause to obtain the warrant. Further, even if they assumed that the detective, as Smith asserts, included inaccurate information in applying for the warrant, in order for that to be a Fourth Amendment violation, Smith would have to show that the correct information would have negated the probable cause. The court held that the "correct" information would not have negated probable cause in this situation, and as such it was not material.

The court next considered whether the chief and detective violated Smith's First Amendment rights. Since there was probable cause for her arrest, there is no First Amendment violation for retaliation and this claim is dismissed on summary judgment.

Lastly, the court examined the state law claim for false arrest. One of the elements of "false arrest" in Georgia, is the absence of probable cause. Since it was determined that probable cause did exist, this claim was also dismissed on summary judgment.

Thus, the court of appeals affirmed the decision of the district court in favor of all defendants.

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<sup>i</sup> No. 16-11800 (11<sup>th</sup> Cir. Decided February 15, 2017 Unpublished)

<sup>ii</sup> Id. at 4-8

<sup>iii</sup> Id. at 11

<sup>iv</sup> Id. at 12

<sup>v</sup> Id. at 13

<sup>vi</sup> Id. at 17-18

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