Summons or Arrest? The Arbitrary Enforcement of Low-Level Offenses in New York City

By Alexandra R. Ferlise

Introduction

Enforcement of low-level offenses in New York City is arbitrary and inconsistent. To illustrate: Vendors A and B fail to display the proper license and are approached by police officers. Neither vendor has an open warrant, prior arrests for similar conduct, or meaningful contact with the criminal justice system. Vendor A is arrested, held for over 30 hours, and arraigned in general Criminal Court. After a trial delayed by 19 months, Vendor A is found guilty of an unclassified misdemeanor and sentenced to time served, plus mandatory surcharges. Instead of getting arrested, Vendor B is issued a criminal summons, pleads guilty to a violation at first appearance and is sentenced to pay only a $50 fine. Why was enforcement so different? Short answer: There is no answer.

In New York City, there are a few options for how to deal with low-level offenses (defined here as offenses designated a B misdemeanor, unclassified misdemeanor, or penal law violation), but there is a lack of clear guidance on which method suits a given situation. After observing a violation, an officer can effectuate an arrest, eventuating in either a desk appearance ticket (DAT) or formal arraignment, or the officer may issue a criminal or civil summons. There is official guidance as to whether to issue a civil versus criminal summons, but none as to whether to issue a summons versus making an arrest. Because there is no administrative guidance as to which method is preferred, enforcement depends entirely on the sole, unfettered, unguided discretion of the individual officer.

The Criminal Court of the City of New York is a court of the New York State Unified Court System in New York City that handles misdemeanors and lesser offenses. The Summons Part (SAP) is a division of Criminal Court that deals with even lesser Penal Law offenses (usually unclassified misdemeanors and violations) and violations of varied city ordinances and regulations. The part is staffed by attorneys from the Assigned Counsel Plan, and cases are adjudicated by a Judicial Hearing Officer (JHO), who are usually retired judges able to hear cases up to a B misdemeanor.[1]

SAP has recently been the subject of successful criminal justice reform, namely the City's Criminal Justice Reform Act (CJRA) effective June, 2017. The CJRA has resulted in a reduction in the issuance of criminal, as opposed to civil, summonses. Working off of this momentum, it would be appropriate to further define what the criminal summons court is, and consider what the part is poised to be—a viable alternative to costly arrest for low level offenses. Establishing clear guidelines that emphasize issuing a summons over effectuating an arrest would reduce the population of local jails and detention centers, conserve judicial and prosecutorial resources, and mitigate the negative collateral consequences that accompany contact with the criminal justice system. Overall, defendants are still held accountable for crimes or violations, without the systemic costs and collateral consequences that can stem from an arrest.

For minor crimes and violations, costly and time-consuming arrest procedures should not be the primary method of enforcement. Instead, we should use the established summons system to clear general Criminal Court of petty offenses, and create continuity in low level offense adjudication.

Current Summons Procedure and SAP's Shrinking Caseload

Though not explicitly indicated, article 150 of the Criminal Procedure Law seems to cover the issuance of Criminal Court summonses *and* DATs under the general term of "appearance ticket."[2] Sections 150.10 through 150.75 outline the legislature's expectation of appearance ticket procedure but, likely due to the general nature of the article, there is no language expressing a preference for a particular type of appearance ticket over another. Therefore, article 150, coupled with the allowance for JHOs to adjudicate up to B level misdemeanors, indicates legislative intent to allow broader summons-able charges than the NYPD patrol guide specifically authorizes.[3]

Procedure no. 209-01 of the NYPD patrol guide states that NYPD officers may issue a summons instead of arresting a violator (over 16 years old) for any misdemeanor or violation listed in various codes and regulations, including the New York City Administrative Code and the Vehicle and Traffic Law, as well as Penal Law violations (with some exceptions).[4] Though Penal Law misdemeanors are not explicitly eligible offenses under the patrol guide, Criminal Procedure Law § 150.20 specifically allows for appearance tickets for charges other than A, B, C, and D felonies, with some exceptions.[5] Further, JHOs may

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adjudicate up to a B misdemeanor, and unclassified misdemeanors such as aggravated unlicensed operation of a motor vehicle in the third degree and reckless driving are regularly adjudicated in SAP. In fact, reckless driving was SAP's ninth most frequent charge in 2017.[6]

NYPD summons procedures do not include a listing of factors that would make issuing a summons unavailable, or outline circumstances under which a summons should be issued rather than an arrest made. The procedures that are detailed cut against an individual officer's discretion to issue summons on her own. Effective May 31, 2018, procedures 209-38 and 209-39 cover conditions for issuing Criminal Court summons regarding criminal possession of marijuana in the fifth degree, and some vehicle and traffic law charges respectively. Neither grants complete discretion to the initial officer involved, but tasks the desk officer with the final decision of whether to issue a summons. Stripping the authority to issue a summons from officers on the street suggests to officers that they should not be issuing any summons at all.

