No. 73686

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellant,

v.

ARTHUR KING,

Defendant-Appellee.

On Granted Petition for Leave to Appeal from the Appellate Court of Illinois, First District, First Division, No. 88-3436

There Heard on Appeal from the Circuit Court of Cook County, Illinois Criminal Division

The Honorable Thomas A. Hett, Judge Presiding

BRIEF AND ARGUMENT FOR APPELLEE

CROSS-RELIEF REQUESTED

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POINTS AND AUTHORITIES

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ISSUES PRESENTED FOR REVIEW

1. May a judge prevent a key defense witness from testifying by threatening him with abrogation of his guilty plea and bargained for sentence if the trial judge believes that the testimony of the witness will be prejurious?

2. Does the affidavit of a potential defense witness who did not testify at defendant's trial because he asserted his privilege against self-incrimination newly discovered evidence entitling defendant to an evidentiary hearing or a new trial?

STATEMENT OF FACTS

Jointly with codefendant Dwayne Cheers, appellee Arthur King was charged with armed robbery. The two cases were severed. Dwayne Cheers pled guilty after agreeing with the State to a pleas bargain. After a jury trial, Arthur King was found guilty of armed robbery and sentenced to serve 12 years imprisonment.

At trial, the prosecution presented the testimony of Gwendolyn Harris, as well as police officers Edward Kevin and Edward Schmidt. After the prosecution had rested, defense counsel called Mary Portis and officer Kevin. The prosecution then called officer Kevin in rebuttal.

At the time in question, Mary Portis lived in apartment 404 at 511 east Browning street (R. 38-39), with her three children. (R. 339). In early September of 1987 she shared the apartment with Arthur King, also known as "Coon." (R. 339, 367). Mr. King was the father of one of her three children. (R. 339).

Mr. King first moved in with Mary Portis toward the end of 1985, several months after she bore his child. (R. 364-65). At the time of the events in question, he worked for his brother-in-law as a carpet installer. (R. 335). In August of 1987, Mary Portis had undergone gall bladder surgery. (R. 347). Arthur King had watched all three children while Ms. Portis was in the hospital. (R. 348).

Some time in mid-September of 1987, Mary Portis and Arthur King quarreled and "broke up for a while." Arthur King went to live with his mother. (R. 353, 365). However, on the afternoon of

September 20, Mary Portis sent her sister, Lisa, to bring Arthur over so that he could watch her children. (R. 353).

On that day, Ms. Portis, who was still recovering from gall bladder surgery, was feeling unwell and needed someone to tend her children while Lisa went out for the evening. Shortly after Lisa had gone out, Arthur returned alone. It was still light out. (R. 354).

Arthur remained in the apartment, sleeping over, until the 23rd or 24th of September. He did not leave the apartment on the evening of the 20th. (R. 355).

According to Mary Portis, there were no working lights in the front stairwell of the building, or, for that matter, on the whole first floor, during the month of September. Mary Portis was accustomed to using a flashlight to find her way to the elevator. (R. 356).

On the evening of the 29th, while Arthur King was in Mary Portis' apartment, Gwendolyn Harris, age 20 (R. 188), went to 511 east Browning at about 9:30 p.m. (R. 193) to buy some marijuana. (R. 194). She was wearing eight silver chains, seven silver rings, and one gold class ring. (R. 192).

A short time later, Harris went to the parking lot at a nearby shopping center, where security guards summoned the police after Harris told them she had been robbed. (R. 202). She then toured the area with police officers, looking for the people who had robbed her, but was unable to find either of them. (R. 203).

A few days afterward, Mary Portis cashed her public aid check at a local currency exchange, receiving three hundred and eighty-six dollars. Arthur King accompanied her (R. 346), while her sister watched the children. (R. 347).

As the couple was walking home, a man named Dwayne Cheers, whom Mary Portis had known since childhood, stopped them and asked if they wanted to buy some jewelry. (R. 349). Ms. Portis asked him: "What kind of jewelry?" He replied: "Some silver," and opened his hands to show her a number of rings and chains. (R. 350). He told her that he would give her all of it for ten dollars. (R. 350-51).

Mary Portis replied that she would right back down, and she and Arthur went upstairs. She unrolled her public aid bankroll, took out ten dollars, and went back downstairs alone. She gave Dwayne Cheers the ten dollars, and he gave her the jewelry. (R. 351-52).

Some time after September 23, detective Edward Kevin had a conversation with Gwendolyn Harris. (R. 282). In this conversation, Gwendolyn Harris told him that a friend of hers, who wished to remain anonymous, had seen Mary Portis wearing Ms. Harris's jewelry on the day after the robbery. (R. 284). She also said that her friend had told her that Mary Portis had a boyfriend named "Coon," and that "Coon" was one of the two people who robbed her. (R. 285).

