



October 30, 2015

SENT VIA REGULAR MAIL AND EMAIL: msilverstein@aclu-co.org

Mark Silverstein
Legal Director, ACLU of Colorado
303 E. 17th Avenue, Suite 350
Denver, CO 80203

Dear Mr. Silverstein:

I write to respond further to your letters dated September 14, 2015 and October 1, 2015 concerning the City's enforcement, prosecution, and adjudication of Municipal Court cases filed under Colorado Springs City Code §§ 9.2.111 and 10.18.112. I will begin by explaining the paths that summons and complaints under §§ 9.2.111 and 10.18.112 take in Municipal Court because, contrary to your assertions, City Prosecutors and Municipal Court judges have not played the "culpable role" in prosecuting and convicting individuals under these Code sections that you ascribe to them.

Since January 1, 2014, when legislative changes to Municipal Court jurisdiction and penalties became effective, cases for violations of §§ 9.2.111 or 10.18.112 have proceeded on different tracks. Since January 1, 2014, a violation of § 10.18.112 (a Traffic Code violation) has been a \$50 payable summons. If the defendant pays the fine, a court appearance is not required. If a defendant charged with a violation of § 10.18.112 fails to pay the ticket or to appear on the return date to answer the charge, a bench warrant for the defendant's arrest issues, pursuant to Colorado Municipal Court Rule (C.M.C.R.) 204(f). C.M.C.R. 204(f) provides, "If a person upon whom a summons or a summons and complaint has been served pursuant to this rule fails to appear in person or by counsel at the place and time specified therein, a bench warrant may issue for the person's arrest."

For a defendant charged with a violation of § 9.2.111 (a Criminal Code violation), jail is a potential penalty and the defendant therefore must appear at the arraignment date indicated on the summons and complaint. If a defendant fails to appear, a bench warrant for the defendant's arrest issues pursuant to C.M.C.R. 204(f). A defendant contacted pursuant to an arrest warrant may be arrested and held in jail until he or she first appears in Municipal Court on the jail docket/arraignment docket or posts the required appearance bond.

The defendant's first appearance in Municipal Court is an arraignment where the defendant is advised of his or her rights, advised of the charge(s), and advised of the potential penalties if the defendant either pleads guilty or is found guilty of that charge.

On a charge under § 10.18.112, the defendant who appears on the scheduled return date is afforded an opportunity to have an instant pre-trial conference with a City Prosecutor. If a defendant wishes to plead guilty to the charge, a Prosecutor will review the summons, complaint, police officer's probable cause statement, and the defendant's prior criminal history.

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Based on that information, the Prosecutor may extend an offer to the defendant. If a defendant wishes to contest the charge(s) or raises defenses that require additional investigation, the case will be continued to a pre-trial conference at a later date or, at the defendant's request, set directly for a trial.

On a charge under § 9.2.111, the defendant is offered the opportunity to qualify for a court-appointed attorney prior to being arraigned because jail is a potential penalty for a conviction. At a defendant's first appearance at Municipal Court on a charge under § 9.2.111, he or she may contest the charge or enter a guilty plea. A Prosecutor is not present at the defendant's first appearance on a charge under § 9.2.111, nor has a City Prosecutor reviewed the summons, complaint or police officer's probable cause statement in advance of a defendant's first appearance. A Prosecutor generally has no involvement in a charge under § 9.2.111 unless the defendant contests the charge, and then, generally only at a pre-trial conference scheduled at a later date or, if the defendant requests the case be set directly for trial, at the trial.

If the defendant elects to plead guilty at his or her first appearance on a charge under §§ 10.18.112 or 9.2.111, the Court will determine whether the defendant understands the charge, their rights, and the potential penalties. According to C.M.C.R. 204(b)(4), the summons and complaint need only contain "a brief statement or description of the offense charged, which statement or description shall be sufficient if it states the type of offense to which the charter or ordinance relates." No further factual basis is required by the Municipal Court Rules prior to the entry of a guilty plea by the defendant. If the Court is satisfied that the plea is providentially entered into, the plea will be accepted. C.M.C.R. 211(b).