Procedural confusion may be a factor in SAP's diminishing caseload. Summons filings have decreased significantly in the past few years, remarkably more than the general downward trend in criminal filings systemwide.[7] In fact, for the first time, DAT and general arraignments in 2017 outnumbered summons filings by just about 60,000 cases. Though no one cause is known, various factors have likely contributed to the steep decline. First could be the results of the *Stinson* lawsuit. Filed in 2010, the suit alleged the police were issuing summonses without any probable cause, resulting in the city's 2016 settlement, in which it agreed to pay over $75 million to affected parties.[8] While summons filings have decreased since 2006, after 2010 the rate becomes increasingly steep, indicating a possible aversion to summonses post-filing of the suit.

Another factor is the CJRA, which is a set of legislative and policy changes enacted by the New York City Council and signed into law by Mayor Bill de Blasio, that shifted certain behaviors from the criminal to the civil/administrative law courts (specifically the Office of Administrative Trials and Hearings (OATH)). By creating a "presumption that civil summonses should be issued for eligible charges," charges including public urination, littering, open container, spitting, and excessive noise (the "five behaviors") as well as some offenses of the parks regulations that once packed SAP, are now almost entirely dealt with in the civil system.[9] Notably, officers had already been authorized to send these offenses to OATH before the CJRA was enacted; however, it was only after the CJRA provided officers with specific guidance (under procedure no. 209-03) and a clear preference for a civil summons that the practice became widespread.

Reports also indicate that officers have stepped away from the practice of issuing summons, favoring warnings instead.[10] Looking at the demographics of SAP, the question then becomes who gets a warning and why. In the second quarter of 2018, a whopping 91 percent of criminal summons defendants were people of color, compared to 85 percent of civil summons defendants, signifying possible implicit bias.

Regardless of the exact reason, the New York City Summons Parts are down from over 600,000 cases a year to under 200,000 cases per year, and the New York and Kings County SAP courtrooms at One Centre Street have been combined for most of 2018. Therefore, SAP has recently obtained the capacity to adjudicate more cases without being overburdened.

Differences in DAT and Summons Procedure

Once arrested, defendants may be issued a DAT or proceed to general Criminal Court arraignment. Either way, they are processed, their data is stored in arrest records, and they are held in a precinct for hours until DAT eligibility is determined by a desk officer. As with a summons, if issued a DAT, a defendant is not held in jail or detention until arraignment. Instead, they appear on their own on a date set at the time the DAT is issued, and a warrant is ordered in the event of a no-show.

The NYPD patrol guide also gives specific guidance for DAT eligibility. Procedure number 208-27 includes eligible charges (misdemeanors, violations, and certain class "E" felonies), and a list of specific situations in which a DAT cannot be issued. There are no similarly instructive guidelines for the issuance of summonses on a general level.

Arrest and processing alone can cost the city hundreds or even thousands of dollars per defendant.[11] This estimate *doesn't* take into account all of the costs of the officer's lost time on patrol, the defendant's loss of wages or missed school, or the costs associated with prosecutors' offices, indigent defense providers, or the courts. For seemingly little added benefit, issuing a DAT carries costs significantly higher than issuing a summons.

Why Venue Matters

The difference in venue—that is, SAP versus the general Criminal Court parts—has several significant implications. Both venues will issue a warrant if a defendant fails to appear, but unlike general criminal dispositions, SAP does not issue warrants if a defendant fails to pay fines. Instead, a civil judgment is automatically entered against the defendant's credit. There are no additional mandatory surcharges in SAP, other than cases stemming from the Environmental Protection Agency, and for some Vehicle and Traffic Law cases. There is no prosecutor present, and plea negotiations often center on fines and ACDs, rather than dispositions involving jail time. Therefore, defendants are still held accountable for their actions, but they are not subject to the more traumatic and costly procedures related to arrest, processing, and jail time.

Adjudicating cases in SAP has advantages for both the defendant and city (such as expediency and systemic/personal costs), but there is resistance to its use. Some public defenders would rather their clients appear in general Criminal Court, believing a sentence of time served is better for indigent clients unable to pay fines. They also value the due process of general Criminal Court over the "chaos" they had personally experienced in SAP.

