Filed 7/30/08 Opinion following rehearing

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL JEROME SUTTON et al., Defendant and Appellant.	B195337 (Los Angeles County Super. Ct. No. BA304502)

APPEAL from a judgment of the Superior Court of Los Angeles County, Judith L. Champagne, Judge. Affirmed in part; reversed and remanded in part.

William L. Heyman, under appointment by the Court of Appeal, for Defendant and Appellant Michael Jerome Sutton.

Jennifer L. Peabody, under appointment by the Court of Appeal, for Defendant and Appellant Willie J. Jackson.

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* Pursuant to California Rules of Court, rules 8.1100 and 8.1110, this opinion is certified for publication with the exception of parts II, III and IV of the Discussion.

Michael P. Judge, Public Defender, and John Hamilton Scott, Deputy Public Defender, for Public Defender of Los Angeles County, California, as Amicus Curiae on behalf of Defendants and Appellants.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Steven D. Matthews and David E. Madeo, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

The joint trial of defendants and appellants Michael Jerome Sutton and Willie J. Jackson began six days after the 60-day statutory deadline in Penal Code section 1382.[1] The trial court continued the trial as to both defendants because Jackson's counsel was engaged in trial on another matter. On appeal, defendants contend that good cause did not exist to continue the trial beyond the statutory deadline. In the published portion of this opinion, we hold that an appointed counsel's present engagement in another matter is good cause to continue the joint trial of jointly charged defendants. In the nonpublished portion of this opinion, we reject defendants' contention that the trial court erred in excluding evidence, although we agree with Sutton's other contention that there are errors in his sentence. We therefore reverse and remand this matter as to Sutton with respect to the sentencing errors only. We otherwise affirm the judgment as to both defendants.

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[1] All further undesignated statutory references are to the Penal Code.

FACTUAL AND PROCEDURAL BACKGROUND

I. Factual background.

On May 31, 2006, Officer Anthony Jackson, a member of the Narcotics Division Buy Team, was working undercover at 7th and Ceres in Los Angeles. Defendant Jackson was counting money on Ceres. The officer looked at defendant Jackson, who approached the officer and asked what he wanted. The officer said he wanted "a 20," meaning $20 worth of narcotics. Defendant Jackson said he had to get it; he crossed the street to a waist-high camping tent, where Sutton was waiting.

Sutton and defendant Jackson talked, although the officer could not overhear their conversation. Sutton opened a white bottle out of which he poured an off-white solid substance into his hand and gave it to defendant Jackson. Defendant Jackson walked back to the officer and asked him for the money. The officer gave defendant Jackson a prerecorded $20 bill, and defendant Jackson gave the officer an off-white solid resembling rock cocaine. As the officer walked away, he signaled to his partners that the buy was complete.

Jackson was arrested. Officers recovered $14 from his pants pockets. Sutton was arrested. Officers recovered an off-white substance resembling rock cocaine, a white canister also containing an off-white substance resembling cocaine, and $44 from him. Detective Vip Kanchanamongkol, who was in charge of the operation, compared a $20 bill recovered from Sutton to the prerecorded bill Officer Jackson used to buy the drugs from defendant Jackson. The bills matched. Testing confirmed that the substance Officer Jackson bought was 0.33 grams of cocaine base and that the substance recovered from Sutton was 0.99 grams of cocaine base.

II. Procedural background.

Trial was by jury. On October 5, 2006, the jury found Sutton and Jackson guilty of count 1, sale of a controlled substance, cocaine base (Health & Saf. Code, § 11352, subd. (a)). The jury also found Sutton guilty of count 2, possession for sale of a controlled substance, cocaine base (Health & Saf. Code, § 11351.5).

On October 24, 2006, the trial court sentenced Jackson to the midterm of four years on count 1.

On November 21, 2006, the trial court sentenced Sutton to the upper term of five years on count 1. The court imposed an additional three years under Health and Safety Code section 11370, subdivision (a), based on a prior felony conviction for violating Health and Safety Code section 11351.5 and an additional year under section 667.5, subdivision (b). The court sentenced him to a concurrent four-year term on count 2. The court dismissed one prior conviction from 1990.

This appeal followed.[2]

DISCUSSION

I. The six-day delay did not violate defendants' statutory right to a speedy trial.[3]

Because their trial was delayed beyond the statutory deadline in section 1382, Sutton and Jackson contend that their right to a speedy trial was violated.[4] We disagree.

A. *Additional facts.*

The People filed a felony complaint on June 2, 2006, charging Jackson and Sutton with sale of a controlled substance (Health & Saf. Code, § 11352, subd. (a)) and charging Sutton with sale of cocaine base (Health & Saf. Code, § 11351.5). On June 16, noting that it was "10 of 10" and that the defendants had been inadvertently sent to the wrong

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[2] We filed an opinion in this case on March 26, 2008, but, on our own motion, we granted rehearing and ordered the parties to file supplemental briefs addressing section 1050.1.

[3] In Jackson's opening brief he joined any contention Sutton raised that may be "applicable and beneficial" to him. He did not separately brief the speedy trial issue. Jackson's appellate counsel, in response to our rehearing order, thereafter submitted a supplemental brief in which she argued that the speedy trial issue was indeed applicable to her client. We therefore will consider the issue as to Jackson.

[4] The argument is based solely on section 1382. Sutton does alternatively contend that his trial counsel rendered ineffective assistance of counsel by, among other things, failing to object to continuing trial.

courthouse, the trial court dismissed the matter. Sutton was released from custody, but was placed in custody again three days later.

