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## Consensual Contact: **Police Encounters** of the **Third Kind**

by David L. Miller

Two common types of **police/citizen encounters** are those based on reasonable suspicion(fn1) and probable cause. The **third** type of encounter is consensual contact.(fn2) This article assumes the reader is generally familiar with the three. The discussion herein focuses on recent cases that have added confusion to the issue of when **police** can confront an individual without triggering Fourth Amendment scrutiny.

### **Planes, Trains and Automobiles**

Recently, the U.S. Supreme Court expanded the scope of constitutionally permissible consensual **police** contact to include passengers seated on a bus. In *Florida v. Bostick*,(fn3) the defendant was on a bus headed for Miami. The **police** boarded the bus at a rest stop and began to confront various passengers. Admittedly, they had neither reasonable suspicion nor probable cause to contact or arrest any of the passengers. After the defendant provided adequate identification, the **police** asked permission to search his luggage. He consented, whereupon contraband was discovered.

The defendant moved to suppress the evidence, arguing that a reasonable bus passenger would not have felt free to leave the bus to avoid questioning because there was no place to go and, particularly, because the bus was about to depart. He argued that this conduct was a seizure by the officers and not a consensual encounter.

The Court disagreed, stating that it was not necessarily the **police** activity that confined the defendant's movements. Instead, the Court reasoned, the defendant was confined as a natural result of his decision to take a bus.(fn4) The Court did not decide if, in fact, a seizure took place; it merely decided that the **police** conduct in question did not automatically constitute a seizure. Consequently, the Court remanded the case for factual findings on that issue.

To determine if a seizure occurred, the trial court was directed to consider all of the circumstances surrounding the encounter to discern whether the **police** conduct would have communicated to a reasonable person that the person was not free to decline the officer's requests or otherwise terminate the encounter.(fn5) The Court went on to state that the initial encounter was consensual and required no pre-existing reasonable suspicion. Thus, the contact did not trigger Fourth Amendment scrutiny because it still was consensual in nature.(fn6)

### **Crack Houses**

Individuals leaving a known crack house also may be subject to the same type of consensual interview as bus passengers. However, just running away from the **police** does not give rise to an articulable suspicion allowing the **police** to stop the person running.(fn7)

An articulable suspicion to stop also does not arise from the fact that an individual is approaching a known crack house. The fact that a person keeps cocaine at a residence is insufficient to raise a reasonable suspicion that everyone who approaches that residence (and all occupants of the cars used by such persons to travel to that residence) are in some way involved in a transaction related to the cocaine.(fn8)

One note of concern in this area deals with what are known as "pretext" arrests. In *People v. Sosbe*,(fn9) the **police** were conducting a "high visibility patrol" in marked **police** cars in the area of suspected crack houses. Three

males approached a car. One leaned into the car while the other two appeared to be lookouts. On noticing the officers, the three ran. When the car drove away, the officers perceived it to be speeding.(fn10)

The driver consented to a **police** search after they stopped the car, and a rock of crack was found in the car. The stopping of the defendant was upheld based on the speeding violation. Although the officers' subjective intent was a factor the Colorado Supreme Court considered in determining whether the purpose of the intrusion was reasonable, it was not critical in the analysis. What was determinative was whether the purpose of the intrusion was reasonable in light of the objective circumstances confronting the officers at the time and place in question.(fn11)

### **Gang Affiliation**

Gang-related criminal activity is a serious and growing problem. Gang affiliation has become a new reason for **police** to tiptoe on the line of consensual contact. However, gang membership alone is insufficient to create reasonable suspicion.(fn12)

An individual's attempt to avoid contact with the **police** does not, by itself, justify an investigative detention of that person.(fn13) The Colorado bar has been familiar with the problems associated with this type of **police** contact since the days when Cherokee Thomas roamed the streets of Denver making furtive gestures.(fn14)

In *People v. Rahming*,(fn15) the prosecution attempted to justify a stop based on the following evidence:

- 1) three young male companions were dressed in a manner that implied gang membership;
- 2) two of the three ran when they saw the **police** car;
- 3) the three reunited, entered a car and drove away;
- 4) the location they drove away from was known to be the residence of gang leaders;
- 5) other gang members were arrested in the same area one week earlier; and
- 6) it was a high-crime-rate area.(fn16)

The **police** followed the defendants as they drove away. Although there were no traffic violations, the **police** stopped the car, then contacted and searched the driver, who also consented to a search of his car. Articles of stolen property were discovered in the car, and the individuals were arrested.

Although it appeared to the **police** that they had adequate grounds for seeking consensual contact, the Colorado Supreme Court concluded that gang affiliation alone did not provide the reasonable suspicion needed to justify the stop. The court stated that it would have upheld the **police** officers' right to investigative detention of the suspected gang members if there had been facts in addition to the individuals' appearance which created a reasonable and articulable suspicion that criminal activity had occurred, was taking place or was about to take place.(fn17) The court suppressed the evidence obtained, based on the unwarranted contact.

### **Conclusion**

The meaning of the above decisions is open to question. However, attorneys should be aware that the courts are expanding the meaning of a "consensual contact." Therefore, what once may have been a questionable encounter requiring proof of either reasonable suspicion or probable cause is sometimes now being endorsed as an appropriate response to the war on crime.

### **NOTES**

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Footnotes:

1. *People v. Ratcliff*, 778 P.2d 1371 (Colo. 1989); *People v. Hughes*, 767 P.2d 1201 (Colo. 1989); *People v. Thomas*, 660 P.2d 1272 (Colo. 1983); *People v. Tate*, 657 P.2d 955 (Colo. 1983); *Stone v. People*, 485 P.2d 495 (Colo. 1971).

2. *People v. Trujillo*, 773 P.2d 1086 (Colo. 1989).

3. 115 L.Ed.2d 389 (1991).

4. *Id.* at 399.

5. *Id.* at 402.

6. *Id.* at 398.

7. *Thomas*, *supra*, note 1 at 1275.

8. *People v. Carillo-Montes*, 796 P.2d 970 (Colo. 1990).

9. 789 P.2d 1113 (Colo. 1990).

10. Harrison, "Roadside Sobriety Checkpoints in Colorado," 20 *The Colorado Lawyer* 897 (May 1991) (discussion of **police encounters** based on traffic infractions). A recent decision by the Colorado Supreme Court also addresses this issue. *See, People v. Coca*, 91-SA-396 (Colo., May 11, 1992).

11. *Sosbe*, *supra*, note 9 at 1115.

12. *People v. Rahming*, 795 P.2d 1338 (Colo. 1990).

13. *Id.* 1342.

14. *Thomas*, *supra*, note 1.

15. *Rahming*, *supra*, note 12.

16. *Id.* at 1341.

17. *Id.* 1342.

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