Against this background, the City has taken the following actions:

1. Review of Actions Cited In September 14 Letter. The City has thoroughly reviewed the citations and prosecution case files cited in your September 14, 2015 letter and offers the following position:

a. Summons No. E131740. This case was dismissed on the Prosecutor's motion on August 17, 2015. The defendant was not required to be present at this court date.

b. Summons No. 3071055-2. On January 18, 2015, the defendant was cited for a violation of § 9.2.111. On February 9, 2015, the defendant appeared in court. At that time, the Prosecutor amended the charged citation to a violation of § 10.18.112. The defendant then voluntarily accepted a written plea agreement in which the defendant acknowledged the nature and elements of the amended offense and pled guilty. Pursuant to the review described in paragraph 4 below, the Prosecutor has submitted a motion to vacate all outstanding costs and sentencing conditions and administratively close the case.

c. Summons No. E107575. This case was dismissed on a motion submitted by the Prosecutor pursuant to the review described in paragraph 4 below.

d. Summons No. E107574. This case was dismissed on a motion submitted by the Prosecutor pursuant to the review described in paragraph 4 below.

e. Case No. 14M15155. On May 18, 2014, the defendant was cited for a violation of § 9.2.111. The police officer's probable cause statement provided that the "officer observed the defendant standing at stoplight soliciting stopped traffic." Based upon the officer's use of the

term “soliciting,” which City Code defines as non-passive requests for donations, the City Prosecutor proceeded with the case. On June 9, 2014, the defendant appeared and was advised by the Court of her right to court appointed counsel, which the defendant waived. On July 3, 2014, the Prosecutor amended the charge to a violation of § 10.18.112. The defendant then voluntarily accepted a written plea agreement in which she acknowledged the nature and elements of the amended offense and pled guilty. Pursuant to the review described in paragraph 4 below, the Prosecutor has submitted a motion to vacate all outstanding costs and sentencing conditions and administratively close the case.

f. Case No. 15M17624. On May 27, 2015, the defendant was cited for a violation of § 9.2.111, a jailable offense. On June 10, 2015, before defendant's first appearance on the solicitation charge, the defendant was arrested on warrants for failing to appear in two separate municipal trespass cases. On June 11, 2015, the defendant appeared in court on all three cases via a Criminal Justice Center (“CJC”) closed circuit link. At that time, the Court advised the defendant regarding his right to a court appointed attorney on the criminal charges. The defendant waived his right to counsel. The Court advised the defendant of the charges, and the defendant then entered knowing and voluntary guilty pleas to the solicitation charge and the two open trespass charges (all jailable offenses). The defendant was sentenced to 10 days in jail in all three cases with the sentences to run concurrently. The Court granted the defendant one day credit for time served and imposed no additional fines, court costs, or warrant costs.

g. Case No. 14M33998. On October 20, 2014, the defendant was cited for a violation of § 9.2.111, a jailable offense. On November 10, 2014, the City moved to amend the summons and complaint to reflect a violation of § 10.18.112. The defendant failed to appear on November 10, 2014, and the Court did not address the City's motion to amend. A bench warrant issued for defendant's arrest based on his failure to appear, and defendant was arrested pursuant to that warrant on January 5, 2015. The defendant was scheduled for a criminal arraignment via a CJC closed circuit link on January 6, 2015, at which time he voluntarily entered guilty pleas both to the original charge of a violation of § 9.2.111 in this case as well as to an open charge under § 10.18.112 in a separate case (14M29993). At sentencing, the Municipal Court judge was informed that the defendant had eight prior convictions on solicitation offenses, one for which he served a sixty (60) day jail sentence. Accordingly, on defendant's ninth and tenth convictions for violating the City's solicitation ordinances, the judge sentenced the defendant to ninety (90) days in jail on his conviction under § 9.2.111.

2. Review of Action Cited In October 1 Letter. In case number 15M23044, the defendant appeared in Municipal Court on August 27, 2015 and was advised of his rights and the potential penalties for the charge. The police officer's probable cause statement that accompanied the summons and complaint provided that the “Defendant was standing on the NE Corner of Academy Bl [sic] at Platte Ave. . . holding a sign for cars exiting from WB Platte Ave., soliciting for money.” The summons and complaint further stated that the defendant was attempting to “solicit” money from cars on the roadway. Based upon the officer's use of the terms “soliciting” and “solicit,” which City Code defines as non-passive requests for donations, the Prosecutor proceeded with the case. The defendant executed a written plea agreement acknowledging that he understood the nature and elements of the charge and the court accepted the defendant's guilty plea. Pursuant to the review described in paragraph 4 below, the Prosecutor has submitted a motion to vacate all outstanding costs and sentencing conditions and administratively close the case.

3. Review of All Charges Under § 9.2.111. Since September 14, 2015, the City has identified a total of 49 active Municipal Court cases with charges under § 9.2.111. “Active” cases include both pending prosecutions that have not yet resulted in a conviction or a dismissal (“pre-disposition”) and convictions with outstanding sentence obligations (“post-disposition”). Prosecutors examined the summons, complaint and police officer’s probable cause statement in each of the cases with charges under § 9.2.111 to determine whether, based solely on those documents, the prosecution of the § 9.2.111 charge should continue. When making that determination, reviewers considered both *Reed v. Town of Gilbert*, 135 S.Ct. 2218 (2015) and the possibility that the definition of “soliciting” may have been misunderstood. Because this review was conducted outside the normal procedural course of prosecutions of these types of violations in the Municipal Court, the Prosecutors applied a standard more appropriately employed when making decisions whether to proceed to trial. Under this heightened standard, the City has determined that the prosecution of 6 charges under § 9.2.111 should proceed. These 6 case files indicate conduct by the defendant that violated City Code § 9.2.111(C)(1)(b), (d) and/or (f). In the remaining 43 cases, Prosecutors have filed motions to quash the active warrant (if any), to vacate any outstanding costs or sentence conditions related to the solicitation charge, and to dismiss or administratively close the case (in cases where § 9.2.111 was the only charge) or to dismiss the charge under § 9.2.111 (in cases where § 9.2.111 was not the only charge).