It should be noted that defendants are not forced to proceed in SAP even if they are issued a summons. Should they refuse to consent to the jurisdiction of the JHO, their cases will be transferred to general Criminal Court. Therefore, defendants and their attorneys can decide whether they want to proceed in general Criminal Court.

Still, the public defenders' concerns are valid. Due process rights are not as consistently observed in SAP as in general Criminal Court. For example, some JHOs will refuse to rule on facial sufficiency arguments, stating that that is a matter for trial. Further, the sufficiency of a plea allocution depends heavily on the JHO. Therefore, depending on the day, a defendant may or may not be apprised of the rights they waive by pleading guilty, and may not even be informed of the charge they are pleading guilty to. The Appellate Term, First Department commonly dismisses accusatory instruments on appeal based on blatant due process violations.[12]

Equally disconcerting is the part's lack of substantive oversight. The Appellate Term, First Department, will generally assign counsel to people on appeal from SAP convictions, as mandated by statutory and state constitutional law.[13] However, the Appellate Term, Second Department, rarely grants appellate counsel or poor person relief to defendants convicted in SAP, regardless of their inability to pay for a lawyer. Research has not produced a single decision assigning appellate counsel to a Kings County SAP defendant. Therefore, appeals from Kings County (and thus appellate oversight) are few and far between.

The summons court need not be scorned by public defenders and prosecutors, and these issues could be addressed by the judicial system. They are easily addressed, and regardless of any plan to expand SAP's use, should be rectified through consistent access to appellate review, and periodic trainings for court staff, defense attorneys, and officers issuing summonses.[14]

Criteria Considered in Decision to Arrest Over Summons Is Unknown

In the moment they witness a low-level offense, officers have two choices; arrest or issue a summons, (whether or not to issue a DAT or proceed with arraignment is decided post-arrest by the desk officer). It is unclear how this decision is made, or exactly what factors are considered.

When asked, neither defense attorneys, prosecutors, nor police officers could specify exactly why an arrest would occur rather than issuing a summons. There was, however, plenty of speculation. A prosecutor posited that it was likely based on whether a defendant had a warrant or a history of warrants, a sentiment echoed by officers standing nearby (despite that, in the case of DATs versus summonses, a mere history of warrants should not be definitive given that the defendant is released either way). Another was similarly unsure of the exact reason, but knew that recidivism would result in an arrest over a summons, and added that recidivism did not necessarily mean a history of arrests for similar conduct, but *any* notation in an officer's system.

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The majority of responses noted that the decision of whether to arrest or issue a summons is left to the discretion of officers, with no official reasoning known. Technically, official reasoning is not strictly necessary because an officer can legally arrest an individual for any crime they witness, even if jail time is not an authorized sentence. The Supreme Court solidified this sentiment in *Atwater v. Lago Vista*, in which it noted "[i]f an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender."[15] However, this ability does not preclude local governments from expressing a preference against effectuating an arrest in certain circumstances. Rather than asking police to memorize "frequently complex penalty schemes," or impede on an officer's discretion, providing guidance would simply guide an officer's decision making.[16] Further, it would provide transparency to an officer's decision to effectuate an arrest or issue a summons.

As it currently stands, one can only speculate as to what officers are considering when they decide to arrest an individual for summons-able conduct. It could be that officers prefer arrest and DAT procedures over confusing summons practice, or generally disfavor the summons system (another possible reaction to the *Stinson* suit). It may also be that data collection from processing is prioritized over adding to the SAP caseload. There are also more nefarious explanations, such as the officer's desire to boost personal or precinct arrest numbers for quotas, or using lengthy DAT procedures to rack up overtime.

One defense attorney that appears in SAP frequently guessed an arrest may occur for a summons-able offense to justify an otherwise illegal stop or search. Finally, some believed there was an element of implicit bias at play, using summonses as a substitute for stop-and-frisk policing that targeted communities of color. While more research is needed, it is a valid concern across the city, and DAT arrest demographics indicate possible racial bias. Without more transparency, speculation will remain.

Under the CJRA, officers must state a reason for giving out a criminal summons over a civil summons. Criminal summonses for the five behaviors are issued over civil summons only if (1) the individual has an open warrant, (2) the individual has three or more unanswered civil summonses in the past eight years, (3) the individual has two or more felony arrests in the past two years, (4) the individual is on parole or probation, (5) the officer has a legitimate law enforcement reason, or (6) multiple offenses are charged, at least one of which must be adjudicated in criminal court.[17] Though broad, these criteria give the police clear administrative guidance on whether to issue a civil versus a criminal summons. These measures are not applied to the arrest-versus-summons determination, but could easily be adjusted and adopted through another piece of CJRA legislation.