On October 2, 1987, Mary Portis took the jewelry she had bought from Dwayne Cheers and put it in her jewelry box. (R> 344-

45). Arthur King was still coming over, occasionally spending the night. On October 3, Arthur had come over to watch Mary Portis's children while Mary went over to her sister's house to wash. (R. 367).

On that same day, detective Kevin and other members of his unit went to Mary Portis's apartment. (R. 286, 340). They arrested Arthur King (R. 286) and retrieved the stolen jewelry from Mary Portis's jewel box. (R. 289-92). Detective Kevin later claimed Mary Portis had told him that at the time of the arrest that she had got the jewelry from Arthur King and Dwayne Cheers. (R. 395-96). Gwendolyn Harris subsequently picked Arthur King out of a four person line-up. (R. 319-20).

On September 23, detective Edward Kevin also spoke with Gwendolyn Harris about the robbery. (R. 326). In this conversation, Gwendolyn Harris told detective Kevin that she had been robbed in the hallway of the first floor at 511 east Browning. (R. 327).

Gwendolyn Harris told detective Kevin that as she entered the building, the shorter of two men blocked her path and asked her how she was doing. A few seconds later a taller man walked up to her, and placed a revolver to her temple. She told detective Kevin that it was she who took the first two of eight silver chains she was wearing off her neck, by removing them over her head. The taller man then took the remaining six chains off by undoing the clasps. (R. 329).

According to her testimony at trial, as Ms. Harris was

entering the building she saw two men, one short and dressed in blue, the other tall, wearing a white jacket and a white hat, with his hair braided. She had never seen either of these two men before. (R. 194). As she was going in, the shorter one said: "Hi." (R. 195).

Ms. Harris then went to the second floor and bought some marijuana. She stayed only for a few seconds, and then returned down the stairs. (R. 195).

As she was going down, the shorter man was coming up. As he passed her, he asked her if there was any marijuana on the second floor. She replied that there was. (R. 196).

When Ms. Harris reached the bottom of the stairs, the taller man was standing in the building entrance. (R. 196). He pulled a gun out of his pocket and pointed it at her head. (R. 197). Saying, "bitch, don't say a word before I shoot you," he unzipped her jacket and started to take off the chains around her neck. In the meantime, the shorter of the two men rifled her purse. (R. 198).

After the taller man unclasped the first two chains, Ms. Harris told him that she could do it herself, and she pulled the remaining six chains over her head. (R. 199). The shorter man then searched her and took fifty dollars and two nickel bags from her pocket. (R. 201).

The taller man told the shorter one to go get the car. Both men ran out of the hallway. Ms. Harris, meanwhile, went around to the back of the building and stood outside. (R. 201). She heard

one of the two men say to the other: "I told you that was the bitch to get." (R. 202).

During the entire incident, the gun remained pointed at Ms. Harris's head. She was "very nervous." (R. 201). SHe claimed that there was a light in the hallway and that she was able to clearly see the faces of the robbers. (R. 202-03). Ms. Harris identified Arthur King as the taller of the two men. (R. 197).

Ms. Harris conceded on cross-examination that she had not originally told the police that she had gone to 511 east Browning to buy marijuana (R. 226), and in fact had falsely told them that she was merely taking a short-cut through the building. (R. 229). SHe also failed to identify the stairwell as the spot where the robbery occurred. (R. 229-30). She denied telling detective Kevin that it was she who had removed the first two chains, and one of the robbers who had removed the last six. (R. 240). Detective Kevin, however, testified that she had told him that it was she had removed the first two chains, and that the second robber had removed the remaining six. He also testified that she had orginally told him that it was Dwayne Cheers who blocked her path as she entered the building, and Arthur King who walked up behind her and placed a gun to her head. (R. 329).

After Gwendolyn Harris testified, the defense attempted to call Dwayne Cheers as a witness.

Just before trial, Dwayne Cheers had pled guilty, in return for a promised sentence of eight years. (S.R. I, 142, R. 273). The prosecutor gave as the factual basis of the plea, that if

called as a witness, Gwendolyn Harris would testify that Dwayne Cheers and Arthur King had robbed her. (S.R. I, 145). After the prosecutor had given this factual basis, defense counsel said: "So stipulated." (S.R. I, 146).

