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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS, )	Appeal from the Circuit Court
)	Of Cook County.
Respondent-Appellee, )	
)	No. 16 CR 21062
v. )	
)	The Honorable
DEREK CISNEROZ, )	Lawrence Flood,
)	Judge Presiding.
Petitioner-Appellant. )	

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JUSTICE WALKER delivered the judgment of the court.  
Presiding Justice Mikva and Justice Griffin concurred in the judgment.

**ORDER**

¶ 1 *Held:* Where a defendant knew he could have presented certain testimony at his trial, the testimony cannot qualify as newly discovered evidence for purposes of a claim of actual innocence in a postconviction petition. This court will not reverse the trial court's credibility determinations at an evidentiary hearing unless those determinations are contrary to the manifest weight of the evidence.

¶ 2 A jury found Derek Cisneroz guilty as an accessory to a first degree murder committed with a firearm. The trial court imposed the minimum sentence, 35 years in prison. In a postconviction petition, Cisneroz claimed that his attorney's erroneous advice led him to

reject a plea offer, and newly discovered evidence in an affidavit from the shooter proved Cisneroz innocent. The trial court dismissed the claim of innocence and after an evidentiary hearing, rejected the claim for ineffective assistance of counsel in plea negotiations. We find that the shooter's affidavit, which matches his testimony at his own trial, cannot count as newly discovered evidence. The trial court's findings concerning the plea negotiations are not contrary to the manifest weight of the evidence. Accordingly, we affirm the trial court's judgment dismissing the postconviction petition.

¶ 3

### I. BACKGROUND

¶ 4

Around 5 a.m. on July 16, 2006, Cisneroz and Jose Soto went to a bar on Kedzie Avenue in Chicago, but the bouncers did not let them enter. Later, Cisneroz drove past the bar with Soto sitting in the passenger seat. Soto fired a gun, and one shot killed Miguel Aguayo. Prosecutors charged Cisneroz and Soto with first degree murder. The defendants chose to have simultaneous jury trials before separate juries.

¶ 5

The trial court made a record of plea negotiations for Cisneroz. The State offered to reduce the charge against Cisneroz to conspiracy to commit murder and to recommend a sentence of 15 years, subject to day-for-day good time credit, in exchange for a guilty plea and truthful testimony in the trial of Soto. Cisneroz, on the record, rejected the offer.

¶ 6

At trial, the bar's manager, Luis Chavez, testified that when Cisneroz and Soto came to the bar, Chavez told them the bar's dress code required them to button their shirts. Cisneroz and Soto "started throwing up gang signs, saying they were going to come back."

¶ 7

Edwin Cruz, a bouncer for the bar, testified that Cisneroz and Soto also shouted gang slogans as they drove off. They returned 15 minutes later, slowing the car as it neared the

bar. Soto leaned out of the passenger window and pointed a gun at Cruz while Cisneroz and Soto shouted gang slogans. Cruz heard other gang slogans from outside the bar. Soto turned the gun away from Cruz and fired three shots. Cruz saw Aguayo lying on the sidewalk and called 911.

¶ 8 Cisneroz's attorney, Jack Rodgon, presented no witnesses on Cisneroz's behalf. Soto's attorney called Soto as a witness. The trial court granted Rodgon's request to excuse the Cisneroz jury prior to Soto's testimony.

¶ 9 Soto testified that he and Cisneroz belonged to the 2-6, a street gang. On July 16, 2006, he and Cisneroz left a party to find more beer. When the manager of the bar turned them away, they drove off but found nothing open. They turned around and stopped at a stoplight by the bar. There they saw a man on the corner flashing signs for a rival gang. Soto flashed back the sign for the 2-6. The man on the corner shouted, "ram 'em, ram 'em." A truck on a crossing street started towards them. Soto pulled out his gun and fired four shots at the truck. Cisneroz drove off, and the truck did not hit Cisneroz's car.

¶ 10 The juries found Cisneroz and Soto guilty of first degree murder committed with a firearm. The trial court sentenced Cisneroz to the statutory minimum term, 35 years in prison. The appellate court affirmed the trial court's judgment. *People v. Cisneroz*, No. 1-08-2748 (2010) (unpublished order under Supreme Court Rule 23).