By a felony complaint, the People refiled the matter on June 19, 2006. An information was filed on July 21, 2006, charging Sutton and Jackson again with violating Health and Safety Code section 11352, subdivision (a), and Sutton with violating Health and Safety Code section 11351.5. Sutton and Jackson were arraigned that same day, July 21, and trial was scheduled for September 11, 2006, as day 52 of 60. The trial date, however, was vacated and set for September 12, as day 53 of 60. On September 12, all parties announced ready for trial, although Jackson's appointed counsel said he might be engaged in trial on another case.[5] The case was transferred to Department 100 for trial assignment on September 15, as day 56 of 60.

On September 15, 2006, Jackson's counsel said he was engaged in trial, but he would be available on the 19th. The trial court asked Jackson if it was "agreeable with you that you come back here on September 19th and have your trial within two days of that date?" Jackson said, "As long as no time is being waived," and "I don't want to waive time," to which the court replied, "That's fine." The court trailed the matter to September 18, as day 59 of 60.

On September 18, 2006, all parties announced ready, except for Jackson's counsel, who was still engaged in trial. On Jackson's continuing motion to trail, the court trailed the trial to September 19. The court noted that there was no time waiver from either defendant.

On September 19, 2006, day 60 of 60, Jackson's counsel said he was still engaged in trial. The court again noted that the defendants were not waiving time, and Sutton expressly asked when the 60 days started to run. Noting that Jackson's counsel was still engaged in trial on another matter, the court found good cause to continue the matter as to both defendants.

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[5] Sutton also had appointed counsel. The parties do not dispute that Sutton and Jackson remained incarcerated during these proceedings.

The next day, September 20, 2006, day 61 of 60, Jackson's counsel was still in trial but he nevertheless made "a pro forma" motion to dismiss. The court said it was not a good faith motion to dismiss because he was also making a motion to continue.[6] The court again found good cause to continue the matter based on Jackson's counsel being in trial.

The following day, September 21, 2006, Jackson's counsel was still engaged in trial. The trial court again found good cause to trail the case until September 22. Sutton asked if this meant he waived time. The court said, "You haven't waived one second. I find good cause because one of the two counsel are engaged in trial, which is good cause to trail the case."

On September 22, 2006, Jackson's counsel asked to trail the matter to the 25th, because he was still engaged in trial. The trial court granted the motion, and it found that there was no time waiver. Sutton personally addressed the court:

"Defendant Sutton: I'm confused.

"The court. What are you confused about, Mr. Sutton?

"Defendant Sutton: I'm told you have 60 days to start trial. Sixty days was up yesterday, and we've not waived any time. The minute order –

"The court: That's excellent. And I found good cause to put your case over.

"Defendant Sutton: What's the good cause? What's the good cause?

"The court: The good cause is that one of the lawyers is engaged and can't try two cases at one time. And if one of the lawyers is engaged on a case with two defendants, it's good cause to put both over. [¶] Now, do you want a further explanation than that?

"Defendant Sutton: Yeah, but the minute order show we never waived any time. I'm confused.

"The court: You're not confused. You just don't like it.

"Defendant Sutton: Well, that's a fact.

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6 Sutton's counsel was not present for this portion of the proceedings. He had called and said he would be late.

"The court: That's a fact. [¶] And you know what my answer to you is? Too bad. See you on Monday."

On September 25, 2006, all parties announced ready for trial, and the case was transferred to Department 124 for trial. Noting that it was day 66 of 60 and that his client never waived time, Sutton's counsel cited, among others, *People v. Escarcega* (1986) 186 Cal.App.3d 379 (*Escarcega*), and moved for dismissal based on the lack of a speedy trial. The People responded, "The People have answered ready since the first day this case was in Department 100. It is my recollection on each and every occasion when defense counsel for Mr. Sutton was asked if he wanted to waive time for the convenience or because his co-counsel was in fact in trial he did. In light of that fact and in light of the fact the People have been ready each and everyday, the People would oppose the motion."

Sutton's counsel corrected the district attorney: "I never waived time. I emphasized on the record that Mr. Sutton did not want to waive time. The court was aware of that. That is why they brought Mr. Sutton everyday from a week ago, over a week ago, on a daily basis in case a trial court opened up. It was over our decision not to waive time. We did not waive time." The court said good cause to trail the case had been found because co-counsel was engaged in another matter, and it therefore denied the motion.[7]

B. *There was good cause to continue defendants' trial.*

The California Constitution guarantees a criminal defendant's right to a "speedy public trial." (Cal. Const., art. 1, § 15; see also § 1050.)[8] Section 1382 interprets the

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[7] Although the prosecutor said that Sutton had waived time and various minute orders state he waived time, the record is clear he did not. Therefore, Sutton does not have a claim of ineffective assistance of counsel based on his trial counsel's failure to object to the delay of trial. The People also do not argue on appeal that there was such a waiver.

