

**SUPREME COURT OF THE STATE OF NEW YORK**  
***Appellate Division, Fourth Judicial Department***

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**KA 09-01060**

PRESENT: SCUDDER, P.J., CENTRA, SCONIERS, GORSKI, AND MARTOCHE, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JOHN R. MCLELLAN, DEFENDANT-APPELLANT.

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TREVETT CRISTO SALZER & ANDOLINA P.C., ROCHESTER (ERIC M. DOLAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOSEPH V. CARDONE, DISTRICT ATTORNEY, ALBION (KATHERINE BOGAN OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Orleans County Court (Robert C. Noonan, A.J.), rendered February 27, 2009. The judgment convicted defendant, upon his plea of guilty, of criminal sexual act in the second degree (two counts).

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of two counts of criminal sexual act in the second degree (Penal Law § 130.45 [1]). Although, as the People correctly concede, defendant's challenge to the legality of the sentence survives his waiver of the right to appeal (*see People v Christopher T.*, 48 AD3d 1131), we reject defendant's contention that the imposition of consecutive sentences was illegal. The facts and circumstances that defendant admitted during the plea allocution establish that he committed two separate and distinct acts of oral sexual conduct that formed the basis for the two counts of criminal sexual act to which he pleaded guilty. Thus, County Court was authorized to impose consecutive sentences (*see People v Quirk*, 73 AD3d 1089, *lv denied* 15 NY3d 955; *see generally People v Laureano*, 87 NY2d 640, 643-644).

Entered: March 25, 2011

Patricia L. Morgan  
Clerk of the Court