Filed 11/20/06 P. v. Ludwick CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. EARL RICHARD LUDWICK, Defendant and Appellant.	G035624 (Super. Ct. No. 04HF0395) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Robert W. Fitzgerald, Retired Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed as modified.

Mark S. Devore, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Rhonda Cartwright-

Ladendorf and Heather F. Crawford, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

Earl Richard Ludwick appeals from the judgment sending him to prison for a total of six years, four months, after a jury convicted him of possession of methamphetamine for sale, simple possession of cocaine and transportation of methamphetamine. (See Health & Saf. Code, §§ 11350, subd. (a), 11378, 11379, subd. (a).)[1] In a bifurcated proceeding, the court found he had a prior prison term as provided in Penal Code section 667.5, subdivision (b). On appeal, Ludwick argues the trial court abused its discretion in permitting the prosecution a rebuttal witness but not allowing the defense to present another expert witness on surrebuttal. He then attacks the sentencing scheme, contending the court should have *stayed* the term for transporting methamphetamine under Penal Code section 654, and not ordered a concurrent term. With this one issue, we agree. On the other hand, Ludwick contends the trial court improperly used the same fact both to impose the enhancement of the prior prison term and to order the terms to be served consecutively, which is an erroneous dual use of the same fact. He also characterizes the California sentencing laws, permitting an *aggravated* or *consecutive* term, as violating the dictates of *Blakely v. Washington* (2004) 542 U.S. 296. However, we are bound by the contrary holding of *People v. Black* (2005) 35 Cal.4th 1238 under the mandate of *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455. Therefore, we order the judgment modified and, as modified, we affirm.

---

[1] He also faced, and was found guilty of a misdemeanor count of possessing narcotics paraphernalia. (See Health & Saf. Code, § 11364.)

All further section references are to the Health and Safety Code, unless otherwise stated.

FACTS

Ryan Reilly, a Newport Beach Police Officer, stopped Ludwick one evening because he was driving a truck with a blocked rear license plate. Ludwick acted suspiciously, and Ryan asked him to step out of the truck. A subsequent conversation alerted the officer to a black bag which Ludwick said might contain contraband, as it had been left in the truck by another person. He also admitted that he had ingested methamphetamine earlier in the day.

A trained police dog was brought to the scene and "alerted" on the black bag. Inside of that bag, the officer found 2.9 grams of cocaine in one plastic baggie, .1 grams of methamphetamine in a smaller baggie, .3 grams of methamphetamine in a twisted baggie inside some clothes, and .7 grams of methamphetamine in a final baggie. There was also a clear glass pipe for smoking methamphetamine, three glass vials, miscellaneous empty baggies, a scale, a scalpel, razor blades, and syringes. In his wallet, Ludwick had $3550 in cash.

The prosecution called a detective from the Newport Beach Police Department to testify as an expert in the field of illegal narcotics sales and distribution, even though his experience in the field was rather minimal. He testified that, in his opinion, the various amounts of methamphetamine were possessed for the purposes of sales.

The defense presented its case without the testimony of Ludwick. It relied on the expert testimony of Steven Strong, a private investigator who had retired from the Los Angeles Police Department after 20 years of service. Strong, who had testified in narcotics cases more than 400 times and had been involved in over 1000 drug sales cases, concluded that the methamphetamine was possessed by Ludwick for his own personal use.

Over the defense objection, the prosecution called Sergeant Daron Wyatt of the Placentia Police Department on rebuttal. He testified that his extensive experience in

narcotics investigation revealed that *chronic* users of methamphetamine would consume no more than one-half to three-quarters gram of methamphetamine a day. He rejected the idea that it was even possible for someone to use two grams of the drug daily. He said that very rarely did individuals carry scales with them when they carried methamphetamine solely for their own personal ingestion and not for sales. Finally, he testified he had arrested people for selling in the odd-lot quantities possessed by Ludwick.

DISCUSSION

Permitting Rebuttal Yet Barring Surrebuttal Evidence

Ludwick contends the trial court abused its discretion in permitting the prosecution to call an expert witness on rebuttal. He characterizes the witness's testimony to be merely duplicative of that given by Eric Peterson in the prosecution's case-in-chief. Thus, the rebuttal witness was unnecessary. Moreover, once the court permitted the prosecution to present the rebuttal expert, he argues it was improper for the court to bar the defense from doing the same thing on surrebuttal.

The trial court has the inherent power to control the parties' general presentation of their case. Specifically, the court has the discretion to limit rebuttal and surrebuttal evidence. When a trial court exercises that discretion, the decision must be upheld on appeal in the absence of a clear showing of abuse. (See Pen. Code, § 1093, subd. (d); *People v. DeSantis* (1992) 2 Cal.4th 1198, 1232-1233.)