[8] Section 1050, subdivision (a), provides: "The welfare of the people of the State of California requires that all proceedings in criminal cases shall be set for trial and heard and determined at the earliest possible time. To this end, the Legislature finds that the

state constitutional right to a speedy trial. (*People v. Johnson* (1980) 26 Cal.3d 557, 561 (*Johnson*); *People v. Martinez* (2000) 22 Cal.4th 750, 766 [the statutory speedy trial rights are supplementary to and a construction of the state constitutional speedy trial guarantee].) Section 1382 provides that absent a showing of good cause, waiver or consent, a defendant accused of a felony is entitled to a dismissal of charges if the matter is not brought to trial within 60 days of arraignment. (§ 1382; *Johnson*, at p. 563.) What constitutes good cause to continue a case depends on the circumstances of each case, and the issue is reviewed on appeal under an abuse of discretion standard. (*Johnson*, at p. 570; *Hollis v. Superior Court* (1985) 165 Cal.App.3d 642, 645.)

Examples of good cause to delay a trial include an unexpected illness or unavailability of counsel or witnesses, delay caused by a defendant's conduct, and delays for the defendant's benefit. (*Johnson*, *supra*, 26 Cal.3d at p. 570.) The preference for a joint trial of jointly charged defendants can also constitute good cause to delay a trial beyond the statutory deadline. That preference is in section 1098, which provides that "[w]hen two or more defendants are jointly charged with any public offense, whether felony or misdemeanor, they must be tried jointly, unless the court order[s] separate trials." (See also Cal. Const., art. I, § 30, subd. (a) ["This Constitution shall not be construed by the courts to prohibit the joining of criminal cases as prescribed by the Legislature or by the people through the initiative process"]; § 1050.1 [discussed *post*].)

Notwithstanding the clear statutory preference for joint trials, Sutton and Jackson contend that the preference cannot here trump their statutory speedy trial rights, based on

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criminal courts are becoming increasingly congested with resulting adverse consequences to the welfare of the people and the defendant. Excessive continuances contribute substantially to this congestion and cause substantial hardship to victims and other witnesses. Continuances also lead to longer periods of presentence confinement for those defendants in custody and the concomitant overcrowding and increased expenses of local jails. It is therefore recognized that the people, the defendant, and the victims and other witnesses have the right to an expeditious disposition, and to that end it shall be the duty of all courts and judicial officers and of all counsel, both for the prosecution and the defense, to expedite these proceedings to the greatest degree that is consistent with the ends of justice. . . ."

Johnson, supra, 26 Cal.3d 557. In *Johnson*, defendant's appointed counsel, over his client's objection, asked for a continuance of trial because he was engaged in trial on other matters. He explained that he was presently engaged in another trial and that he had two older cases he felt he should try before defendant Johnson's case. (*Id.* at pp. 563-564 & fn. 2.) The court found good cause to continue the trial. On the continued trial date, defense counsel asked for another continuance, again detailing his schedule in connection with three other cases. (*Id.* at pp. 563-564 & fn. 3.) Over defendant's objection, the court again found good cause to continue the matter. Defendant was finally brought to trial 144 days after the information was filed. (*Id.* at p. 565.)

Johnson made two holdings. First, when a client expressly objects to waiving his or her right to a speedy trial under section 1382, "counsel may not waive [the speedy trial] right to resolve a calendar conflict when counsel acts not for the benefit of the client before the court but to accommodate counsel's other clients." (*Johnson, supra*, 26 Cal.3d at pp. 561-562; see also *id.* at p. 567 ["consent of appointed counsel to a postponement of trial beyond the statutory period, if given solely to resolve a calendar conflict and not to promote the best interests of his client, cannot stand unless supported by the express or implied consent of the client himself"].)[9] Second, in the case of an incarcerated defendant, the public defender's inability to try a case within the statutory time because of conflicting obligations does not constitute good cause to avoid dismissal of the charges. (*Id.* at pp. 561-562.)

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9 In reaching this conclusion, the *Johnson* majority distinguished *Townsend v. Superior Court* (1975) 15 Cal.3d 774. *Townsend* held that a defendant's appointed counsel has the power to control judicial proceedings and to waive nonfundamental rights. Thus, consent of counsel alone, without that of the client, satisfies section 1382; in other words, counsel can waive the client's rights under section 1382. (*Townsend,* at p. 780; *Johnson, supra,* 26 Cal.3d at p. 568.) Although it appears that *Johnson* departs from *Townsend*—indeed the *Johnson* majority strongly criticized *Townsend*—the majority did not expressly overrule it. Justice Richardson, who authored *Townsend*, dissented from the majority's holding with respect to the right to speedy trial issue, and described the majority opinion as a reversal of *Townsend*. (*Johnson,* at pp. 581-582.)

Although *Johnson*'s second holding refers broadly to appointed counsel's "conflicting obligations," the factual scenario on which this holding was based is different than the one before us. In *Johnson*, defendant's trial counsel delayed Johnson's first trial date because counsel was engaged in trial on another matter and because he felt his other cases had precedence over Johnson's. On all later trial dates Johnson's trial counsel based his requests for continuance only on conflicting trial schedules of his other clients. He was thus engaging in case management, to Johnson's detriment. Here, Jackson's trial counsel, before the statutory deadline passed, initially announced ready for trial, although he said he might be engaged in trial on another case. He thereafter became engaged in that other trial. While Jackson's counsel was engaged in the other matter, Sutton and Jackson's trial trailed day to day, until their case was transferred for trial on September 25, six days after the 60-day deadline in section 1382. A situation such as this, in which trial counsel is presently engaged in another matter and the matter before the court trails for a minimal number of days, is thus distinguishable from *Johnson*. Trial counsel here was actually in trial on another matter and was not delaying this matter so that he could try other cases ahead of it.**[10]**

The facts here are also distinguishable from those in *Sanchez v. Superior Court* (1982) 131 Cal.App.3d 884 (*Sanchez*). The petitioner and two codefendants in *Sanchez* were jointly charged. (*Id.* at p. 887.) Codefendant's counsel told the court he was engaged in another criminal trial and "was assigned to two other 'must-go' criminal trials immediately thereafter." (*Ibid.*) The trial court found good cause to continue petitioner's trial along with his codefendant's trial.**[11]** Relying on *Johnson*, *Sanchez* said that "on

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10 Because we conclude that good cause existed to continue Jackson's trial based on his counsel's unavailability, we need not determine whether Jackson waived or expressly or impliedly consented to the continuance under section 1382, subdivision (a)(2)(A) and (B), an issue which is not raised by any party.