The trial judge then found Dwayne Cheers guilty, and entered judgment on the conviction. (S.R. I, 146). The prosecutor then asked the judge to withhold judgment because "[t]here's been no amendment to the defendant's answer regarding defendant Cheers being called on behalf of him..." The judge responded that he was going to enter judgment but that he would withhold the sentence for a time. He also promised Dwayne Cheers that he would not change the sentence, as "this is just a tactical move that the State is asking that we hold up the sentencing." (S.R. I, 147).

Dwayne Cheers replied: "Yes, sir, but that would make me, me and Arthur King, we ain't connected with nothing." The trial judge replied: "Well, I understand that, but I just want to, so that the State doesn't have that fear." (S.R. I, 147).

During Arthur King's trial, but before Dwayne Cheers had been sentenced, defendant attempted to call Dwayne Cheers as a witness on his behalf. (R. 272).

Before Mr. Cheers could testify, his attorney informed the court that he had told his client that if her testified, "there are possibly elements in his testimony which may be used by the State or by the Court in considering what the appropriate sentence would be. And that sentence, based on his testimony in this matter may be something other than the 8 years offered in

the pretrial conference." (R. 274).

Before letting Mr. Cheers testify, the trial judge conducted a voir dire.

During the voir dire, the trial judge told Mr. Cheers that at the time of his plea of guilty, his attorney had agreed to certain facts, among which were the fact that Mr. Cheers had committed the robbery with Arthur King. Mr. Cheers immediately denied that she had agreed to that fact. (R. 274).

The trial judge then told Mr. Cheers that if he testified in a manner which the trial judge "believed" to be perjurious, he would vacate the plea on his own motion, "and we'd probably have to have a trial in connection with that matter." (R. 275). He again said that the facts included in the plea included the fact that Mr. Cheers had committed the crime with Arthur King. (R. 275).

Mr. Cheers then replied: "To may knowledge, that I was pleading guilty to the crime, true enough. I understand that. But I had stipulated that it was --- King had nothing to do with me." The trial judge replied that he did not hear any such stipulation. (R. 276).

Thereafter, Dwayne Cheers stated that if called as a witness on behalf of Arthur King, he would plead the fifth. (R. 278). Counsel for Arthur King then asked that Dwayne Cheers be immediately sentenced. The trial judge replied: "You have no standing for that. I understand your point. And that's a good shot. But you have no standing to ask that and I'm not prepared

to do that, at this time." (R. 279).

Following Arthur King's conviction, Arthur King's attorney obtained from Dwayne Cheers and affidavit. In his affidavit, Mr. Cheers swore that he committed the armed robbery not with Arthur King, but with another man, Thomas Matthis, a.k.a. "Slick." Matthis was 29 years old, stood six feet tall, and matched the description of the assailant given by Gwendolyn Harris. (S.R. III, 3).

Mr. Cheers swore that at the time of the robbery, there were no lights on in the stairwell. (S.R. III, 3). He also swore that on the day of the robbery he sold some of Gwendolyn Harris's rings and chains to Mary Portis. He further stated that he would have testified to all of these facts at Arthur King's trial, but was afraid that if he did the trial judge would not give him the agreed upon sentence of eight years. (S.R. III, 4).

Despite this affidavit, appended to Arthur King's motion for a new trial, the trial judge would not give him the agreed upon sentence for eight years. (S.R. III, 4).

I.

THE APPELLATE COURT CORRECTLY DECIDED THAT THE TRIAL JUDGE DENIED ARTHUR KING HIS RIGHTS TO PRESENT EVIDENCE AND TO DUE PROCESS BY COERCING DWAYNE CHEERS INTO REFUSING TO TESTIFY

During trial, Arthur King called Dwayne Cheers to testify on his behalf. Before Cheers could do so, however, the trial judge told Cheers that he would interpret exculpatory testimony for Arthur King as perjury. He further told Cheers that if he "believed" Mr. Cheers testimony to be perjurious, he would sua sponte vacate his plea of guilty and not give him his promised sentence of eight years in prison. After hearing these threats, and with a sword of Damocles hanging over his head, Cheers chose not to testiity on Arthur King's behalf and instead pled the fifth. (R. 274-75).

The trial judge did not give similar warnings to any of the prosecution witnesses, one of whom, Gwendolyn Harris, admitted at trial that she was in possession of marijuana at the time of the incident, and that she had lied about this in her initial statements to the officers. (R. 226, 229). As Dwayne Cheers explained in his post-trial affidavit, his decision not to testify was motivated solely by his fear that the judge would punish truthful testimony on Arthur King's behalf by depriving him of his promised plea bargain. (S.R. III, at 4).

