

7369 Gibson



The State of South Carolina  
OFFICE OF THE ATTORNEY GENERAL

CHARLES M. CONDON  
ATTORNEY GENERAL

May 21, 2002

The Honorable Rebecca Meacham-Richardson  
Member, House of Representatives  
Post Office Box 142  
Columbia, South Carolina 29201

Re: S.C. Code Ann. §16-25-70(B)

Dear Representative Meacham-Richardson:

You have raised questions concerning a law enforcement officer's discretion when determining whether to arrest pursuant to S.C. Code Ann. §16-25-70(B) in light of the fact that such section uses the phrase "must arrest." You wish to know whether a police officer retains discretion in carrying out his or her duties pursuant to such section. It is our opinion that a police officer possess broad discretion under this statute.

Section 16-25-70(B) provides as follows:

A law enforcement officer must arrest, with or without a warrant, a person at the person's place of residence or elsewhere if physical manifestations of injury to the alleged victim are present and the officer has probable cause to believe that the person is committing or has freshly committed a misdemeanor or felony under the provisions of Section 16-25-20, 16-25-50, or 16-25-65 even if the act did not take place in the presence of the officer. The officer may, if necessary, verify the existence of an order of protection by telephone or radio communication with the appropriate police department.

A probable cause analysis "includes a realistic assessment of the situation from a law enforcement officer's perspective." State v. Moultrie, 316 S.C. 547, 451 S.E.2d 34 (1994) quoting United States v. Pasquarille, 20 F3d 682 (6th Cir. 1994). Further, in determining the presence of probable cause for arrest, the probability cannot be technical, but must be factual and practical considerations of everyday life on which reasonable and cautious men, not legal technicians, act. Summersell v. S.C. Department of Public Safety, 377 S.C. 19, 522 S.E.2d 144 (Ct.App. 1999).

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The officer's determination of probable cause involves broad discretion in gathering facts and evaluating existing conditions. See Copper v. City of Fargo, 905 F.Supp. 680 (1994); Reese v. May, 955 F.Supp. 869 (1996). Accordingly, despite the fact that arrest is mandated when there is probable cause of a violation of Section 16-25-20, etc. and physical manifestations of injury to the victim, it is our opinion that the officer, nevertheless, retains broad discretion in enforcing Section 16-25-70(B).

Sincerely,

A handwritten signature in black ink, appearing to read 'D. Avant', written over the word 'Sincerely,'.

David K. Avant  
Assistant Attorney General

DKA/an