¶ 11 Cisneroz, with the assistance of counsel, filed a postconviction petition in 2011. He alleged that in plea negotiations, Rodgon told him the court could impose a minimum sentence of 20 years for murder, and "he believed that Cisneroz would receive the minimum sentence if he was convicted." Cisneroz asserted that if he had known that statutes required

the court to impose a sentence of at least 35 years, he would have accepted the plea bargain for a 15 year sentence.

¶ 12 Cisneroz amended his postconviction petition to add a claim that newly discovered evidence proved his innocence. He attached Soto's affidavit which averred that when the bouncer at the bar "gave [Cisneroz] a hard time about buttoning up his shirt," and Soto told Cisneroz they would go to another bar. They returned to the area a few minutes later, heading back to the party. Aguayo, standing on the corner, flashed a gang sign for a rival gang and Soto flashed back the sign for the 2-6. Aguayo then yelled, "Ram them, ram them." A truck from the crossing street started towards them. Soto pulled out his gun and fired at the truck. Soto said, "I didn't know that I was going to shoot until it happened so there is no way that Derek knew that I was about to shoot. He never encouraged me to shoot or anything. It happened so fast that I just reacted because I was scared that they were going to ram us and kill us."

¶ 13 Because counsel assisted Cisneroz with his petition, the court permitted the State to file a motion to dismiss the postconviction petition. The trial court dismissed the claim of innocence, but advanced the claim for ineffective assistance of counsel during plea negotiations to an evidentiary hearing.

¶ 14 Rodgon testified at the hearing he told Cisneroz that if the jury found him guilty of murder, the court would impose a sentence between a minimum of 20 years and a maximum of 60 years, and Cisneroz would have to serve 100% of the sentence. Rodgon did not recall whether he told Cisneroz about the 15 year firearm enhancement, which made the sentencing range 35 years to 75 years. Rodgon said he never offered any opinion on what sentence the

court would impose within the sentencing range. Rodgon testified that he recommended as forcefully as he could that Cisneroz accept the State's offer.

¶ 15 Cisneroz testified, "[Rodgon] said exactly 20 years is what I would get if found guilty because I'm not the shooter." Rodgon never mentioned the mandatory 15-year firearm enhancement. Cisneroz admitted that Rodgon told him that he would have to serve 100% of the sentence imposed after trial, whereas he could serve less than 7 more years, with time served and other considerations, if he chose the plea bargain. According to Cisneroz, if he had known that the court would impose a sentence of at least 35 years, he would have taken the plea bargain.

¶ 16 On cross-examination, the prosecutor elicited the following testimony:

"Q. \*\*\* [Y]ou were expecting 20 years?

A. No, I was not expecting to get found guilty at all.

Q. \*\*\* [Y]ou were expecting a not guilty?

A. Yeah.

Q. And that's why you didn't take the offer?

A. Mainly, yes.

\* \* \*

Q. \*\*\* And it was not worth it for you to testify against \*\*\* Mr. Soto, if there was only a 5-year difference, correct?

A. Yes.

\* \* \*

Q. You would have to do 20 years.

A. Yes.

Q. But you knew if you took the offer, although the offer says 15 years, you would only be doing six?

A. Yes. \*\*\*

\* \* \*

Q. You said that this 5-year difference is what kept you from testifying against Mr. Soto.

A. Mainly, and that fear [] for my family and myself.

Q. So the fact that you had to do additional time after you were found guilty, your fear went away, you would have testified against him?

A. If I had known it was almost double the time that my lawyer told me, yes.

Q. So you didn't care about your family or fear for yourself?

A. It would have only been 5, 6 years compared to 30, 35.

Q. So the gang loyalty or the fear for your family went out the window with the sentence, correct?

A. I believe my family \*\*\* would have told me [to] testify \*\*\*, instead of me doing 35 years."

¶ 17 The trial court, in an order dated April 7, 2016, held:

"The credible testimony indicates that petitioner was aware he faced up to 60 years imprisonment, apart from any sentencing enhancement, and the plea offer

would have resulted in 6 years imprisonment on lesser charges. It is evident from the record that in turning down an offer for a sentence up to 10 times shorter than the maximum sentence he believed he faced, petitioner was motivated by a desire to contest the charges and was clearly looking for, and believed he would obtain, exoneration. [Citation.] Petitioner fails to show prejudice because he does not demonstrate a reasonable probability that he would have accepted the plea offer."