4. Dismissal of All Charges Under § 10.18.112. Since September 14, 2015, the City has identified 332 active Municipal Court cases with charges under section § 10.18.112. As we defined above, “active” cases include both pending prosecutions that have not yet resulted in a conviction or a dismissal (“pre-disposition”) and convictions with outstanding sentencing obligations (“post-disposition”). Although following-up with the police officers who issued the 332 citations for additional information might indicate that the defendants, in fact, engaged in active or aggressive solicitation prohibited by Code § 10.18.112, the City elected to dismiss all charges under § 10.18.112 in active Municipal Court cases. In pre-disposition cases where the defendant faced charge(s) under only § 10.18.112, Prosecutors filed motions to quash the active warrant (if any), vacate any outstanding costs and dismiss the case. In pre-disposition cases where the defendant also was charged with violations of other Code sections, Prosecutors filed motions to dismiss the charge(s) under § 10.18.112. In post-disposition cases, Prosecutors filed motions to quash the active warrant (if any), vacate any outstanding costs or sentence conditions and administratively close the case. Prosecutors have filed such motions on a rolling basis since mid-September and will continue to do so should any additional cases containing charges under § 10.18.112 appear.

5. Amended Police Bulletin. On October 2, 2015, a high priority email was sent to all sworn police officers stating the following:

Bulletin 1022-15(P) regarding solicitation directed officers to refrain from issuing summonses for City Ordinance 10.18.12 and certain sections of City Ordinance 9.2.111. Additionally, officers should not issue verbal warnings to individuals engaged only in passive solicitation, nor should officers direct individuals engaged only in passive solicitation to move from a particular area. An exception to this policy may be made when an officer has a public safety reason for directing a person to move, such as in the case of a person blocking ingress/egress to a business or a person impeding traffic. Bulletin 1022-15(P) is being amended to include this additional information and will be re-distributed next week.

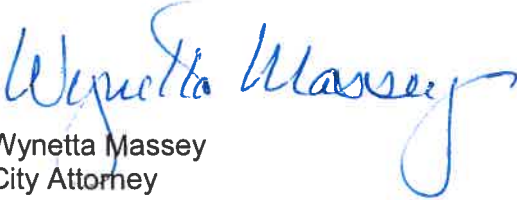
On October 5, 2015, CSPD issued the enclosed police bulletin. It amends the bulletin issued on September 18, 2015 in two ways: it directs officers to (1) refrain from issuing verbal warnings or “move along” orders to individuals engaged in passive solicitation, and (2) cease issuing citations under City Code section 9.2.111(C)(1)(a) (continuing to solicit from a person after the person has given a negative response to the soliciting), in light of Judge Arguello’s September 30, 2015 order in *Browne v. City of Grand Junction*, 14-cv-809-CMA-KLM, D. Colo.

6. Police Instructional Video. A copy of the instructional video is enclosed. All CSPD officers are required to watch the instructional video created by the CSPD Training Academy.

7. Amendment of City Code: The City Attorney’s Office currently is drafting proposed ordinances that, if passed by City Council, would repeal City Code §§ 10.18.112 and 9.6.106 and amend § 9.2.111.

I want to thank you, again, for bringing the ACLU’s concerns regarding the handling of these matters to the City’s attention. Please feel free to contact me with any additional questions or concerns.

Very truly yours,



Wynetta Massey
City Attorney

Enclosures



COLORADO SPRINGS POLICE DEPARTMENT

BULLETIN



ORIGINATED BY: SENIOR ATTORNEY FREDERICK STEIN	APPROVED BY: DC VINCE NISKI VN	DATE ISSUED: 10-05-15	GENERAL TOPIC: SOLICITATION <b style="color: red;">AMENDED - (2)	SERIAL NO: 1025-15 (P)
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It has come to our attention that there may be some concerns with the Colorado Springs Police Department continuing to issue summonses for City Ordinance § 10.18.112: Solicitation on or Near Street or Highway. After consulting with the City Attorney’s Office, we have decided, for the time being, to discontinue issuing summonses for Solicitation on or Near Street or Highway.

