

Are CPL § 180.80 “Hours in Custody” to Be Calculated Differently, Depending Upon Whether the Arrest Was Made Pursuant to a Warrant or Was Warrantless?

By John Brunetti

The question posed by the title to this article may sound like heresy. Permit me to explain.

CPL § 180.80(1) provides, in relevant part: “Upon application of a defendant against whom a felony complaint has been filed with a local criminal court, and who, since the time of his arrest or subsequent thereto, has been held in custody pending disposition of such felony complaint, and who has been confined in such custody for a period of more than...one hundred forty-four hours, without either a disposition of the felony complaint or commencement of a hearing thereon, the local criminal court must release him on his own recognition.”¹

In applying CPL 180.80 in the cases of both warrant and warrantless arrests, the starting point from which the number of hours is to be calculated differs because of the phrase “such custody.”

1. There must be an “application of a defendant against whom a felony complaint has been filed.”
2. “Who, since the time of his arrest or subsequent thereto, has been held in custody pending disposition of such felony complaint.”
3. “Who has been confined in *such custody*,” for the requisite number of hours without disposition of the felony complaint.

What custody is “such custody”? It is the “custody pending disposition of such felony complaint.” In warrantless arrest cases, a felony complaint does not exist at the time of arrest. As a result, it is literally impossible for a person to be “held in custody pending disposition of such felony complaint” until a felony complaint at least exists (not necessarily an arraignment thereon). Only in cases where a felony complaint exists at the time of an arrest, i.e., arrest warrant cases, is it possible for a person to be held in custody pending disposition of a felony complaint from the time of arrest. Therefore, the 144 hours runs from the time of arrest in arrest warrant cases where a felony complaint has necessarily been filed prior to arrest as required by CPL 120.10, but runs from the time of existence (for practical purposes, filing) of the felony complaint on warrantless arrest cases.

If CPL 180.80(1) was designed to treat warrantless arrest cases the same as arrest warrant cases in calculat-

ing the 144 hours, it would simply read: “Upon application of a defendant against whom a felony complaint has been filed with a local criminal court, who, since the time of his arrest...has been confined in custody for a period of more than...one hundred forty-four hours, without either a disposition of the felony complaint or commencement of a hearing thereon...,” such defendant must be released. But, CPL 180.80(1) does not say that.

The phrase “who, since the time of his arrest or subsequent thereto, has been held in custody pending disposition of such felony complaint” is necessary to reach both arrest warrant cases and warrantless arrest cases. The “since the time of his arrest” clause reaches solely arrest warrant cases because the existence of the felony complaint temporally precedes the arrest. The “subsequent thereto” clause reaches solely warrantless arrest cases because the existence of the felony complaint temporally follows the arrest. The result is two different start times for calculating how many hours a defendant “has been held in custody pending disposition of such felony complaint.”

The definition of the adjective “such” found in the Random House Unabridged Edition of the English Language is “of the kind indicated.” There is no doubt that under the old version of CPL 180.80, the adjective “such” modified the word “custody” and referred to the “kind” of custody “indicated,” i.e., “custody of the sheriff pending disposition of such felony complaint.”²

The first appearance of the word “custody” in the present version of CPL 180.80 is found in the clause “custody pending disposition of such felony complaint,” and the adjective “such” modifies the word “custody” when it appears the second time and refers to the same “kind” of custody “indicated” in the original version, i.e., “custody pending disposition of such felony complaint.”

The juxtaposition of the former and present versions of CPL 180.80 demonstrates that the change from “arraignment” to “arrest” was accomplished by plugging the new words into the existing statute without removing the now problematic phrase “pending disposition of such felony complaint.”

<p>Present Version:</p> <p>“Upon application of a defendant against whom a felony complaint has been filed with a local criminal court, and who,</p> <p>since the time of his arrest or subsequent thereto, has been held in custody</p> <p>pending disposition of such felony complaint, and who has been confined in such custody for a period of more than</p> <p>one hundred forty-four hours,</p> <p>without either a disposition of the felony complaint or commencement of a hearing thereon, the local criminal court must release him on his own recognizance.”</p>	<p>Prior Version:</p> <p>“Upon application of a defendant against whom a felony complaint has been filed with a local criminal court, and who,</p> <p>either at the time of arraignment thereon or subsequent thereto, has been committed to the custody of the sheriff</p> <p>pending disposition of such felony complaint, and who has been confined in such custody for a period of more than</p> <p>seventy-two hours</p> <p>without either a disposition of the felony complaint or commencement of a hearing thereon, the local criminal court must release him on his own recognizance.”</p>
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As is obvious from the above, if “pending disposition of such felony complaint” had been removed from the present version, it would treat warrantless arrest cases the same as arrest warrant cases. However, it remains and describes the kind of custody that has to last 144 hours before release is mandated.

No court has ever directly addressed this issue.

Three Appellate Division opinions emanating from the First, Second and Third Departments offer the observation that the 144 hours runs from the time of arrest, but close examination of each suggests that each observation may viewed as dictum should the need arise to squarely address the issue raised here.