¶ 18 The trial court dismissed Cisneroz's postconviction petition. Cisneroz now appeals.

¶ 19 II. ANALYSIS

¶ 20 Cisneroz argues on appeal that the court erred by dismissing his actual innocence claim without an evidentiary hearing, and the court erred in finding that he suffered no prejudice due to Rodgon's failure to inform him about the mandatory 15-year firearm enhancement.

¶ 21 A. Innocence

¶ 22 We review *de novo* the trial court's dismissal without an evidentiary hearing of a claim in a postconviction petition. *People v. Sanders*, 2016 IL 118123, ¶ 31. When a defendant, in a postconviction petition, "claims actual innocence, the question is whether his petition and supporting documentation set forth a colorable claim; that is, whether they raise the probability that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence. [Citation.] The evidence supporting the claim of actual innocence must be (1) newly discovered; (2) material and not merely cumulative; and (3) of such conclusive character that it would probably change the result on retrial." *People v. Adams*, 2013 IL App (1st) 111081, ¶ 30. Evidence counts as newly discovered only if it "has

been discovered since the trial and \*\*\* the defendant could not have discovered [it] sooner through due diligence." *People v. Ortiz*, 235 Ill. 2d 319, 334 (2009).

¶ 23 Before the end of his trial, Cisneroz knew, from Soto's actual testimony, that Soto would testify willingly to all the facts in the affidavit. Soto's testimony matches the assertions in his affidavit. Cisneroz, through his attorney, actively prevented the jury deciding his case from hearing the very testimony he now relies on as proof of his innocence. Soto's affidavit does not present newly discovered evidence. The trial court correctly denied Cisneroz's request for an evidentiary hearing on his claim of actual innocence.

¶ 24 B. Plea Bargain

¶ 25 The trial court held an evidentiary hearing and found that Cisneroz failed to show that counsel's erroneous advice caused him to reject the plea offer. "We review a trial court's determination following an evidentiary hearing under the manifestly erroneous standard." *People v. Jellis*, 2016 IL App (3d) 130779, ¶ 33.

¶ 26 To show that ineffective assistance of counsel caused the defendant to reject a plea offer, "the defendant must establish that there is a reasonable probability that, absent his attorney's deficient advice, he would have accepted the plea offer. [Citation.] This showing of prejudice must encompass more than a defendant's own [subjective, self-serving] testimony. [Citation.] Rather, there must be 'independent, objective confirmation that defendant's rejection of the proffered plea was based upon counsel's erroneous advice,' and not on other considerations. [*People v.*] *Curry*, 178 Ill. 2d [509] at 532 [(1997)]. The disparity between the sentence a defendant faced and a significantly shorter plea

offer can be considered supportive of a defendant's claim of prejudice." *People v. Hale*, 2013 IL 113140, ¶ 18.

¶ 27 Cisneroz himself identified at least two considerations, other than his understanding of the sentencing range, that led him to reject the plea offer. He expected the jury to acquit him, and he did not want to testify against Soto, his fellow gang member, for fear of retaliation against him or his family. Cisneroz also testified that Rodgon told him he would receive a sentence no greater than 20 years, but the trial court found that part of Cisneroz's testimony not credible. Instead, the court believed Rodgon's testimony that he consistently told Cisneroz the court could sentence him to as much as 60 years, and Cisneroz would need to serve 100% of the sentence the court imposed. As in *Hale*, "the circuit court's credibility determination herein was not against the manifest weight of the evidence." *Hale*, 2013 IL 113140, ¶ 24. The record supports the conclusion that the possibility of acquittal and reluctance to testify against Soto would have led Cisneroz to reject the plea offer even if he had known the possible sentencing range was 35 years to 75 years. In this case, the manifest weight of the evidence does not demand a finding that Cisneroz showed a reasonable probability that he suffered prejudice due to counsel's erroneous advice. See *Hale*, 2013 IL 113140.

¶ 28 III. CONCLUSION

¶ 29 We find Soto's affidavit, which effectively matches his trial testimony, is not newly discovered evidence. The manifest weight of the evidence supports the trial court's finding that Cisneroz did not show a reasonable probability that he would have accepted the plea

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bargain if counsel had informed him correctly about the sentencing range. Accordingly, we affirm the judgment dismissing Cisneroz's postconviction petition.

¶ 30            Affirmed.