As the appellate court below properly concluded, the trial judge's "admonition to Cheers resulted in Cheers' fear

of giving favorable testimony on behalf of defendant and ultimately, Cheers' decision to invoke his fifth amendment right, thereby depriving defendant of due process and the right to present his defense." People v. King, No. 88-3467 (Ill. App. April 20, 1992), slip op. at 10, see U.S. Const., amend. XIV; Ill. Const. 1970, art. I, sec. 2; U.S. Const. amend. VI; Ill. Const. 1970, art. I, sec. 8.

The appellate court's sound analysis rests upon the case of Webb v. Texas, 409 U.S. 95 (1972). In Webb, the defendant, charged with burglary, attempted to call as his only witness one Leslie Max Mills, a fellow convict who was then serving a prison sentence. Before Mills could testify, the trial judge admonished him as to his fifth amendment rights, and then said:

> "If you take the witness stand and lie under oath, the Court will personally see that your case goes to the grand jury and you will be indicted for perjury and the likelihood is that you would get convicted of perjury and would stacked onto what you have already got, so that is the matter you have got to make your mind up on. If you get on the witness stand and lie it is probably going to mean several more years *** You may tell the truth and if you do, that is all right, but if you lie you can get into real trouble."

409 U.S. at 97. The Supreme Court reversed, holding that the singling out of defendant's only witness for an admonition on his fifth amendment rights and on the dangers of perjury, combined with the judge's implication that he expected the witness to lie and that the witness would suffer penal consequences for doing so, deprived the defendant of due

process by driving that witness from the stand. 409 U.S. at 97-98.

Here similarly, the trial judge singled Dwayne Cheers out for a special admonition on fifth amendment rights and the dangers of perjury which he did not provide for any of the other witnesses, including Gwendolyn Harris, a self-confessed liar and possessor of an illegal narcotic. He similarly implied that any testimony by Cheers in Arthur King's favor would be a lie, and similarly threatened Cheers with sanctions if he gave testimony which proved to be perjurious.

As the appellate court below recognized, the facts here are:

> "even worse than those in Webb. Here, the trial court had reserved Cheers' sentencing for a later date, and stated that it would revoke the plea bargain if it "believed" Cheers had perjured himself. In Webb, the trial court threatened to prosecute the witness if the court believed the witness' testimony to perjurious. Such a prosecution would require the State to prove perjury beyond a reasonable doubt. The potential for retaliation was much more direct and immediate in the case at bar than in Webb."

Slip op. at 9.

The State, however, maintains that Webb is distinguishable. The State cites two circumstances not present in Webb: (1) the trial judge here, unlike the trial judge in Webb, "did not use strong language or threaten" the witness (St. Br. at 15), 2) Cheers' guilty plea, and the factual stipulation at the plea, constituted prior statements

inconsistent with testimony exculpating Arthur King, and therefore provided the trial judge with a legitimate basis to believe that Cheers' testimony would be perjurious, (R. 15-16), and (3) since Cheers's sentencing had been delayed, and he was still in jeopardy of having his plea vacated, "the trial court did not threaten [him] with anything more than he was already faced with." (St. Br. at 16). All three of these distinctions in fact make no difference to the result reached below.

First, the trial judge's language here was every bit as "strong," and as "threatening" as the statements in Webb. In Webb the trial judge stated that if the witness took the stand and lied, he might be prosecuted for perjury and have several years added on to his sentence. Here, the trial judge stated "if you do testify and you testify in a manner that I believe is perjurious, which would not be the truth, I would on my own motion, vacate the plea of guilty. You'd then be as if the plea had never taken place. And we'd probably have to have a trial in connection with that matter." (R. 274). Although the trial judge qualified his statement slightly by saying "if you testified in this matter and testify in what I believe is a truthful manner, I would not vacate the plea," this was no better -- in fact it was a good deal worse --than the similar statement by the judge in Webb ("[y]ou may tell the truth, and if you do, that is all right"). Cheers was being told, in no uncertain terms, that he must convince the

judge of his personal sincerity or risking losing the benefit of the plea bargain. 405 U.S. at 97.

Moreover, the trial judge's statements were considerably more "threatening" than the statements in Webb, because unlike the judge in Webb, the trial judge here had deliberately -- and for no other reason than to prevent Cheers from testifying -- retained the power to abrogate Cheers' plea until after King had been convicted. And, unlike the judge in Webb the judge here made clear to Cheers, in no uncertain terms, that any testimony which exculpated King would be regarded as perjurious.

Second, the prosecution claims that the trial judge's statements were justified because Cheers' plea, and the factual stipulation at the plea, constituted a prior statement of Cheers inconsistent with with testimony exculpating Cheers. Here, the prosecution is simply wrong.

