DIVISION ONE
FILED: 10/09/2012
RUTH A. WILLINGHAM, CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 11-0673
	)	
Appellee,	)	DEPARTMENT B
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication –
HARRY SIMON MCGILL,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2009-125324-002

The Honorable Susanna C. Pineda, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General By Kent E. Cattani, Chief Counsel, Criminal Appeals/Capital Litigation Section Attorneys for Appellee	Phoenix
James J. Haas, Maricopa County Public Defender By Cory Engle, Deputy Public Defender Attorneys for Appellant	Phoenix
Harry Simon McGill Appellant	Buckeye

W I N T H R O P, Chief Judge

¶1 Harry Simon McGill ("Appellant") appeals his conviction and sentence for sale or transportation for sale of

narcotic drugs. Appellant's counsel has filed a brief in accordance with *Smith v. Robbins*, 528 U.S. 259 (2000); *Anders v. California*, 386 U.S. 738 (1967); and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), stating that he has searched the record on appeal and found no arguable question of law that is not frivolous. Appellant's counsel therefore requests that we review the record for fundamental error. *See State v. Clark*, 196 Ariz. 530, 537, ¶ 30, 2 P.3d 89, 96 (App. 1999) (stating that this court reviews the entire record for reversible error). Appellant has filed a supplemental brief *in propria persona*, which we address.

¶2 We have appellate jurisdiction pursuant to the Arizona Constitution, Article 6, Section 9, and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (West 2012),[1] 13-4031, and 13-4033(A). Finding no reversible error, we affirm.

I. FACTS AND PROCEDURAL HISTORY[2]

¶3 On April 1, 2011, a grand jury issued an indictment, charging Appellant with one count of sale or transportation for sale of narcotic drugs, a class two felony, in violation of

[1] We cite the current Westlaw version of the applicable statutes because no revisions material to this decision have since occurred.

[2] We review the facts in the light most favorable to sustaining the verdict and resolve all reasonable inferences against Appellant. *See State v. Kiper*, 181 Ariz. 62, 64, 887 P.2d 592, 594 (App. 1994).

A.R.S. § 13-3408(A)(7). Before trial, the State filed an allegation of historical priors, alleging that Appellant had thirteen historical prior felony convictions.

¶4 At trial, the State presented the following evidence: On April 13, 2009, a Phoenix police officer on patrol noticed a man, later identified as Appellant, in the passenger side of a truck talking to another man on a bicycle. The officer observed what he believed was a hand-to-hand drug transaction and saw the man on the bike start to give Appellant money. Appellant then noticed the officer's patrol vehicle, and the man on the bike left the scene "at a very high rate of speed." The officer conducted a traffic stop of the truck as it was leaving the scene. During the traffic stop, the driver of the truck advised the officer of six pieces of foil-wrapped heroin in a black bag in the truck's center console. The officer searched the center console and found six pieces of a substance later determined to be black tar heroin wrapped in foil.

¶5 A second officer arrived, placed Appellant in handcuffs, and advised Appellant of his constitutional rights pursuant to *Miranda*.[3] Appellant acknowledged he understood his rights and agreed to speak with the second officer. Appellant then confessed to having sold six "balls" of heroin, packaged in aluminum foil, for fifty-four dollars.

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[3] *See Miranda v. Arizona*, 384 U.S. 436 (1966).

¶6 The jury found Appellant guilty as charged. At sentencing, the trial court found Appellant had at least two historical prior felony convictions and sentenced Appellant to a partially mitigated term of twelve years' imprisonment, to be served concurrently with a sentence of six years' imprisonment resulting from a plea agreement made in another case. The court also credited Appellant with 190 days of presentence incarceration. Appellant filed a timely notice of appeal.

II. ANALYSIS

A. Application of A.R.S. § 13-107

¶7 Appellant raises the following question: "Did the State lack jurisdiction when refiling the same charges after a dismissal, [when] the six months['] provision for doing so under criminal code title 13-107 had expired?"

¶8 Appellant states that after his arrest on April 13, 2009, he was booked into custody and charged with a narcotics violation, but the charge was dismissed shortly before his preliminary hearing.[4] The record reflects the following subsequent events: On December 7, 2009, the State charged Appellant by direct complaint. The State attempted to serve Appellant, who was out of custody, with a summons but the certified mail was returned unclaimed, and Appellant failed to

[4] Although Appellant asserts that the State filed and then dismissed formal charges against him in April 2009, the record does not support his assertion.

appear at the scheduled initial appearance. The trial court issued an arrest warrant for Appellant, and in March 2011, police officers arrested Appellant and booked him into custody. Before Appellant's scheduled preliminary hearing, however, a grand jury issued a supervening indictment on April 1. Appellant pled not guilty at his April 11 arraignment, and his trial began on August 15, 2011.