With that, I want to ensure everyone is aware of the current definition of soliciting which is located in City Ordinance § 9.2.111 titled Solicitation Prohibited. The definition of soliciting states:

To knowingly approach, accost or stop another person in a public place and to make a request, whether by spoken words, bodily gestures, written signs or other means, for a gift of money or other thing of value. Soliciting includes, but is not limited to, seeking a donation where the person being solicited receives an item of little or no monetary value in exchange for a donation, under circumstances where a reasonable person would understand that the purchase is in substance a donation, or begging or panhandling.

Soliciting does not include passively standing or sitting with a sign or other indication that one is seeking donations, without addressing any solicitation to any specific person, other than in response to an inquiry by that person.

The above wording has been interpreted to mean the person passively soliciting, regardless of location, with a sign has to make a verbal request or some other type of affirmative action (i.e. physically approaching or stopping an individual, pointing at specific people, walking up to specific vehicles). In addition, per the definition cited above, solicitation cannot be charged if the passive solicitor approaches a person or vehicle in response to an inquiry by that person. The fact that a person who is passively soliciting has received money is not enough to provide probable cause that active solicitation has occurred. Please be aware it is not against any City Ordinance to stand or sit in a public area passively with a sign soliciting donations. **Officers should not give verbal warnings or issue “move on” requests from a particular area to individuals who are simply holding a sign and passively soliciting. An exception to this policy may be made when an officer has a public safety reason for directing a person to move, such as in the case of a person who is obstructing ingress/egress to a business or a person impeding traffic.**

If officers observe individuals who are soliciting at streets or highways in such a manner as to obstruct or interfere with the movement or traffic than the officer should consider whether probable cause exists to cite the person for a violation under § 10.18.111: Obstruction or Interference with Traffic. The narrative portion of the citation or case report should include specific observations supporting the obstruction or interference of the movement of traffic caused by the individual’s actions.

Additionally a recent U.S. Supreme Court case, *Reed v. Town of Gilbert Arizona* (June 18, 2015), has caused the City Attorney’s Office to review and reinterpret several of the charging sections under § 9.2.111: Solicitation Prohibited. Based upon that review officers should **NO** longer write summons citing the following provisions:

§ 9.2.111(C)(1)(a): Continuing to solicit from a person after the person has given a negative response to the soliciting

§ 9.2.111(C)(1)(g): Soliciting money from anyone who is waiting in line for tickets, for entry to a building or for another purpose;

§ 9.2.111(C)(3): Soliciting within twenty feet (20') of any automated teller machine;

§ 9.2.111(C)(4): Soliciting in or upon any public transportation vehicle or public transportation facility within or at any bus stop or in any parking lot, structure or other parking facility;

§ 9.2.111(C)(5): Soliciting within twenty feet (20') of an entrance to a building;

§ 9.2.111(C)(6): Soliciting any person entering or exiting a parked motor vehicle or in a motor vehicle stopped on the street;

§ 9.2.111(C)(7): Soliciting any person located within the patio or sidewalk area of a retail business establishment that serves food and/or drink; and

§ 9.2.111(C)(8): Soliciting after dark, which shall mean one-half ($\frac{1}{2}$) hour after sunset until one-half ($\frac{1}{2}$) hour before sunrise.

All of the remaining charging sections under § 9.2.111 may still be charged if the probable cause exists to show that the solicitor is engaged in Aggressive or Active solicitation.

Aggressive solicitation continues to be prohibited in all public places throughout the City at all times. It is unlawful when soliciting to:

- ~~✓~~ Continue to solicit after being told "no"
- ✓ Make unwanted physical contact
- ✓ Follow or obstruct pedestrians
- ✓ Use profane or abusive language, exhibit violent behavior or make threats
- ✓ Approach in a group of two or more.

Active solicitation now only includes:

- ✓ Soliciting on private property that displays a "No Soliciting" sign*

*Seeking a *donation* from someone displaying a "No Soliciting" sign is unlawful. Seeking to *sell* something (Girl Scout cookies, popcorn, etc.) to someone displaying a "No Soliciting" sign does not violate the solicitation ordinance. Other charges may apply (trespass, for example), but a charge under Code § 9.2.111 is inappropriate against a person *selling* something on private property displaying a "No Soliciting" sign.

When issuing a summons for a violation of § 9.2.111 be sure to specify in the narrative section of your report the **Aggressive** or **Active** (not **Passive**) solicitation conduct that the solicitor was engaging in. Passive solicitation is lawful everywhere in the City. Unless a passive solicitor is violating some other law, a passive solicitor may not be forced to move from a public place or warned or ticketed for violating § 9.2.111. As stated above officers should not give verbal warnings or issue "move on" requests from a particular area to individuals who are simply holding a sign and passively soliciting.