The cases of People v. Henderson, 95 Ill. App. 3d 291 (1981) and People v. Traylor, 201 Ill. App. 3d 86, 88-91 (1990) are dispositive. In Henderson, defendant's accomplice pled guilty. At the accomplice's plea hearing, the prosecution gave a synopsis of what the evidence at trial would be. The synopsis included testimony that the defendant was present when the accomplice was arrested. After listening to the synopsis, the accomplice expressed neither agreement not disagreement with its accuracy, and pled guilty.

At defendant's trial, the accomplice denied that

defendant was present during the arrest. The prosecution was allowed to impeach him with proof that he heard the contrary synopsis at the plea hearing, and did not state his disagreement with it.

On appeal, the appellate court reversed, holding that the accomplice's plea of guilt did not constitute an admission of all facts in the synopsis, and therefore could not be used as a statement inconsistent with his denial at trial of the codefendant's presence. Although a guilty plea constitutes an admission of every fact alleged in the indictment, this rule is limited to those facts which constitute an ingredient of the offense charged. People v. Langford, 392 Ill. 584 (1946). Since the identity of the codefendant was a collateral matter, not constituting an element of the crime charged, the accomplice's plea of guilt and failure to dispute the synopsis could not be considered his own "statement." Moreover, even had the accomplice agreed to the synopsis "any such assent would have been to the fact that certain evidence would have been presented," and would not have constituted the accomplice's own admission that the evidence was true. 95 Ill. App. 3d at 291.

It should also be noted that although Henderson involved a "synopsis" of testimony to which the witness did not stipulate, Henderson has been more recently applied to a case with facts more closely similar to those presented here. In People v. Traylor, 201 Ill. App. 3d 86, 88-91 (1990), the

codefendant at his guilty plea agreed to a statement of what the prosecution intended to prove, which included an inculpatory reference to the codefendant. When the codefendant testified on the defendant's behalf, he was successfully impeached with his prior assent to fact that these facts would be presented. The appellate court held that despite the witness' seeming agreement, this was not a prior inconsistent statement, and the witness was improperly impeached. 201 Ill. App. 3d at 91.

Here, similarly, Dwayne Cheers' plea of guilt constituted a confession of his own participation in the robbery, and had no bearing upon the collateral matter of whether Arthur King had also participated. And although Cheers stipulated that Gwendolyn Harris would identify Arthur King, this agreement constituted merely an assent to the fact that such evidence would have been presented, not necessarily that it was true. Finally, of course, as the appellate court below recognized:

> "Further there is evidence in the record that Cheers did not agree with <u>all</u> the facts to which his attorney stipulated. During Cheers plea hearing, Cheers responded to the trial court, 'Yes, sir, but that would make me, me and Arthur King, we ain't connected with nothing.' Then when Cheers was called by defendant's attorney to testify on defendant's behalf, Cheers stated that he did not agree at his plea hearing that defendant was his partner in crime. In fact, Cheers informed the trial court of his understanding of his plea by saying, 'To my knowledge, that I was pleading guilty to the crime, true enough. But I had stipulated that it was -- King have nothing to do with me."

Slip op. at 10.

Third, the State argues that the trial judge's power to vacate the nonfinal plea somehow makes his actions more palatable. As the appellate court below observed, this fact cuts strongly in the other direction: the trial judge's unilateral decision to delay sentencing -- for no other apparent reason but to alleviate the State's "fear" of Dwayne Cheers giving exculpatory testimony for Arthur King -- made his actions more threatening and less justifiable. Nor could it be argued that Webb is inapplicable to a witness who has previously pled guilty. The appellate court has held that a plea cannot be properly conditioned upon a defendant's promise not to testify on his codefendant's behalf. See People v. McKiness, 105 Ill. App. 3d 92, 98-100 (1982).

The prosecution maintains that the trial judge's threat to vacate Dwayne Cheers' plea sua sponte was justified because testimony by Dwayne Cheers which contradicted his stipulation would have deprived his plea of its requisite factual basis. This argument, which is basically unsupported by any citation to authority, is, in any case, incorrect.

Although Rule 402(c) requires a determination by the trial judge that there is a factual basis for the plea, this is a minimal requirement. "All that is required to appear on the record is a basis from which the judge could reasonably reach the conclusion that the defendant actually committed the acts with the intent (if any) required to constitute the

offense to which the defendant is pleading guilty." People v. Barker, 83 Ill. 2d 319, 327-28 (1981) (emphasis supplied). The requisite basis can be established either by the defendant's express admission or by a recital to the court of evidence which will support the allegations of the indictment. People v. Green, 12 Ill. App. 3d 418, 419 (1973).