11 The record is not clear how far past the statutory deadline trial occurred, but it appears it was somewhere between seven to twenty-one days. (*Sanchez*, *supra*, 131 Cal.App.3d at p. 888.)

balance, whatever unspecified 'interests of justice' might be promoted by a joint trial in the underlying prosecution, the state interest cannot be permitted to subordinate the conflicting right of [a defendant] to a trial within the 60-day period." (*Sanchez*, at p. 893.)[12] *Sanchez* mirrors more closely the facts in *Johnson* than the ones before us. It involved trial counsel's attempts to manage his caseload to the defendant's detriment.

Arroyo v. Superior Court (2004) 119 Cal.App.4th 460, is also distinguishable. Arroyo and his codefendant were arraigned on different days. Arroyo's trial was set for December 15, 2003, but his codefendant, who had been arraigned on a later date, was not scheduled to be tried until January 26, 2004. The trial court continued Arroyo's trial to January 26 so that he could be jointly tried with his codefendant. The Court of Appeal held that Arroyo's speedy trial rights were violated. The trial court erred in relying on "maintaining joinder alone as the sole reason for continuance, without regard to any competing factors." (*Id.* at p. 467.) *Arroyo*, however, did not involve, as here, the unavailability of codefendant's counsel due to his present engagement in trial on another matter.

Thus, there was good cause to continue the trial of Jackson. The question then becomes whether there was also good cause to continue the trial of the jointly charged defendant, Sutton. *Johnson* does not answer this question directly, because it did not involve jointly charged defendants. But our California Supreme Court has otherwise noted that where "a continuance is granted upon good cause to a codefendant the rights of

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12 We relied on *Sanchez* in *Escarcega*, *supra*, 186 Cal.App.3d at page 386, footnote 4, to reject the People's contention that their and the codefendants' desire "to avoid needless duplication or to obtain an expeditious disposition are relevant factors in determining whether defendant's right to a speedy trial was violated." We said that the "preference for a joint trial of jointly charged defendants does not constitute good cause to delay one defendant's trial beyond the time period set forth in Penal Code section 1382, subdivision [(a)(2)]." (*Escarcega*, at p. 386, fn. 4.) To the extent *Escarcega* can be interpreted as finding that the preference for a joint trial does not, under any circumstance, constitute good cause to continue a trial past the statutory time, such an interpretation is "overly broad." (*Greenberger v. Superior Court* (1990) 219 Cal.App.3d 487, 495 (*Greenberger*).)

the other defendants are generally not deemed to have been prejudiced." (*People v. Teale* (1965) 63 Cal.2d 178, 186 [continuance premised on codefendant's counsel's need to prepare for trial], revd. on other grounds by *Chapman v. California* (1967) 386 U.S. 18; see also *Ferenz v. Superior Court* (1942) 53 Cal.App.2d 639 [cited with approval in *Teale* and finding that the unavailability of two defendants was good cause to continue for 22 days the joint trial of nine defendants in a complex trial].)

Greenberger, supra, 219 Cal.App.3d 487, also held that the preference for joint trials can constitute good cause to delay a trial beyond the statutory time. *Greenberger* was a multi-defendant-murder trial in which defendant Greenberger refused to waive time, although her codefendants moved to continue trial based on a need for pretrial investigation. Greenberger was ultimately tried six months beyond the statutory time. The court found that although there are "no magic calipers marking the exact reach of good cause delay," good cause existed based on a consideration of factors including length of delay, seriousness of charges, complexity of the case, prejudice to the defendant, the reason for the delay, witness hardship, and burden on the courts. (*Id.* at pp. 502, 505-506; see also *Hollis v. Superior Court, supra,* 165 Cal.App.3d 642 [defendant's right to a speedy trial was not violated by a continuance of 100 days past the statutory time based on codefendant's assertion he needed more time to prepare for trial].)

Greenberger recognized that the preference for a joint trial "encompasses varied and significant interests. So significant, in fact, that they may serve as counterweights to a defendant's right to confront witnesses [citation], his privilege against self-incrimination [citation]; his right to exclude prejudicial character evidence [citation], and others [citations]." (*Greenberger, supra,* 219 Cal.App.3d at p. 499.) The court then said that "if the precipitating cause for trial delay is justifiable, such as codefendants' need to adequately prepare for trial, then the section 1098 joint trial mandate constitutes good cause to delay the trial of an objecting codefendant." (*Id.* at p. 501, fn. omitted.) As we have explained, the precipitating cause for delaying Jackson's trial here was justifiable, namely, his counsel's present, and brief, engagement in trial on another matter. Under

such a circumstance, the joint trial mandate constituted good cause to delay Sutton's trial as well.

