

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D34099
W/prt

_____AD3d_____

Submitted - January 27, 2012

RUTH C. BALKIN, J.P.
THOMAS A. DICKERSON
ARIEL E. BELEN
JEFFREY A. COHEN, JJ.

2009-01619

DECISION & ORDER

The People, etc., respondent,
v Louis Holmes, also known as
Shabaka Shakur, appellant.

(Ind. No. 439/88)

Lynn W. L. Fahey, New York, N.Y. (Michelle Vallone of counsel), for appellant, and
appellant pro se.

Charles J. Hynes, District Attorney, Brooklyn, N.Y. (Leonard Joblove and Morgan
J. Dennehy of counsel), for respondent.

Appeal by the defendant, by permission, from an order of the Supreme Court, Kings
County (Holdman, J.), entered December 24, 2008, which denied, without a hearing, his motion
pursuant to CPL 440.20 to set aside so much of his sentence as imposed consecutive terms of
imprisonment upon his two convictions of murder in the second degree.

ORDERED that the order is affirmed.

The Supreme Court properly denied the defendant's motion pursuant to CPL 440.20
to set aside so much of his sentence as imposed consecutive terms of imprisonment upon his two
convictions of murder in the second degree (*see* Penal Law § 125.25[1]). The challenged
consecutive sentences were imposed pursuant to the statutory sentencing scheme that requires
concurrent sentences to be imposed "[w]hen more than one sentence of imprisonment is imposed
on a person for two or more offenses committed through a single act or omission, or through an act
or omission which in itself constituted one of the offenses and also was a material element of the
other" (Penal Law § 70.25[2]), but allows for judicial discretion to impose consecutive sentences

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where “the “acts or omissions” committed by defendant were separate and distinct acts” (*People v Frazier*, 16 NY3d 36, 41, quoting *People v Laureano*, 87 NY2d 640, 643; see *People v Battles*, 16 NY3d 54, 58, *cert denied* 565 US_____, 132 S Ct 123; *People v McKnight*, 16 NY3d 43, 48; *People v Mannino*, 89 AD3d 1105, 1105).

Here, although the two victims’ deaths “may be said to have occurred in the course of a single extended transaction,” contrary to the defendant’s contention, there was no evidence that a single shot killed both victims (*People v Brathwaite*, 63 NY2d 839, 843; see *People v Garcia*, 303 AD2d 600; *People v Grimes*, 277 AD2d 945). Since the evidence supported the sentencing court’s conclusion that the two victims were killed by separate bullets and, thus, that there were separate and distinct acts involved, the motion court correctly concluded that the imposition of consecutive sentences was not illegal (see *People v McKnight*, 16 NY3d 43; *People v Jones*, 41 AD3d 507, 509).

The defendant’s contention that New York’s sentencing scheme with respect to the imposition of consecutive sentences was rendered unconstitutional by *Apprendi v New Jersey* (530 US 466) and its progeny (see e.g. *Blakely v Washington*, 542 US 296) is without merit (see *Oregon v Ice*, 555 US 160, 164; *People v Mannino*, 89 AD3d at 1106; *People v Bridges*, 63 AD3d 752, 753; *People v Cruz*, 46 AD3d 567, 568; *People v Azaz*, 41 AD3d 610, 611-612, *affd* 10 NY3d 873).

BALKIN, J.P., DICKERSON, BELEN and COHEN, JJ., concur.

ENTER:



Aprilanne Agostino
Clerk of the Court