Testimony by Dwayne Cheers that Arthur King was not involved in the robbery would in no way have vitiated the factual basis of Dwayne Cheers' plea, since the trial judge could still have reasonably reached the conclusion that Dwayne Cheers had committed the robbery. The guilt of the two defendants was not inextricably interlinked: a rational trier of fact could easily have concluded that Gwendolyn Harris accurately identified Dwayne Cheers, but mistakenly identified Arthur King.

If it was true that the trial judge would have to vacate Dwayne Cheers' plea if he believed Arthur King was innocent, strange results would follow. For example, if Arthur King had been acquitted, would the trial judge have been required to vacate Cheers' plea? The short answer is: No. See Harris v. Rivera, 454 U.S. 339 (1981).

The prosecution also argues (St. Br. at 16-22) that a number of other cases, particularly the recent appellate court case of People v. Young, No. 90-1498 (June 16, 1992) support its position. All of these cases are distinguishable from the instant case, and none is inconsistent with the

appellate court's wise decision in King.

Young, for example, is distinguishable because in Young the codefendant, after having pled guilty to possession of a controlled substance, testified at the defendant's trial that neither he nor the defendant possessed a controlled substance. Slip op. at 1,3. Since this testimony was genuinely inconsistent with the codefendant's plea of guilty, the trial court was entirely proper in threatening to vacate the plea, have the codefendant indicted for perjury and/or hold him in contempt. Slip op. at 3-4.

Similarly, in People v. Cedillo, 142 Ill. App. 3d 849 (1986), the codefendant at his plea hearing "stipulated under oath that he and the defendant had acted jointly in possessing and processing the cocaine." 142 Ill. App. 3d at 850. When the prosecutor learned before trial that the codefendant was planning to testify that defendant had not acted jointly with him, he informed the codefendant that if he so testified he would be charged with perjury. Thereafter, the codefendant invoked his right against self-incrimination. 142 Ill. App. 3d at 851. This court held that the prosecutor's conduct was proper, and did not constitute "substantial governmental interference with a defense witness' desire to testify." 142 Ill. App. 3d at 849, 851-52, citing People v. Bailey, 132 Ill. App. 3d 399, 407 (1985).

Cedillo is distinguishable for two reasons. First, the codefendant in Cedillo swore to the stipulation, thus making

it possible that he could be prosecuted for perjury if it was contradicted by his testimony at defendant's trial. People v. Anderson, 57 Ill. App. 3d 95 (1978). Second, the codefendant in Cedillo directly stipulated that he jointly possessed the controlled substance with the defendant, not merely that another witness would so testify. Thus, if he had taken the stand in defendant's behalf and testified contrary to the sworn stipulation, he could have been impeached with the stipulation, which would have been a prior inconsistent statement, and he could also have been charged with perjury.

Here, of course, the stipulation was merely to the fact that Gwendolyn Harris, if called to testify, would identify Arthur King, and Dwayne Cheers did not swear to its accuracy under oath. Therefore, it would not have qualified as a statement inconsistent with Cheers' testimony exculpating Arthur King, and he could not have been charged with perjury on that basis. See People v. Henderson, 95 Ill. App. 3d 291, 296 (1981). The trial judge's intimations that Cheers would be perjuring himself, and his threat to vacate Cheers' plea and give him a higher sentence if he testified inconsistently with the stipulation that Harris would identify King, were therefore unjustified, and constituted substantial governmental interference with Cheers' desire to testify.

The remaining cases cited by the prosecution deal with a number of disparate situations in which the trial judge properly exercised his discretion to warn witnesses of the

dangers of perjury or self-incrimination. For example, the prosecution's citation of People v. Pantoja, 35 Ill. App. 3d 375 (1976) is also inapposite. In Pantoja the trial judge merely advised a witness who was unrepresented by counsel and "manifestly *** unaware that he was in danger of subjecting himself to further prosecutorial actions on the basis of his in-court testimony." 35 Ill. App. 3d at 380. The trial court then appointed the witness counsel so that he could decide whether he wanted to waive his right not to testify.

Here, however, the witness was already represented by counsel, who had specifically informed him that his testimony might result in a sentence greater than eight years. (R. 274). Despite this warning, Dwayne Cheers was willing to testify. Moreover, the trial judge did not confine himself to a general warning about the dangers of self-incrimination, but specifically told Dwayne Cheers that if his testimony did not agree with Gwendolyn Harris' identification of Arthur King, the trial judge would vacate the plea and would not give him the promised eight year sentence. Under these circumstances, the trial judge's warnings went beyond a permissible exercise of his discretion, and seriously interfered with Dwayne Cheers' already informed decision to testify.

