

Opinion No. 55-6115

February 25, 1955

BY: RICHARD H. ROBINSON, Attorney General

TO: Mr. Bertrand B. Prince, District Attorney, First Judicial District, Santa Fe, New Mexico

You have requested the opinion of this office relative to § 40-9-6, N.M.S.A., 1953, which section deals with the crime of breaking and entering into places other than dwellings.

First, it seems necessary in view of the tenor of your request to determine if this section of our statute is applicable only to a breaking and entering in the nighttime with the intent to commit a felony as opposed to a misdemeanor. The important verbiage of the section is "with intent to commit the crime of murder, rape, robbery, larceny, or any other felony". Larceny, of course, is a felony if the value of the property stolen exceeds \$ 50.00.

The last phrase above quoted, "or any other felony", is, in the opinion of this office, indicative that this section of the statute only applies to a breaking and entering with intent to commit a felony. The State Supreme Court in the case of State v. Grubaugh, 54 N.M. 272, while not dealing directly with this problem, had the following to say at page 274, which verifies this interpretation:

"The act of prying the lock as shown by the record, in and of itself, did not, and could not, constitute the crime of burglary, in the absence of the required proof that there was an entry **with intent to commit a felony, . . .**"

You have requested that we assume a breaking and entering in the night-time into a building not a dwelling with a taking of articles of property of less than \$ 50.00 in value.

You inquire whether or not the above cited section of the statutes is applicable in such a factual situation. Of course in prosecution under this section of the statutes under this factual situation, it is incumbent upon the state to prove that the accused broke into the building **with the intent** to carry away goods in value of \$ 50.00 or more. In the final analysis, whether the intent was to take \$ 5.00 or \$ 500.00 is a question for the jury to determine based upon the evidence presented. The amount of property taken is nothing more than one circumstance in determining the intent.

A good general discussion on the question of intent can be found in 12 CJS, page 666, Section 2.

Hoping this is of service to you, we remain

By J. A. Smith

Assistant Attorney General