

MEMORANDUM

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF QUEENS : CRIMINAL TERM : PART L-1

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PEOPLE OF THE STATE OF NEW YORK, : HON. ROBERT J. McDONALD  
: :  
: :  
- against - : Date: June 18, 2002  
: :  
TRACY MIDDLETON, : Indt. No. 6836 / 87  
Defendant(s). :  
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Defendant was convicted after trial of two counts of Murder in the Second Degree [Penal Law §125.25(1) and Penal Law §125.25(3)] and Burglary Second Degree [Penal Law §140.25(1)(a)]. Thereafter, on August 17, 1988 he was sentenced [Leahy, J.] to a term of imprisonment of 25 years to life on both Murder convictions, and 7 ½ years to 15 years on the Burglary conviction. The sentence on the first count, Murder in the Second Degree [Penal Law §125.25(1)] was to run consecutively to the conviction for Burglary in the Second Degree [Penal Law §140.25(1)(a)]. This conviction was affirmed [*People v Middleton*, 180 AD2d 761 *lv denied* 79 NY2d 1052].

Defendant brings the instant *pro se* motion pursuant to CPL 440.20(1) and Penal Law §70.25(2) to set aside his sentence to consecutive time on the ground that the sentence imposed was legally improper. Defendant argues that the consecutive sentences imposed are statutorily prohibited and that any sentence imposed must merge. In particular, defendant posits that the law prohibits the imposition of consecutive sentences when two offenses are committed simultaneously and arise out of a single transaction.

Defendant is correct to the extent that when two offenses are committed with a single objective, he may not be punished more than once (*People v Baker*, 27 AD2d 269 *aff'd* 19 NY2d 982). However, that is only where the statutory definitions of the crimes involve an identical *actus reus* (*People v Mack*, 242 AD2d 543). Whether this is so, requires an analysis which is “fact-specific” (*People v Day*, 73 NY2d 208; *People v Abreau*, 184 AD2d 707 *lv denied* 80 NY2d 972).

When separate and distinct acts are committed, separate sections of the Penal Law are violated, and punishment for each is appropriate, even though the acts involved arose from a single transaction (*People el rel Maurer v Jackson*, 2 NY2d 259).

The core elements of Burglary in the Second Degree [Penal Law §140.25(1)(a)] is entry into a building with the intent to commit a crime while being armed with a deadly weapon during the commission of that burglary. Thus, the crime of Burglary in the Second Degree was completed when defendant entered the premises with the requisite intent while armed with a revolver. Therefore, while an element of this burglary charge requires that defendant be armed with a revolver, the act committed during the course of the burglary was a disparate and separate act which resulted in the intentional murder of a non-participant (*People v Underwood*, 52 NY2d 882; *People v Campos*, 206 AD2d 633). It is beyond cavil that this murder was not naturally or inherently related to the burglary, and did not spring from a single act, nor was it motivated by a single mental state (*People v Brown*, 80 NY2d 361). This, the sentencing court properly found when it imposed consecutive sentences (*People v Laureano*, 87 NY2d 640). This would not have been the case if the sentencing court had imposed consecutive sentences for the felony murder [Penal Law §125.25(3)] and the burglary conviction.

Accordingly, Defendant's motion is denied.

Order entered accordingly.

The Clerk of the Court is directed to mail a copy of this decision to the defendant and to the District Attorney.

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ROBERT J. McDONALD, J.S.C.