¶9 Appellant's argument appears to be that the State was required to refile any charges against him within six months after his release in April 2009. Appellant, however, misreads A.R.S. § 13-107, which provides in part that the time limit for prosecuting class two through class six felonies is seven years after discovery by the State. A.R.S. § 13-107(B)(1). The language that Appellant appears to rely on exists in current subsection (G) of the statute:

> If a complaint, indictment or information filed before the period of limitation has expired is dismissed for any reason, a new prosecution may be commenced within six months after the dismissal becomes final even if the period of limitation has expired at the time of the dismissal or will expire within six months of the dismissal.

A.R.S. § 13-107(G).

¶10 In this case, the State became aware of Appellant's offense on April 13, 2009, and the State had seven years from that date to commence its prosecution for Appellant's offense. *See* A.R.S. § 13-107(B)(1). Both the December 7, 2009 complaint

and the April 1, 2011 supervening indictment were filed well within the seven-year period of the statute of limitations. Further, even assuming *arguendo* Appellant is correct that he was formally charged with the current offense in April 2009, the language of subsection (G) does not operate to further limit the time limits provided in subsection (B). Instead, A.R.S. § 13-107(G) acts as a savings statute in that it serves to increase the limitation period after a dismissal, allowing a new prosecution to commence even after the limitation period provided in subsection (B) has passed if a prior complaint, indictment, or information was filed but dismissed. *See State v. Hantman*, 204 Ariz. 593, 595-96, ¶ 9, 65 P.3d 974, 976-77 (App. 2003); *Johnson v. Tucson City Court*, 156 Ariz. 284, 286-87, 751 P.2d 600, 602-03 (App. 1988). Consequently, the trial court did not violate the time limits provided in A.R.S. § 13-107.

B. Application of Rule 8.2

¶11 Appellant also appears to contend the State violated former Rule 8.2(b) of the Arizona Rules of Criminal Procedure.

¶12 Former Rule 8.2(b), Ariz. R. Crim. P., required that persons held in custody on a criminal charge be tried within the lesser of 120 days from the date of the person's initial appearance or ninety days from the date of the person's arraignment. Rule 8.2 was amended in 2002, however, and the

amended rule was made applicable to all criminal cases in which the indictment, information, or complaint was filed on or after December 1, 2002. Rule 8.2(a)(1) now governs the time limits pertaining to defendants in custody, and provides that defendants held in custody generally must be tried by the court within 150 days of arraignment.[5]

¶13 In this case, Appellant's arraignment occurred on April 11, 2011, and his trial commenced on August 15, 2011. Thus, Appellant's trial commenced 126 days after his arraignment, well within the 150-day time limit provided in Rule 8.2. Consequently, with respect to the applicable time limit for commencing trial, no error occurred, much less fundamental error.

C. Other Issues

¶14 We have reviewed the entire record for reversible error and find none. *See Leon*, 104 Ariz. at 300, 451 P.2d at 881; *Clark*, 196 Ariz. at 537, ¶ 30, 2 P.3d at 96. The evidence presented at trial was substantial and supports the verdict, and the sentence was within the statutory limits. Appellant was represented by counsel at all stages of the proceedings and was

[5] Current Rule 8.2(b) is inapplicable in this instance. The current rule provides that when a defendant waives his or her appearance at an arraignment, the date of the arraignment without the defendant present shall be considered the arraignment date for the purposes of calculating the 150-day time period. Ariz. R. Crim. P. 8.2(b).

given the opportunity to speak at sentencing. The proceedings were conducted in compliance with his constitutional and statutory rights and the Arizona Rules of Criminal Procedure.

¶15 After filing of this decision, defense counsel's obligations pertaining to Appellant's representation in this appeal have ended. Counsel need do no more than inform Appellant of the status of the appeal and of his future options, unless counsel's review reveals an issue appropriate for petition for review to the Arizona Supreme Court. *See State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984). Appellant has thirty days from the date of this decision to proceed, if he desires, with a *pro per* motion for reconsideration or petition for review.

III. CONCLUSION

¶16 Appellant's conviction and sentence are affirmed.

_____/S/_____
LAWRENCE F. WINTHROP, Chief Judge

CONCURRING:

_____/S/_____
PATRICIA A. OROZCO, Presiding Judge

_____/S/_____
JON W. THOMPSON, Judge