The First Department case involved an arrest warrant, so the felony complaint was necessarily pending at the time of the arrest. The core holding of the case was that if 180.80 time expires early in the business day, the deadline may not be extended to the close of that business day because “144 hours means 144 hours.”³ It was in that context that the Court observed that, “for future guidance we may say that the statutory reference to a 144-hour limitation period from arrest to indictment (where a weekend intervenes) means what it says.” The Court’s rationale for its ruling, however, was that 144 hours means 144 hours.⁴

The Second Department case involved a period of nine days, and the felony complaint was filed almost immediately after the defendant’s arrest, so the starting time was not in issue. The core holding of the case was that a defendant does not have to demand his release to start 180.80 time because the statute imposes no such

requirement.⁵ It was in this context that the Court observed that “the 144-hour period begins to run at the time of the arrest of the accused.” The Court’s rationale for its ruling, however, was that CPL180.80 “provides that the local criminal court must release the accused from jail within the prescribed time frame unless an indictment has been returned, or a preliminary hearing has been commenced, or a showing of other special circumstances has been made.” That was the reason why no demand was necessary.⁶

The Third Department case involved period of eight days, so again, the starting time was not in issue. The core holding of the case was that a defendant does not have to demand a preliminary hearing to start 180.80 time because the statute imposes no such requirement.⁷ While the Court observed that “CPL 180.80 speaks directly to the “custody” or confinement of a defendant, the start of which always begins at the moment of arrest,” the rationale for the ruling was that “the burden of ensuring that such a hearing is held falls on the prosecution” and that CPL 180.10 (4) provides that “[t]he court...must itself take such affirmative action as is necessary to effectuate [a preliminary hearing].”

Dictum is a statement by a court that is not necessary to the disposition of the case⁸ that “could have been deleted without seriously impairing the analytical foundations of the holding.”⁹ Set forth via endnote are reproductions of each of the three Appellate Division cases, one with the potential dictum italicized¹⁰ and one with the potential dictum deleted.¹¹ You make the call!