Benefits of Preferring Summons, and Charges That Should Be Considered Summons-Preferred

As with the CJRA, the way to create uniform enforcement of low-level offenses is through clear legislative and administrative guidelines. Simply establishing set criteria where issuing a criminal summons would be preferred over a DAT or full arrest, while still allowing law enforcement discretion to arrest with aggravating circumstances, would have the following benefits:

- Keep low-level offenders out of jail or holding cells;
- Ease Criminal Court caseloads, particularly in arraignment and AP parts, allowing judges to focus on eliminating the backlog of cases clogging New York City courts;
- Preserve prosecutorial resources by eliminating many low-level violations and misdemeanors from their trial caseload altogether (as there is no prosecutor present in the Summons Court);
- Reduce the caseloads of institutional providers (as the summons part is staffed by 18-B attorneys and cases are often disposed of at first appearance);
- Reduce the negative impact that the criminal justice system can have in a person's life. Arrests and taking days off to attend court dates may inevitably lead to the loss of employment and the disruption of New York families.
- Reduce the costs of enforcing the law by eliminating the need to spend thousands of dollars arresting, processing, holding, and arraigning New Yorkers for low-level offenses.

The Annual Report for the Criminal Court of the City of New York shows that some of the most frequently arraigned DAT charges are also common charges adjudicated in SAP.[18] The first most frequently arraigned DAT charge city-wide in 2017 was criminal possession of marijuana in the fifth degree, followed by aggravated unlicensed operation of a motor vehicle in the third degree. Criminal trespass in the third degree and unlicensed general vending are further down the list at number 10 and 11 respectively. Without any piece of legislation or regulation, these four charges could be adjudicated in SAP, and general Criminal Court could clear a large swath of cases from its docket.

Marijuana offenses present their own issues. Kings and New York Counties have stopped prosecution of low level marijuana cases and have dismissed warrants related to those offenses.[18] Reports from CourtWatch, however, noted that "people continued to be arbitrarily prosecuted for marijuana-related charges."[19] Their frequency in Criminal Court is both disconcerting and unnecessary where a summons could have easily been issued pursuant to NYPD procedure number 209-38. Take, for instance, the case CourtWatch noted, in which a young adult was arraigned in Manhattan Criminal Court for marijuana possession and unlicensed driving, two charges eligible for adjudication in the summons part. Despite the Manhattan DA's insistence that they are not prosecuting such cases, they refused to dismiss the marijuana charge and requested a sentence of probation with a $500 fine.[20]

Then, there are the charges that could have been brought via summons, but were instead brought via DAT or arrest on a charge that cannot be adjudicated by a JHO. By overcharging turnstile jumping as theft of services, and possession of a pocket knife on the subway as criminal possession of a weapon in the fourth degree, both A misdemeanors, the general Criminal Court is clogged with petty cases that could have been handled by summons for fare evasion under N.Y.C.R.R. § 1151.1 or a public safety violation of AC § 10-133, respectively. Establishing clear summons criteria may also mitigate overcharging.

The charges discussed here are fairly common, but there are a number of other B misdemeanors and violations that can be adjudicated in SAP, including criminal sale of marijuana in the fifth degree, possession of graffiti instruments, and reckless endangerment of property, among others. For these crimes, non-recidivist offenders (and by recidivist, meaning *convicted* recidivists) should not be arrested unnecessarily, absent aggravating circumstances. Such circumstances could be an element of violence, open warrant, significant history of similar conduct, or failure to provide accurate identifying information.

Conclusion

More guidance to the officer will assure uniform and consistent enforcement of low level offenses. Whether to issue a summons or make an arrest should be up to the discretion of the individual officer, but that discretion should be guided. Policies should be adopted to establish when a criminal summons would be the preferred method of enforcing low level offenses.