Finally, the case of People v. Caplinger, 162 Ill. App. 3d 74 (1987), which the prosecution cites in support of its position, is not on point. In Caplinger the defendant claimed

that she was entitled to an instruction on the lesser included offense of attempt retail theft based upon her codefendant's testimony. Her codefendant had pled guilty, but claimed at defendant's trial that she was not really guilty since she had not removed the admittedly stolen tapes from the store. The appellate court held that this testimony did not entitle the defendant to that instruction, since the codefendant's guilty plea established that the codefendant had committed retail theft, an offense which, contrary to the codefendant's perception, did not require her to remove the tapes from the store. Since the jury could only have found the defendant guilty of retail theft on an accountability theory or not guilty, the lesser included instruction could not be given. 162 Ill. App. 3d 80, 79-80. The court did not hold that the codefendant's guilty plea was tantamount to an admission of the defendant's guilt.

The line between advising a witness of the possible dangers of perjury or self-incrimination is admittedly thin. Here, however, the trial judge went over that line. Arthur King's conviction must therefore be reversed, and the appellate court opinion should be affirmed.

II.

THE TRIAL JUDGE ERRED BY REFUSING TO GRANT A NEW TRIAL OR AN EVIDENTIARY HEARING BASED UPON NEWLY DISCOVERED EVIDENCE.

[Request for Cross-Relief]

Following trial, defense counsel moved for a new trial on the basis of newly discovered evidence. In support of his motion, he produced the affidavit of Dwayne Cheers.

In his affidavit, Mr. Cheers swore that he committed the armed robbery not with Arthur King, but with another man, Thomas Matthis, a.k.a. "Slick." Matthis was 29 years old, stood six feet tall, and matched the description of the assailant given by Gwendolyn Harris. (S.R. III, 3).

Mr. Cheers swore also that at the time of the robbery, there were no lights on in the stairwell. (S.R. III, 3). He also swore that the day after the robbery he sold some of Gwendolyn Harris's rings and chains to Mary Portis. He further stated that he would have testified to all of these facts at Arthur King's trial, but was afraid that if he did the trial judge would not give him the agreed upon sentence of eight years. (S.R. III, 4).

In support of his motion, defense counsel cited to the court the case of People v. Molstad, 101 Ill. 2d 128 (1984). (R. 464-65). The prosecution claimed that Molstad was distinguishable because the affiant in Molstad did not specifically invoke their right against self-incrimination, as had Cheers. (R. 468).

The trial judge agreed. He stated that because Arthur King's attorney "had an opportunity I believe to speak with Mr. Cheers before the trial began and knew at least you thought [what] his potential testimony was going to be," the affidavit was not newly discovered evidence. (R. 471). He went on to say that since "there were plenty of facts brought to the jury's attention concerning the alibi," the evidence "might have been even cumulative." (R. 471-72).

The trial judge was wrong. Molstad is dispositive, and compels the conclusion that Arthur King should have been granted a new trial or an evidentiary hearing on his motion. Therefore, even assuming that this Court disagrees with the appellate court's disposition of the Webb issue, this Court should still affirm the appellate court's grant of a new trial, and/or modify the appellate court's judgment to remand for an evidentiary hearing of the motion for a new trial.

The general standard for newly discovered evidence is as follows: It must be (1) discovered since the trial, (2) of such character that it could not have been discovered prior to trial by the exercise of due diligence, (3) material to the issue and not merely cumulative, and (4) of such a conclusive character that it would probably change the result on trial. People v. Baker, 16 Ill. 2d 364, 374 (1959). Molstad, directly on point, shows that all four prongs of the test were met here.

In Molstad, the defendant, together with five

codefendants, was charged with aggravated battery, armed violence, and criminal damage to property. One of the prosecution witnesses testified that the defendant was one of a gang which attacked her car with bats and leadpipes, chased her boyfriend from the car and into a nearby ditch, and then beat him severely as he lay there. In response, defendant gave evidence of an alibi, which was corroborated by the testimony of his parents. None of his codefendants testified or presented any defense.

After a bench trial, defendant was convicted, as were four of his codefendants; a fifth was acquitted. Defendant's lawyer filed a post-trial motion buttressed by affidavits from the other codefendants, including the acquitted, all of whom stated that defendant had not been present at the time of the attack.

The trial judge denied the motion. The appellate court reversed and remanded for an evidentiary hearing. The Supreme Court affirmed the appellate court's judgement, but remanded for a new trial rather than an evidentiary hearing.

