COURT OF APPEALS
DECISION
DATED AND FILED

November 19, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP2768-CR **Cir. Ct. No. 2005CF2616**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LUIS A. ESTRADA-JIMENEZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: DANIEL R. MOESER, Judge. *Affirmed.*

Before Dykman, P.J., Lundsten and Higginbotham, JJ.

¶1 PER CURIAM. Luis Estrada-Jimenez appeals a judgment convicting him of first-degree intentional homicide, as a party to the crime. He also appeals an order denying his motion for postconviction relief. The conviction followed a jury trial. Estrada-Jimenez contends that he is entitled to reversal

because the jury did not learn the details of the deals he believes two key prosecution witnesses received in exchange for their testimony. We affirm.

¶2 Jose Suarez and Pablo Lopez Baez testified to planning and participating in a homicide along with Estrada-Jimenez and others. The circuit court described Suarez's and Lopez Baez's testimony as very important testimony against Estrada-Jimenez. Estrada-Jimenez contends that he would not have been convicted without it.

¶3 After the trial, both witnesses received what the circuit court described as "lenient and favorable treatment" from the prosecution, including dismissal and/or deferral of all charges related to the homicide, and significant consideration in charging or sentencing for other pending cases as well. No evidence surfaced at trial that the two were promised this favorable treatment beforehand in exchange for their testimony, although defense counsel vigorously argued in closing that Suarez and Baez at the very least had an understanding, if not a deal, that they would receive leniency if they testified against Estrada-Jimenez.[1]

¶4 Estrada-Jimenez sought postconviction relief on the following theory.

> It would be an amazing leap of blind faith to believe that Suarez and [Baez] voluntarily testified in regard to a violent drug related and gang related homicide without receiving some type of consideration from the District Attorney's Office to do so. It is further a leap of blind faith to believe that all components of said agreement were derived after Jimenez's trial. It is therefore axiomatic that

[1] The brief of Estrada-Jimenez cites numerous instances at trial where Suarez and Baez denied any pretrial promise of leniency in exchange for testimony.

> some agreement, or some germ of an agreement, must have been made prior to the testimony of Suarez and [Baez] in the trial against Jimenez. In the alternative, the extremely favorable post-trial treatment given to Suarez and [Baez] by the State is relevant, newly discovered evidence requiring a new trial.

¶5 The only witness at the postconviction hearing was trial counsel for Estrada-Jimenez. Counsel testified that the attorneys for Suarez and Baez denied the existence of any pretrial agreements with the prosecutor, as did Suarez and Baez in their trial testimony. At the conclusion of the hearing the court found "little doubt" that Suarez and Baez hoped to be rewarded for their testimony. However, the court also found that there was no evidence the prosecutor made either an express or implied ("wink and nod") agreement with them before the trial. The court added "[T]he fact that [Baez] and Suarez were hopeful their testimony would help them is in evidence and is obvious. A later 'deal' does not mean one was in existence at the time of their testimony." The court also held that evidence of the favorable treatment Suarez and Baez received was not newly discovered evidence, and would not have changed the outcome of the trial in any event.

¶6 On appeal, Estrada-Jimenez requests a new trial, contending that the details of the witnesses' agreement for testifying was highly relevant evidence that the jury should have heard. The flaw in this request is the fact that there is no basis to conclude that the circuit court clearly erred when it found that there were no pretrial deals. While one might argue that the court could have reasonably inferred agreements from subsequent events, an inference of no deals was also reasonably available from the evidence, which consisted of testimony that both the witnesses and their attorneys denied the existence of any pretrial agreements. We review circuit court fact findings under the clearly erroneous standard, and under

that standard we will uphold the decision of the circuit court if it is supported by credible evidence or reasonable inferences that can be drawn from this evidence *See* ***State v. Lopez***, 173 Wis. 2d 724, 729, 496 N.W.2d 617 (Ct. App. 1992). Here, the court heard credible evidence that no deals existed, and reasonably inferred from it that there were no deals that could or should have been disclosed to the jury.

¶7 Estrada-Jimenez also contends that even if the deals did not exist at the time of trial, their subsequent implementation constitutes newly discovered evidence entitling him to a new trial. The State appears to concede that information about the deals qualifies as newly discovered evidence. The State concedes too much. Evidence of the deals made subsequent to the trial is not newly discovered evidence. To constitute newly discovered evidence, the evidence must have existed at the time of conviction. A defendant seeking a new trial on the grounds of newly discovered evidence must satisfy a four-part test, including that the evidence was discovered after the trial. *See* ***State v. Edmunds***, 2008 WI App 33, ¶13, 308 Wis. 2d 374, 746 N.W.2d 590. This prong infers that the evidence existed at the time of trial, and, as we have observed, the trial court found that no deal existed at that time.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.