Section 1050.1 underscores the soundness of this conclusion. That section provides: "In any case in which two or more defendants are jointly charged in the same complaint, indictment, or information, and the court or magistrate, for good cause shown, continues the arraignment, preliminary hearing, or trial of one or more defendants, the continuance shall, upon motion of the prosecuting attorney, constitute good cause to continue the remaining defendants' cases so as to maintain joinder. The court or magistrate shall not cause jointly charged cases to be severed due to the unavailability or unpreparedness of one or more defendants unless it appears to the court or magistrate that it will be impossible for all defendants to be available and prepared within a reasonable period of time."[13] Although we do not directly rely on section 1050.1, because the prosecutor here did not make a motion under it, the statute states a clear preference for joint trials under situations similar to the one before us.[14] Under section 1050.1, if good cause exists to continue the trial of defendant No. 1, then good cause exists to continue the trial of defendant No. 2 to maintain joinder. As we have said, good cause existed to continue Jackson's trial, therefore, had a motion under section 1050.1 been expressly made, good cause would have existed to continue Sutton's trial as well under that statute.

In reaching our conclusion that defendants' speedy trial rights were not violated by the six-day delay, we are mindful that "neither a defendant's constitutional right to trial within the 60-day period nor the mandate for joint trial are absolute, but are subject to the

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13 Proposition 115, adopted by the voters and made effective June 6, 1990, added section 1050.1, among others, to the Penal Code.

14 See generally, *A.A. v. Superior Court* (2003) 115 Cal.App.4th 1, 4, 6 (section 1050.1 is not a " 'joinder' " statute; if anything, it is a " 'continuance' " statute that gives the People good cause to seek a continuance of the entire case when the court grants a continuance to two or more defendants in a jointly charged case); *In re Samano* (1995) 31 Cal.App.4th 984, 995 (dissenting Justice Stone noting that section 1050.1 "gives the prosecution the right to maintain joinder" (dis. opn. of Stone, J.)).

discretion of the trial court in evaluation of conflicting policy and pragmatic considerations." (*Sanchez*, *supra*, 131 Cal.App.3d at p. 891.) Those policy and pragmatic considerations here include the relative brevity of the delay (six days), and the not insignificant burden on the court system in conducting two trials. We thus take note of Justice Richardson's cautionary statement in his dissenting opinion in *Johnson*: "The problem of overcrowded courtrooms is a major concern to all who are involved in the judicial process. . . . We may, on a case-by-case basis and when appropriate, afford relief by dismissal to those individual defendants who have been denied their right to a speedy trial. We should not, however, by judicial improvisation, and in the absence of prejudice to a defendant, particularly in matters so closely affecting the public safety and welfare, impose our own theories of management on local court systems, thereby reaching arbitrary results which are neither constitutionally compelled nor in the public interest." (*Johnson*, *supra*, 26 Cal.3d at p. 586 (dis. opn. of Richardson, J.).)

II. Cross-examination of Officer Hector Diaz.

The trial court excluded video evidence defendants proffered to impeach Officer Hector Diaz's testimony that he saw the entire transaction between defendants and Officer Jackson. Both defendants now contend that the evidence was erroneously excluded, and that they were prejudiced by its exclusion. Jackson, whose trial counsel did not join in the objections to the exclusion of the evidence, also argues that his counsel provided ineffective assistance of counsel for failing to do so. We hold that the trial court did not abuse its discretion by excluding the evidence, and therefore, the ineffective assistance of counsel claim must also fail.

A. *Additional facts.*

During the transaction, Officer Hector Diaz was the "point" officer—the officer who keeps his eyes on the undercover officer conducting the buy and who relays information to other officers in the area. He was standing on the south sidewalk of 7th in the middle of Ceres, and he testified he had a direct view of Officer Jackson the entire time Officer Jackson was on Ceres. He saw defendant Jackson approach Officer Jackson and talk to him. Officer Diaz also saw Sutton give something to defendant Jackson, who

then gave it to Officer Jackson. After Officer Jackson walked away, Officer Diaz saw defendant Jackson walk back to Sutton and give him something.

During cross-examination, Sutton's defense counsel asked Officer Diaz if he was involved in Davon Spencer's arrest on December 15, 2005. The prosecutor objected, and, at sidebar, defense counsel explained that he was going into the unrelated incident for impeachment purposes. Officer Diaz filed a report in the Spencer case stating he saw the transaction there, but a DVD showed that "if you are standing on either corner [of 7th and Main], you could not see the transaction because there is a bus in the way." Defense counsel said that the camera was on a telephone pole, which, the trial court noted, gave the camera a different vantage point than any officer on the ground.

"Mr. White: [The bus] pulled up, stopped and either let people off or on. It is a Santa Monica bus. This was the time that Mr. Spencer was alleged to have been doing something, but the bus was in the way. You can see the top of Mr. Spencer's head.

"The court: If I were to allow this, I have to allow you to play the DVD. We are going to get into a case that has no other connection with this case; is that correct?

"Mr.White: That's correct, Your Honor. The only connection is that the officer is in a similar situation where he is testifying. Here he is in a position where he could see. In this report it says that he could see when he couldn't have seen what he saw on another case. I am using it for impeachment only.