The Supreme Court first reasoned that the evidence was newly discovered and could not have been discovered by the exercise of due diligence:

> "The State maintains that the evidence was not newly discovered because defendant Molstad knew of the evidence before trial. However, the State has not disputed that the affidavits were not prepared until after the guilty verdict and before the sentencing hearing. Thus, at the time of trial, the only testimonial evidence that Molstad could offer to counter [the prosecution witness's] was

> his testimony that he was not present at the scene of the attack. Molstad's codefendants did not present their testimony concerning Molstad's whereabouts at trial because such testimony would have incriminated them. The testimony of Molstad's codefendants clearly qualifies as newly discovered evidence.
>
> "The affidavits submitted as the basis for a new trial could not have been discovered with the exercise of sue diligence. The record reveals that the defendants were acquainted with each other, and presumably due diligence on the part of Molstad or his counsel could have ascertained what posture the codefendants would have taken at trial. However, no amount of diligence could have forced the codefendants to violate their fifth amendments right to avoid self-incrimination *** if the codefendants did not choose to do so."

101 Ill. 2d at 135.

Contrary to the trial judge's assertion, Molstad is directly on point. Here, as in Molstad, the affidavit attesting to the newly discovered evidence was not prepared until after Arthur King's conviction. Here, as in Molstad, the affiant did not present his testimony sooner because it would have incriminated him. Here, as in Molstad, trial counsel could not exercise due diligence because no amount of diligence could have forced Cheers to forgo his fifth amendment right against self-incrimination, once he chose to exercise it.

Indeed, the difference between this case and Molstad make this case stronger, not weaker.

In Molstad it was merely likely that the codefendants would have exercised their right to self-incrimination had defense counsel chosen to call them to the stand; here, defense counsel exercised even greater diligence by

subpoenaing Dwayne Cheers to testify at which point Cheers explicitly pled the fifth.

Indeed, counsel did even more. When it became clear that Cheers' exercise of his right was solely motivated by fear that the trial judge might vacate his plea and deny him his promised sentence, defense counsel asked that Cheers be sentenced immediately, so that he could give truthful testimony without fear of retribution.

Moreover, in Molstad, the attorney did not move to have the cases of the codefendants severed, a fact which the State argued showed lack of due diligence. Here defense counsel successfully moved for a severance in timely and appropriate fashion, and then subpoenaed Cheers. There was nothing more he could have done to secure his testimony.

Molstad also demonstrated that the trial judge erred in his conclusion that Cheer's affidavit "might even have been cumulative" because Arthur King had been able to present some evidence in support of his alibi. In Molstad, the court concluded:

> "It is difficult to see how the admission of the five affidavits would not produce new questions to be considered by the trier of fact. The testimony of the codefendants goes to the ultimate issue in the case: Who was present at the time of the attack on [the victim] and the automobile? We believe that the evidence offered as a basis for a new trial is not merely cumulative. Although Molstad offered alibi testimony at trial, the introduction of five affidavits at the post-trial stage raises additional questions concerning the trial court's verdict."

101 Ill. 2d at 135.

Here, similarly the admission of Cheers' affidavit could not have failed to produce new questions for the trier of fact, notwithstanding the alibi evidence that King had already presented. Cheers' affidavit would have corroborated Mary Portis' testimony about the lack of illumination in the dark hallway where Gwendolyn Harris was robbed and his sale of the stolen merchandise to her. But it would also have identified another person, Thomas Matthis, as Cheers' real partner in the robbery. As in Molstad, the identification of a different person as the real criminal "raises additional questions concerning the trial court's verdict."

Finally, this evidence would have been likely to produce a different result at trial. The jury would have had to balance Gwendolyn Harris' identification of Arthur King against the testimony of the actual robber, Dwayne Cheers, that his real accomplice was another person who closely resembled King. The jury would also have had to consider the fact that Arthur King was originally arrested based upon suspicions roused by Mary Portis' possession of the stolen jewelry, possession which Cheers explained resulted from his own sale of the goods to Portis. Finally, Cheers would have provided that testimony of an unbiased witness in support of the contention that there was no light in the hallway or stairwell where Ms. harris was robbed, a circumstance which would cast considerable doubt on the accuracy of her identification of Arthur King as the robber.

Because Dwayne Cheers' affidavit constituted newly discovered evidence, the trial judge should have granted his motion for a new trial, or, int he alternative, held an evidentiary hearing to determine the merit of the testimony contained in the affidavit. Since he did not, Arthur King's conviction should be reversed, and the cause remanded for a new trial or an evidentiary hearing.

CONCLUSION

For the reasons given in section I of this brief, the appellate court's decision should be affirmed. In the alternative, for the reasons given in section II of this brief, the appellate court's decision should either be affirmed or affirmed as modified to remand for an evidentiary hearing.

Respectfully submitted,

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