Proper rebuttal evidence is that which is made necessary by the defense case. It should be noticed to the opposing party in a timely fashion and should be in response to factual points raised in the defense case. However, latitude should be accorded to both parties in their presentation of evidence, and even cumulative evidence is properly admitted on rebuttal where it rehabilitates the prosecution's case-in-chief after pointed attack by the defense. (See generally 3 Witkin, Cal. Evidence (4th ed. 2000) Presentation, §§ 71-72, pp. 102-105; *People v. Young* (2005) 34 Cal.4th 1149, 1199.)

The expert testimony of Wyatt on rebuttal was appropriate to respond to the focused attack on both the expertise of the inexperienced detective and his conclusions admitted in the prosecution's case-in-chief. The defense was apprised of the rebuttal witness early: The prosecution informed the defense and the court of its plan to call Sgt. Wyatt while the defense was still putting on its case, and thus, no sudden surprise occurred. (See *People v. Graham* (1978) 83 Cal.App.3d 736, 741.) Moreover, Wyatt's testimony was focused on the points raised by Strong and which were absent from Peterson's original expert testimony. Ludwick has failed to show the trial court exhibited any abuse of its discretion in its decision.

Ludwick responds that it was then unfairly barred from bringing further expert testimony to bolster *its* expert's opinion on surrebuttal. However, the court did not bar surrebuttal. The court inquired who it was the defense intended to call as it was the time for any surrebuttal to be presented. The defense replied, "I don't know yet, . . ." The court then denied the request. At that point the defense requested it be allowed to recall its expert, Strong, for surrebuttal, and the court denied that request, too, noting that Strong had already testified as to the specific issue the defense wanted to rebut. Thus, the denial was fully within the court's discretion to govern the examination of a witness already excused. (See 3 Witkin, Cal. Evidence (4th ed. 2000), Reexamination and Recall § 78, p. 112 ["once the witness has left the stand, after either direct or cross-examination, to recall him or her for further examination is a different matter, particularly after each party has presented its entire case in chief. Hence, after a witness has been excused from giving further testimony in the action, the witness cannot be recalled without leave of the court. Leave may be granted or withheld in the court's discretion."].)

Sentencing Reasons for Consecutive Service

Ludwick argues that the court improperly used the same fact to both aggravate the term for transporting methamphetamine *and* to order the terms to be served consecutive to each other. Although no objection was entered at the hearing to the

sentencing choices and reasons, and the probation report clearly informed the defense in advance that a prison term was mandated for the defendant, we address the issue rather than rely solely on Ludwick's waiver of it (cf. *People v. Scott* (1994) 9 Cal.4th 331, 353) simply because the record fails to support his allegation.

The court stated at the sentencing hearing that the "base term is going to be aggravated under the authority of Rule of Court [rule] 4.421(B)(3), [that] defendant's prior convictions as an adult are fairly numerous beginning in 1981." The court then decided "to consecutively sentence [Ludwick] as follows and state the reasons for that: Under rule 4.421(B) . . . defendant has served [a] prior prison term under [4.]421(B)(3). Also 4.421(B)(4), defendant was on parole when the crime was committed in this case. . . ." A few moments later, the trial court added "additional reasons under 4.421(B)(5), defendant's prior performance on parole was unsatisfactory as evidenced by parole violations previously."

Thus, the reason for the aggravated term was that Ludwick's criminal history included numerous convictions reaching back more than 20 years. The reason for the consecutive sentencing was because his prior performance on parole was unsatisfactory and that he was on parole when he committed the crime. Although the court also said it was due to his prior prison term—which was erroneously cited because the court imposed a one-year term for that prior prison service—there remained a proper reason to support the consecutive service. (See *People v. Davis* (1995) 10 Cal.4th 463, 552.) Thus, Ludwick's complaint must be rejected.

DISPOSITION

As the Attorney General concedes, the court misspoke when it ordered the execution of sentence for the possession for sale of the methamphetamine after selecting the count of transporting methamphetamine as the base term. As both counts were committed for the single intent and objective of selling the methamphetamine, the term of eight months for that count cannot be ordered without violating the provisions of Penal

Code section 654. Thus, we modify the judgment by ordering the eight-month term imposed for count I to be stayed pending completion of service on the other counts. (See Pen. Code, § 1260.) Upon successful completion, the stay is to become permanent. Once modified, we affirm the judgment.

SILLS, P. J.

WE CONCUR:

ARONSON, J.

FYBEL, J.