Endnotes

1. The exceptions [good cause, indictment voted or filed] are omitted for ease of reading.
 2. The predecessor CPL 180.80 statute read: "Upon application of a defendant against whom a felony complaint has been filed with a local criminal court, and who, either at the time of arraignment thereon or subsequent thereto, has been committed to the custody of the sheriff pending disposition of such felony complaint, and who has been Confined in such custody for a period of more than seventy-two hours without either a disposition of the felony complaint or commencement of a hearing thereon, the local criminal court must release him on his own recognizance."
 3. *People ex rel. Arshack on Behalf of Ellis v. Koehler*, 151 A.D.2d 309, 542 N.Y.S.2d 578 (1st Dep't 1989).
 4. *People ex rel. Arshack on Behalf of Ellis v. Koehler*, 151 A.D.2d 309, 542 N.Y.S.2d 578 (1st Dep't 1989).
 5. *People ex rel. Vancour v. Scoralick*, 140 A.D.2d 658, 529 N.Y.S.2d 11 (2d Dep't 1988). ["The petitioner was arrested at 4:00 A.M. on January 19, 1987, and taken to the Town Court of the Town of Unionvale, where he was arraigned upon a felony complaint. The petitioner was then remanded to the Dutchess County jail in lieu of \$10,000 bail. On January 28, 1987, the petitioner's attorney made an ex parte oral application to a Justice of the Town Court for an order pursuant to CPL 180.80 releasing the petitioner on his own recognizance.... With respect to the merits, we conclude that the County Court erred in holding that the time limitations set forth in CPL 180.80 begin to run only when a suspect, who has been incarcerated after arraignment upon a felony complaint, demands his release from jail. The statute provides, to the contrary, that that 144-hour period begins to run at the time of the arrest of the accused, and further provides that the local criminal court must release the accused from jail within the prescribed time frame unless an indictment has been returned, or a preliminary hearing has been commenced, or a showing of other special circumstances has been made. In the present case, no valid reason was shown for continuing the detention of the petitioner beyond a period of 144 hours after his arrest. The writ of habeas corpus should therefore have been sustained (see, *People ex rel. Barna v. Malcolm*, *660 *supra*; *People v. Aaron*, 55 AD2d 653)."].
 6. *People ex rel. Vancour v. Scoralick*, 140 A.D.2d 658, 529 N.Y.S.2d 11 (2d Dep't 1988).
 7. *People ex rel. Wagner v. Infante*, 167 A.D.2d 630, 632, 562 N.Y.S.2d 861 (3d Dep't 1990). ["The language of the statute is unequivocal. Entitled 'Proceedings upon felony complaint; release of defendant from custody upon failure of timely disposition,' CPL 180.80 speaks directly to the 'custody' or confinement of a defendant, the start of which always begins at the moment of arrest (see, *People ex rel. Vancour v. Scoralick*, *supra*; see also, *People ex rel. Arshack v. Koehler*, *supra*; *People ex rel. Gilbert v. Scoralick*, *supra*, at 534; *People v. Edwards*, 121 Misc 2d 505, 506; Bellacosa, Practice Commentary, McKinney's Cons Laws of NY, Book 11A, CPL 180.80, at 175-176). Thus, the contention that the period for confinement addressed by the statute would begin at the time of the request of a preliminary hearing is misguided. The burden of ensuring that such a hearing is held falls on the prosecution (see, *People ex rel. Gilbert v. Scoralick*, *supra*, at 534; *People v. Edwards*, *supra*, at 506). CPL 180.10 (4) provides that '[t]he court...must itself take such affirmative action as is necessary to effectuate [a preliminary hearing]'. Furthermore, it has been noted that '[t]he burden is on the prosecution to commence a hearing before the magistrate within the time limitation under [CPL 180.80]' (1 Callaghan, Criminal Procedure in New York §12:02 [1987 rev ed])."].
 8. 233233 *Co. v. City of New York*, 171 A.D.2d 492, 496, 567 N.Y.S.2d 411, 415 (1991) ["Appellate Term's 1980 decision as to the proper way to terminate the City's tenancy and to evict subtenants was dictum and was not necessary and essential to its determination."]; *Dow v. Niagara Square Associates*, 190 A.D.2d 1016, 1016, 594 N.Y.S.2d 1007 (1993) ["We add only that the statement contained in the last paragraph of Supreme Court's written decision constituted dictum and was not necessary to the court's resolution of the issues raised."].
 9. *Hormel Foods Corp. v. Jim Henson Prods., Inc.*, 73 F.3d 497, 508 (2d Cir. 1996) ["'Dictum' generally refers to an observation which appears in the opinion of a court which was 'unnecessary to the disposition of the case before it.'" *Burroughs v. Holiday Inn*, 621 F.Supp. 351, 353 (W.D.N.Y.1985) (quoting 1B Moore's *Federal Practice*, ¶ 0.402[2] at 40 (2d ed. 1984)). It is a "statement in a judicial opinion that could have been deleted without seriously impairing the analytical foundations of the holding...." *Sarnoff v. American Home Products Corp.*, 798 F.2d 1075, 1084 (7th Cir. 1986).
 10. *People ex rel. Arshack on Behalf of Ellis v. Koehler*, 151 A.D.2d 309, 542 N.Y.S.2d 578 (1st Dep't 1989) ["We do not find the issue to be moot before us since this situation will undoubtedly recur (see, *People v. Sweeney*, 143 Misc 2d 175), and more likely than not evade direct review (cf., *Matter of Hearst Corp. v. Clyne*, 50 NY2d 707, 714-715; *People ex rel. Barna v. Malcolm*, 85 AD2d 313, *appeal dismissed* 57 NY2d 675). However, we also do not find that this record adequately presents the broad issue that defendant would now have us face, namely, whether the disposition of this case was affected by any pervasive Criminal Court 'policy' to rewrite CPL 180.80 to mean six days, so as to authorize the court to hold defendant until 5:00 P.M. at the close of day for court business whether or not the applicable hourly limit had expired before that time. For future guidance we may say that the statutory reference to a 144-hour limitation period from arrest to indictment (where a weekend intervenes) means what it says, and cannot be made subject to judicial construction translating the given hourly time frame into a less exacting interval measured by days. And, where the People seek even a brief enlargement of the applicable hourly period, they must advance 'good cause,' which does not mean the 'imminence' of an indictment, standing alone, as the basis for a routine extension until the close of the same business day."].
- People ex rel. Vancour v. Scoralick*, 140 A.D.2d 658, 659, 529 N.Y.S.2d 11 (2d Dep't 1988) ["The petitioner was arrested at 4:00 A.M. on January 19, 1987, and taken to the Town Court of the Town of Unionvale, where he was arraigned upon a felony complaint. The petitioner was then remanded to the Dutchess County jail in lieu of \$10,000 bail. On January 28, 1987, the petitioner's attorney made an ex parte oral application to a Justice of the Town Court for an order pursuant to CPL 180.80 releasing the petitioner on his own recognizance.... With respect to the merits, we conclude that the County Court erred in holding that the time limitations set forth in CPL 180.80 begin to run only when a suspect, who has been incarcerated after arraignment upon a felony complaint, demands his release from jail. The statute provides, to the contrary, that that 144-hour period begins to run at the time of the arrest of the accused, and further provides that the local criminal court must release the accused from jail within the prescribed time frame unless an indictment has been returned, or a preliminary hearing has been commenced, or a showing of other special circumstances has been made. In the present case, no valid reason was shown for continuing the detention of the petitioner beyond a period of 144 hours after his arrest. The writ of habeas corpus should therefore have been sustained (see, *People ex rel. Barna v. Malcolm*, *supra*; *People v. Aaron*, 55 AD2d 653)."].
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John Brunetti has served as a Judge of the Court of Claims and acting Supreme Court Justice assigned to criminal matters. He has been a regular contributor to our Newsletter.

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