"The court: Under [Evidence Code section] 352 I am not going to allow it at this time. If later on it appears that this witness' testimony is pivotal, then I will reconsider your offer to recall him. At this point, I can't see any purpose. I can see a lot of time being consumed. I do not want to conduct a trial within a trial. Obviously, at that point you have to let the people bring in other witnesses who may have seen and can corroborate what the witness said he saw. [¶] I don't know that a DVD from a different vantage point is at all probative. We'd have to get into all of that. No, I am not going to permit it at this time. [¶] He may retake the stand and you may get into a different line of questioning.

"Mr. White: I will, Your Honor. I do want to point out this is important to Mr. Sutton to be able to impeach this officer –

"The court: I understand. That is why I said to you down the road in this trial if this should become a pivotal witness, we will revisit. I can see a lot of time being consumed and I am exercising my discretion under [section] 352 of the Evidence Code.

"Mr. White: Under due process and the federal Constitution, Mr. Sutton should be allowed to use it."

Later, after the People rested, the trial court stood by its tentative ruling and reiterated that Officer Diaz was not a primary witness, rather, he testified briefly to corroborate Officer Jackson's testimony.

B. *The trial court did not abuse its discretion by excluding the evidence.*

Sutton and Jackson contend that the exclusion of the above evidence violated their constitutional rights to a fair trial and to present a defense. (See, e.g., U.S. Const., 5th, 6th & 14th Amends.; *Crane v. Kentucky* (1986) 476 U.S. 683, 690 [the federal Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense]; *United States v. Owens* (1988) 484 U.S. 554, 558 [the Confrontation Clause is generally satisfied when the defense is given a full and fair opportunity to probe and expose infirmities through cross-examination, thereby calling to the fact finder's attention reasons for giving scant weight to a witness's testimony].) We disagree.

"A defendant has the general right to offer a defense through the testimony of his or her witnesses [citation], but a state court's application of ordinary rules of evidence—including the rule stated in Evidence Code section 352—generally does not infringe upon this right [citations]." (*People v. Cornwell* (2005) 37 Cal.4th 50, 82.) Although the United States Supreme Court, in *Chambers v. Mississippi* (1973) 410 U.S. 284, 302-303, "determined that the combination of state rules resulting in the exclusion of crucial defense evidence constituted a denial of due process under the unusual circumstances of the case before it, it did not question 'the respect traditionally accorded to the States in the establishment and implementation of their own criminal trial rules and procedures.' [Citation.]." (*Cornwell*, at p. 82.)

Certainly, evidence of misconduct on the part of a prosecution witness "may suggest a willingness to lie [citations], and this inference is not limited to conduct which resulted in a felony conviction." (*People v. Wheeler* (1992) 4 Cal.4th 284, 295-296.) But the "admissibility of any past misconduct for impeachment is limited at the outset by the relevance requirement of moral turpitude. Beyond this, the latitude [Evidence Code] section 352 allows for exclusion of impeachment evidence in individual cases is broad. The statute empowers courts to prevent criminal trials from degenerating into nitpicking wars of attrition over collateral credibility issues." (*Wheeler*, at p. 296, fn. omitted.)

On appeal, we review the exclusion of evidence under Evidence Code section 352 for abuse of discretion. (*People v. Holloway* (2004) 33 Cal.4th 96, 134.) We will not disturb a trial court's decision to exclude evidence under Evidence Code section 352 absent a showing that the court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125.)

Here, the trial court precluded cross-examination of Officer Diaz into whether he lied in the Davon Spencer case. The trial court cited undue consumption of time, lack of probative value, and that Officer Diaz was not a "pivotal" witness to justify exclusion of the evidence. Defendants take issue with the cited justifications.

First, they argue that the evidence need not have been time consuming. They argue that playing the DVD would probably not have taken long and that it may even have been unnecessary to play it if Officer Diaz conceded he lied at Davon Spencer's trial. It is certainly possible that Officer Diaz would have made such a concession, even if unlikely. In any event, there is no record of how long it would take to play the DVD. Even if playing the DVD itself would not have taken long, its admission undoubtedly would have required other witnesses from Davon Spencer's trial to be called to corroborate what Officer Diaz said he saw. This would have, as the trial court feared, created a "trial within a trial."

Second, defendants argue that the evidence was highly probative because of the similarity between their case and Davon Spencer's. Thus, if defense counsel could

establish that Officer Diaz lied in Spencer's case, then Diaz's credibility in this case would be undercut. But, as the trial court pointed out, defense counsel represented that the camera filming the Davon Spencer transaction was on a pole; thus, the DVD was filmed from a different vantage point than the one Officer Diaz had on the street. To establish that the camera had a better vantage point than did Officer Diaz and that the officer could not have seen the transaction would have required introduction of other evidence regarding, for example, where the officer was standing, where Davon Spencer was standing, the specific time of the transaction, and the specific time the bus came and went.

Finally, defendants argue that Officer Diaz was a pivotal witness, contrary to the trial court's conclusion that Officer Diaz was not a pivotal witness. They argue that only Officer Diaz's testimony corroborated Officer Jackson's testimony concerning the transaction between him and defendants. That is not accurate. Detective Kanchanamongkol, although he did not witness the transaction, recovered from Jackson after he was arrested, the prerecorded $20 bill. Drugs and a white bottle or container as described by Officer Jackson were recovered from Sutton. This evidence corroborated the incident as related by Officer Jackson, even in the absence of Officer Diaz's testimony.

