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publication in the New York Reports.

No. 215
The People &c.,
 Appellant-Respondent,
 v.
Charles Frazier,
 Respondent-Appellant.

Eleanor J. Ostrow, for appellant-respondent.
Jody Ratner, for respondent-appellant.

LIPPMAN, Chief Judge:

The primary issue presented by these cross appeals is whether defendant is subject to consecutive sentences for the crimes of burglary in the second degree and grand larceny in the third degree. Since we find consecutive sentences are authorized, we modify and remit to the Appellate Division for

further proceedings.

Defendant broke into two Upper East Side apartments -- each located on the fifth floor of a five-story walk-up. The crimes occurred within weeks of each other, in June and July 2004, respectively. In each case, the door had been forced open, the apartment had been ransacked and several thousand dollars worth of personal property had been stolen. Defendant's fingerprints were found inside both apartments. After defendant was arrested, he failed to appear for a mandatory court date. He was taken into custody the following month in Pennsylvania and was returned to New York for trial.

In response to concerns raised by defense counsel about defendant's lack of communication and his competence to stand trial, the court ordered an emergency examination pursuant to CPL 730.10. Two experts examined defendant and issued reports finding him unfit to proceed based on his inability to assist in his defense. The court confirmed the finding of unfitness and defendant was committed to Mid-Hudson Psychiatric Center for treatment. He was returned as competent to stand trial after approximately two weeks.

Supreme Court conducted a competency hearing. The People introduced into evidence reports from four experts, including one of the doctors who had previously found defendant unfit, each concluding that defendant was now competent to proceed to trial. Two of the psychiatrists testified on behalf

of the People that defendant understood the nature of the proceedings and the charges. The defense called their own expert psychologist who testified that defendant had a severe mental disorder and was unfit to stand trial due to his inability to communicate with counsel. Supreme Court concluded that, although defendant suffered from depression, it did not prevent him from participating in his defense and that defendant was instead unwilling to communicate with his attorney. The court determined that the People had established defendant's competence by a preponderance of the evidence and found defendant fit to proceed.

After trial, defendant was convicted of three counts of burglary in the second degree, two counts of grand larceny in the third degree and one count of bail jumping. He was sentenced, as a persistent violent felony offender, to concurrent terms of 16 years to life for the burglary convictions to be served consecutive to concurrent terms of 2 to 4 years for the grand larceny convictions and consecutive to a term of 2 to 4 years on the bail jumping conviction.

The Appellate Division modified, on the law, by directing that the sentences for the larceny convictions be served concurrently with the sentences for the burglary convictions and, as so modified, affirmed. The Court determined that, since larceny was the only crime that satisfied the intent element of burglary, the acts making up each crime could not be viewed as separate and distinct (58 AD3d 468, 469 [1st Dept

2009])). The Court also found that the People had satisfied their burden to establish defendant's competence to stand trial by a preponderance of the evidence. Finally, the Court rejected defendant's claim that the sentencing procedure under which he was adjudicated a persistent violent felony offender was unconstitutional. A Judge of this Court granted the People leave to appeal and defendant leave to cross-appeal, and we now modify.

The Penal Law dictates that concurrent sentences are required "[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]). We have held that a court must first look to the statutory definitions of the crimes to "determine whether the *actus reus* element is, by definition, the same for both offenses . . . or if the *actus reus* for one offense is, by definition, a material element of the second offense" (People v Laureano, 87 NY2d 640, 643 [1996]). The *actus reus* of the crime is "[t]he wrongful deed that comprises the physical components of a crime and that generally must be coupled with *mens rea* to establish criminal liability" (People v Rosas, 8 NY3d 493, 496 n 2 [2007] quoting Black's Law Dictionary 39 [8th ed 2004]).

Consecutive sentences can still be imposed where there is some overlap in the elements of multiple statutory offenses if

the People can demonstrate "that the 'acts or omissions' committed by defendant were separate and distinct acts" (Laureano, 87 NY2d at 643). However, when the *actus reus* is "'a single, inseparable act'" that violates more than one statute, single punishment must be imposed (see People v Ramirez, 89 NY2d 444, 453 [1996], quoting People ex rel. Maurer v Jackson, 2 NY2d 259, 264 [1957]).

Defendant was convicted of second-degree burglary, which is defined as knowingly entering or remaining unlawfully in a dwelling with the intent to commit a crime therein (see Penal Law § 140.25 [2]). He was also convicted of grand larceny in the third degree for stealing property valued at over three thousand dollars (see Penal Law § 155.35 [1]). These statutes do not contain the same *actus reus*. The crime of burglary was completed when defendant entered each complainant's apartment with the intent to commit a crime. The ensuing larceny was a separate crime, perpetrated through defendant's separate act of stealing property (see People v Yong Yun Lee, 92 NY2d 987, 989 [1998]).

Defendant emphasizes the finding below that larceny was the only crime that satisfied burglary's intent requirement and posits that consecutive sentences would punish him twice for the same conduct. However, "[t]he test is not whether the criminal intent is one and the same and inspiring the whole transaction, but whether separate acts have been committed with the requisite criminal intent" (People v Day, 73 NY2d 208, 212 [1989] [internal

quotation marks and citation omitted]). As noted above, the crimes at issue here are separate offenses that were committed through separate acts. Nor is one offense a material element of the other for sentencing purposes, as larceny is not a necessary component of burglary (see Day, 73 NY2d at 211). Concurrent sentences, therefore, are not required and the Appellate Division should exercise its discretion as to whether consecutive sentences are appropriate under the facts of this case.

Defendant, on his cross appeal, argues that the People failed to demonstrate by a preponderance of the evidence that he was competent to stand trial. In order to be found competent, a defendant must be capable of understanding the nature of the proceedings at issue and be able to assist in providing a defense (see CPL 730.10 [1]; People v Mendez, 1 NY3d 15, 19 [2003]). Where the trial court's determination that defendant is mentally fit to stand trial has been affirmed by the Appellate Division, our review is restricted to determining whether defendant was incompetent as a matter of law (see Mendez, 1 NY3d at 20).

Here, four experts provided reports concluding that defendant was fit to proceed to trial. Although the defense expert found him unfit, even that expert agreed that defendant understood the nature of the charges against him and the potential penalties involved. Supreme Court concluded that defendant's lack of involvement and failure to communicate with his attorney was volitional because he preferred commitment to a

secure psychiatric facility to incarceration. It appears somewhat unusual that defendant was returned as competent after spending only two weeks at Mid-Hudson Psychiatric Center following the prior finding of incompetence. However, that may have been the result of error in the initial determinations finding him unfit. This record affords no basis for finding defendant incompetent as a matter of law.

Defendant's argument that the persistent violent felony offender sentencing scheme is unconstitutional fails under our line of precedent following United States v Almendarez-Torres, 523 US 224 (1998) (see People v Bell, __ NY3d __ [decided today]).

Accordingly, the order of the Appellate Division should be modified by remitting to that Court for further proceedings in accordance with this opinion and, as so modified, affirmed.

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Order modified by remitting to the Appellate Division, First Department, for further proceedings in accordance with the opinion herein and, as so modified, affirmed. Opinion by Chief Judge Lippman. Judges Ciparick, Graffeo, Read, Smith, Pigott and Jones concur.

Decided December 14, 2010