Endnotes

1. *See* CPL § 350.20.
2. *See* CPL § 150.10 ("A notice conforming to such definition constitutes an appearance ticket regardless of whether it is referred to in some other provision of law as a summons or by any other name or title.).
3. It should be noted that a summons *could* be issued for an A misdemeanor, and SAP has been sent A misdemeanors. When this happens, the JHO simply transfers the case to general Criminal Court and issues a new date to the defendant.
4. Other explicitly listed codes for which a summons can be issued include and misdemeanor or violation in the Agriculture and Market Laws, General Business Law, Labor Law, Multiple Dwelling Law, Workers' Compensation Law, New York State Tax Law (art 21, Section 289), Alcoholic Beverage Control law, Navigation Law, New York City Charter, New York City Administrative Code, New York City Health Code, New York City Traffic Regulations, and New York Code of Regulations. *See* Conditions of Service Procedure No. 209-01, New York City Police Department Patrol Guide.
5. *See* CPL § 150.20.
6. *See* Lisa Lindsay, *Criminal Court of the City of New York Annual Report 2017*, Oct. 2018, at 35, www.nycourts.gov/COURTS/nyc/criminal/2017-Annual-Report.pdf (last visited November 19, 2018). (hereafter "Annual Report").
7. As an example, from 2016 to 2017, misdemeanor filings decreased by 25,056. DAT and online arraignments decreased by 28,046. Summons filings decreased by 102,456.
8. *Stinson v. City of New York*, No. 10 Civ. 4228(RWS), (S.D.N.Y. July 19, 2012).
9. NYPD patrol guide, procedure no. 209-03; *see also*, Mulligan, K., Cuevas, C., Grimsley, E., Chauhan, P. (2018, September), *The Criminal Justice Reform Act Evaluation: Post-Implementation Changes in Summons Issuance and Outcomes*. New York: New York. (hereafter "CJRA Evaluation").
10. J. David Goodman, *Fewer Criminal Tickets for Petty Crimes, Like Public Urination*, N.Y. Times, October 20, 2017 at A19.
11. *See generally* Harry G. Levine; Loren Siegel, *$75 Million a Year: The Cost of New York City's Marijuana Possession Arrests*, The Drug Policy Alliance, http://www.drugpolicy.org/resource/75-million-year-cost-new-york-citys-marijuana-possession-arrests (last visited November 20, 2018).
12. *See People v. Richardson*, 43 Misc.3d 126(a) (App Term, 1st Dep't 2014); *People v. Gertner*, 49 Misc.3d 141(A) (App Term 1st Dep't 2015); *People v. Jonas*, 42 Misc.3d 135(A) (App. Term 1st Dep't 2014); *People v. Kravchenko*, 48 Misc.3d 143(A) (App. Term 1st Dep't 2015); *People v. Meehan*, 41 Misc.3d 127(A) (App. Term 1st. Dep't 2013); *People v. Potts*, 43 Misc.3d 141(A) (App. Term 1st Dep't 2014); *People v. Cantrell*, 44 Misc.3d 131(A) (App. Term 1st Dep't 2014); *People v. Jones*, 59 Misc.3d 139(A) (App. Term 1st Dep't 2018); *People v. Gonzales*, 59 Misc.3d 139(A) (App. Term 1st Dep't 2018).
13. Pursuant to the New York Constitution, criminal defendants have a right to appeal a criminal conviction to the intermediate appellate court. N.Y. Const. art. 6 § 4. The nature of the conviction makes no difference in this right, nor is it waived by a guilty plea. *See also, People v. Callahan*, 80 N.Y.2d 273, 284 (1992); *People v. Pollenz*, 67 N.Y.2d 264, 269 (1986). Because New York grants defendants the right to appeal, it is compelled to ensure the defendants receive the effective assistance of counsel. *See Evitts v. Lucey*, 469 U.S. 387 (1985) (where state offers statutory first appeal as of right to a criminal defendant, federal due process requires that he be afforded effective assistance of counsel).
14. When the CJRA moved many SAP cases to the civil summons court, judges there were given trainings, most notably implicit bias trainings.
15. *See Atwater v. Lago Vista*, 532 U.S. 318 (2001).
16. *Id.*
17. *See* CJRA Evaluation at 7. However, city data evaluating the reasons criminal summonses were issued over civil summonses list only four reasons, including: (1) the defendant is an OATH recidivist (2) the defendant has an open warrant or investigation card, (3) a "law enforcement reason" or (4) the offense was not CJRA eligible or multiple offenses were charged at once.
18. *See* Annual Report at 31.
19. Mara Silvers, *Thousands of Manhattan Residents Have Marijuana Warrants Dropped*, Gothamist, September 12, 2018, http://gothamist.com/2018/09/12/marijuana_manhattan_vance.php (last visited November 14, 2018).
20. CourtWatch NYC, *Broken Promises: A CWNYC Response to Drug Policing and Prosecution in New York City* // October 2018 https://static1.squarespace.com/static/5a21b2c1b1ffb67b3f4b2d16/t/5bda55bb21c67c69e6b50409/1541035453806/CWNYC+Drug+Zine+FOR+WEB.pdf (last visited November 19, 2018).