We therefore conclude that the trial court did not abuse its discretion in excluding the DVD evidence. Because we so conclude, Jackson's claim that his trial counsel was ineffective for failing to join in Sutton's objection to the exclusion of the evidence fails, because Jackson was not prejudiced by any failure on the part of his counsel. (*Strickland v. Washington* (1984) 466 U.S. 668, 694 [a defendant claiming ineffective assistance of counsel must also show by a preponderance of evidence "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome"].)

III. Sutton's prior convictions.

An amended information charged Sutton with two prior convictions (case

Nos. BA180496 & BA018332) within the meaning of section 667.5, subdivision (b). The information also alleged that Sutton had been convicted in case No. BA230050 for violating Health and Safety Code section 11351.5, thereby subjecting him to the three-year enhancement in Health and Safety Code section 11370.2, subdivision (a).[15]

On October 5, 2006, after the jury adjourned for deliberations, the trial court asked Sutton if he wanted a jury trial on his priors. The court advised Sutton he would have "all the same rights" as at a jury trial. Sutton waived his right to a jury trial. The prosecutor then advised him as follows: "Michael Sutton, you are entitled to a trial as to whether or not you were previously convicted on April 18th of 1999 of Health and Safety Code section 11350[,] [subdivision (a)] under case number BA180496, in the Superior Court in Los Angeles, and another conviction on July 13th of 1990, for Health and Safety Code section 11350[,] [subdivision (a)], BA018332, in the Superior Court in Los Angeles. [¶] Also a conviction on November 20th of 2002, for Health and Safety Code section 11351.5, under case number BA230050, in the Superior Court of Los Angeles. [¶] You are entitled to a jury trial in that case. At a jury trial you are entitled to call witnesses on your behalf to testify. The People are required to call witnesses into court to testify before you and your counsel. Your counsel would have the opportunity to question or cross-examine those witnesses. [¶] In addition, you have the right to testify on your own behalf and present any defense you have. Any witnesses you wish to subpoena into court, the subpoenas would be issued at no cost to you. [¶] Do you understand your – you also have a right not to testify at all, and that cannot be held

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[15] Health and Safety Code section 11370.2, subdivision (a), provides: "Any person convicted of a violation of, or of a conspiracy to violate, Section 11351, 11351.5, or 11352 shall receive, in addition to any other punishment authorized by law, including Section 667.5 of the Penal Code, a full, separate, and consecutive three-year term for each prior felony conviction of, or for each prior felony conviction of conspiracy to violate, Section 11351, 11351.5, 11352, 11378, 11378.5, 11379, 11379.5, 11379.6, 11380, 11380.5, or 11383, whether or not the prior conviction resulted in a term of imprisonment."

against you. In addition, you have the right to remain silent, which remains through the entire trial. [¶] Do you understand the rights that you have in connection with a trial as to the priors that I just outlined?"

Sutton responded that he understood and that he waived the rights. The trial court then found that Sutton "knowingly, understandingly and intelligently waived and [gave] up his right to have the jury determine the validity of the prior. The court finds it to be a voluntary waiver and accepts the waiver."

Later that same day, the jury reached its verdict. The trial court therefore set the matter over to October 24, 2006. On that day, the court asked Sutton how he wanted to handle the "court trial prior." His counsel said Sutton would admit the priors. Sutton then admitted that on April 18, 1999, he was convicted of a violation of Health and Safety Code section 11350, subdivision (a) in case No. BA180496 and that, on July 19, 1990, he was convicted of violating Health and Safety Code section 11350, subdivision (a) in case No. BA18332. He also admitted that he received a state prison sentence in those cases.

Sutton, however, refused to admit that, on November 20, 2002, he was convicted of violating Health and Safety Code section 11351.5 in case No. BA230050. Because the file on that matter was not available, the sentencing hearing was continued to November 21. By that day, the file had been obtained and it apparently showed that Sutton entered a plea of no contest to a violation of Health and Safety Code section 11351.5. The trial court, in proceeding to sentence Sutton, noted that he had previously admitted the two prior convictions in case Nos. BA180496 and BA018332. The court also mistakenly said Sutton had admitted the prior conviction in case No. BA230050.

Based on these events, Sutton now contends, first, that he was not advised of and did not waive his constitutional rights at the court trial;[16] second, he did not admit he

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16 The specific basis of this claim is Sutton was informed of and waived his rights to a jury trial on October 5, 2006. Nineteen days later, on the day of the court trial, Sutton was not again informed of and did not expressly waive any rights before admitting prior convictions.

served a prison sentence; and, third, he did not admit to a conviction in case No. BA230050. Because we agree with the second and third contentions, we need not reach the first.

Specifically, Sutton admitted he was convicted of a violation of Health and Safety Code section 11350, subdivision (a), on April 18, 1999 in case No. BA180496 and of violating that same section on July 19, 1990 in case No. BA018332. He also admitted that he was sentenced to state prison in those matters. Sutton, however, was never asked and never admitted he *served* a prison sentence. Moreover, there was no admission made concerning the five-year washout period. Thus, as the People concede, the one-year sentence under section 667.5, subdivision (b), was improperly imposed. (See generally, *People v. Lopez* (1985) 163 Cal.App.3d 946; *People v. Epperson* (1985) 168 Cal.App.3d 856.)

We also conclude that the three-year enhancement under Health and Safety Code section 11370.2, subdivision (a), was improperly imposed. As set forth above, Sutton never admitted that he had suffered a conviction in case No. BA230050 for a violation of Health and Safety Code section 11351.5. The People point out that at trial Sutton testified, on cross-examination, that on November 20, 2002, he was convicted of possession for sale of cocaine base. That testimony, however, is insufficient to constitute an admission for the purposes of imposing an enhancement under Health and Safety Code section 11370, subdivision (a). Sutton never admitted a case number, and, moreover, he said he went to county jail as a result of that conviction, although he was apparently sentenced to summary probation. Given this confusion, we cannot find that Sutton admitted the prior conviction in case No. BA230050.

We therefore reverse the sentences imposed under section 667.5, subdivision (b), and under Health and Safety Code section 11370.2, subdivision (a).

IV. The upper term sentences imposed on Sutton.

The trial court imposed the upper term of five years for Sutton's violation of Health and Safety Code section 11352, subdivision (a). The court based its selection of the upper term "on a number of factors, specifically the prior criminal history, the priors

that included the parole status and probation status at the time of the instant offense; the fact that there is a second count for which he could be separately sentenced in a consecutive fashion, but which the court deems will be sentenced in a concurrent fashion. [¶] For those reasons the upper term of five years is imposed[.]"

Citing *Blakely v. Washington* (2004) 542 U.S. 296 and *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856], defendant contends that the imposition of the upper terms violated his federal constitutional right to a jury under the Sixth and Fourteenth Amendments to the United States Constitution.

In *Cunningham*, the United States Supreme Court reaffirmed *Blakely v. Washington, supra,* 542 U.S. 296 and *Apprendi v. New Jersey* (2000) 530 U .S. 466, and overruled *People v. Black* (2005) 35 Cal.4th 1238 (*Black I*). *Cunningham* held that California's determinate sentencing law violates a defendant's right to a jury trial guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution to the extent that law authorizes the trial judge to find facts (other than a prior conviction) that expose a defendant to an upper term sentence by a preponderance of the evidence. "This Court has repeatedly held that, under the Sixth Amendment, any fact that exposes a defendant to a greater potential sentence must be found by a jury, not a judge, and established beyond a reasonable doubt, not merely by a preponderance of the evidence." (*Cunningham v. California, supra,* 549 U.S. at p. __ [127 S.Ct. at pp. 863-864].)

After *Cunningham*, our California Supreme Court, in *People v. Black* (2007) 41 Cal.4th 799 (*Black II*), reexamined California's determinate sentencing system and held that "the existence of a single aggravating circumstance is legally sufficient to make the defendant eligible for the upper term." (*Id*. at p. 813) "[I]mposition of the upper term does not infringe upon the defendant's constitutional right to jury trial so long as one legally sufficient aggravating circumstance has been found to exist by the jury, has been admitted by the defendant, or is justified based upon the defendant's record of prior convictions." (*Id.* at p. 816.)

Black II also took a broad view of the scope of the prior conviction exception. The court said, "As we recognized in [*People v.*] *McGee* [(2006) 38 Cal.4th 682],

numerous decisions from other jurisdictions have interpreted the *Almendarez-Torres* [*v. United States* (1998) 523 U.S. 224] exception to include not only the fact that a prior conviction occurred, but also other related issues that may be determined by examining the records of the prior convictions . . . . [¶] The determinations whether a defendant has suffered prior convictions, and whether those convictions are 'numerous or of increasing seriousness' [citation], require consideration of only the number, dates, and offenses of the prior convictions alleged. The relative seriousness of these alleged convictions may be determined simply by reference to the range of punishment provided by statute for each offense. This type of determination is 'quite different from the resolution of issues submitted to a jury, and is one more typically and appropriately undertaken by a court.' " (*Black II, supra,* 41 Cal.4th at pp. 819-820.) The court continued to take a broad view the recidivism exception in *People v. Towne* (2008) 44 Cal.4th 63 [2008 D.A.R 9681] in which the court agreed "with the majority of state and federal decisions holding that the federal constitutional right to a jury trial and proof beyond a reasonable doubt on aggravating circumstances does not extend to the circumstance that a defendant was on probation or parole at the time of the offense or has served a prior prison term." (*Towne,* 44 Cal.4th at p. ___ [2008 D.A.R at p. 9685].)

We are bound by *Black II,* by its companion case, *People v. Sandoval* (2007) 41 Cal.4th 825, and by *Towne*.[17] (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Therefore, if Sutton suffered prior convictions, then he was eligible for the upper term. A review of his criminal history, as revealed by the probation officer's report, supports the trial court's conclusion that Sutton had at least six prior convictions. The probation report also shows that he was on probation at the time he committed the current offense. His upper term sentence on count 1 was therefore proper.

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17 *People v. Sandoval* held that any sentencing error is reviewed under the standard in *Chapman v. California, supra,* 386 U.S. 18. The test for harmless error is whether the reviewing court can conclude, "beyond a reasonable doubt, that the jury, applying the beyond-a-reasonable-doubt standard, unquestionably would have found true at least a single aggravating circumstance had it been submitted to the jury[.]" (*People v. Sandoval, supra,* 41 Cal.4th at p. 839.)

DISPOSITION

Defendant Michael Sutton's motion for judicial notice is granted. As to Michael Sutton, the judgment is reversed and remanded as to the sentence enhancements imposed under Penal Code section 667.5, subdivision (b), and under Health and Safety Code section 11370.2, subdivision (a). The judgment as to both defendants is otherwise affirmed.

CERTIFIED FOR PARTIAL PUBLICATION

ALDRICH, J.

We concur:

KLEIN, P.J.

KITCHING, J.