

**STATE OF MICHIGAN**  
**SUPREME COURT**

PEOPLE OF THE STATE OF MICHIGAN,  
Plaintiff-Appellant,

Supreme Court  
No. 137908

-vs-

Court of Appeals  
No. 269739

STEVEN JAMES HOCH,  
Defendant-Appellee,

Macomb Circuit  
No. 05-3002-FH

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*137908-  
PLAT's 500d*

**PLAINTIFF-APPELLANT'S SUPPLEMENTAL BRIEF IN SUPPORT OF  
APPLICATION FOR LEAVE TO APPEAL**

*Jo*

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**RULES**

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**ISSUE PRESENTED**

**DID THE DEFENDANT'S FAILURE TO COMPLY WITH MCR 7.210(B)(2), WHICH REQUIRES THE APPELLANT TO FILE A SETTLED STATEMENT OF FACTS WHEN A TRANSCRIPT CANNOT BE OBTAINED, HAVE ANY EFFECT ON THE COURT OF APPEALS DECISION IN THIS CASE, WHEN THE COURT OF APPEALS WOULD HAVE BEEN PRESENTED WITH THE SAME ISSUE EVEN IF THE DEFENDANT HAD COMPLIED WITH MCR 7.210(B)(2)?**

**People say "No".**

## STATEMENT OF FACTS

The Defendant, Steven Hoch, was convicted by the jury of Unarmed Robbery<sup>1</sup>, Fleeing and Eluding in the Fourth Degree<sup>2</sup>, Larceny from a Motor Vehicle<sup>3</sup>, and Driving with a Suspended License<sup>4</sup>. The case was assigned to circuit court Judge Donald Miller but preceded to trial before visiting Judge Roland Olzark while Judge Miller was away on vacation. The Defendant's conviction and sentence arose out of the Defendant's theft of a purse. At trial the Defendant denied the allegation that he assaulted LeAnn Goforth. He claimed that his truck moved accidentally when Goforth attempted to get her purse back. The jury however, did not agree and found the Defendant guilty of Unarmed Robbery. The Defendant was sentenced as a habitual offender to several concurrent terms of incarceration, the longest of which was 114 to 180 months in prison for the Unarmed Robbery conviction.

On appeal the Defendant raised several issues including the issue of whether the trial court violated his constitutional right to be present at a critical stage of the proceedings. The Defendant claimed that during deliberations Judge Miller, who had returned from vacation and taken over the case from Judge Olzark, improperly instructed the jury without

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<sup>1</sup> MCL § 750.530.

<sup>2</sup> MCL § 257.602a(2).

<sup>3</sup> MCL § 750.356a(2)(a).

<sup>4</sup> MCL § 257.904(3)(a).

the Defendant being present. The Court of Appeals, in an unpublished per curiam opinion, agreed<sup>5</sup> and reversed the Defendant's conviction. The People applied for leave to appeal that decision, seeking reinstatement of the Defendant's conviction. The Court has ordered oral argument on the question of whether to grant the People's application or take other peremptory reversal. The Court's Order directed the parties to file supplemental briefs discussing the applicability and effect of *MCR* 7.210(B)(2).

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<sup>5</sup> Schuette, P.J. dissented.

## ISSUE

**MCR 7.210(B)(2), WHICH REQUIRES THE APPELLANT TO FILE A SETTLED STATEMENT OF FACTS WHEN A TRANSCRIPT CANNOT BE OBTAINED, WAS APPLICABLE IN THIS CASE. THE DEFENDANT'S FAILURE TO COMPLY WITH MCR 7.210(B)(2) HOWEVER, MADE NO DIFFERENCE BECAUSE THE COURT OF APPEALS WOULD HAVE BEEN PRESENTED WITH THE SAME ISSUE EVEN IF THE DEFENDANT HAD COMPLIED WITH MCR 7.210(B)(2). THEREFORE, THE COURT OF APPEALS DECISION SHOULD BE REVIEWED ON THE BASIS OF WHETHER THE TRIAL COURT'S ACTION OF ANSWERING THE JURY'S QUESTION BY TELLING THE JURY THAT IT SHOULD RELY ON THE INSTRUCTIONS IT HAD BEEN GIVEN REQUIRED REVERSAL EVEN THOUGH THE DEFENDANT WAS NOT PRESENT IN THE COURTROOM WHEN THE TRIAL COURT DID NOT REINSTRUCT THE JURY.**

## ARGUMENT

In its order for oral argument the Court raises the applicability and effect of *MCR 7.210(B)(2)*. *MCR 7.210(B)(2)* states:

“When a transcript of the proceedings in the trial court or tribunal cannot be obtained from the court reporter or recorder, the appellant shall file a settled statement of facts to serve as a substitute for the transcript.”

The court rule is significant in this case because the Court of Appeals accepted the Defendant's argument without any transcript to support it.

The Defendant argued that Judge Miller had reinstructed the jury

without him being present. The Defendant however, submitted a letter from the court reporter stating that no record of any such reinstruction existed. The sole support for the Defendant's argument and the Court of Appeals' decision was a discussion between the Defendant and Judge Miller that took place at sentencing.<sup>6</sup> Based upon that discussion and

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<sup>6</sup> During the Defendant's sentencing the following colloquy took place between Judge Miller and the Defendant:

*The Defendant:* -- and then I also have one question for you, your Honor, that I'm not sure about the proceedings, how it actually happened if I wasn't in the courtroom when a proceeding happened.

My regular judge -- the original trial judge, Olzark, was a visiting judge and when you returned from vacation, while my jury -- jury was deliberating, after Judge Olzark left, the jury sent a note out asking for further instructions on an inadvertent assault -- to how to apply an inadvertent assault as the assault element for robbery. And I wasn't in here. I was kept in the holding cell. And I would just like you to -- ask you what I-- I was told by my -- even my attorney wasn't here. Somebody else stood in. I have no idea who it was, but he said that you refused further instruction on inadvertent assault and I don't know what happened. If I don't ask you now, I'll never know as long as I live. And that's why I'm just askin' to be filled in a little bit on what happened on that.

*The Court:* As I recall, the jury was instructed to refer to their notes, refer to the jury instructions that they had before them, and refer to the testimony that they heard in this room. And also, to use their judgment as -- as citizens, as -- as qualified jurors to work through the evidence as they see it before them and -- and arrive at their own conclusion and that's as I recall. Obviously, I didn't keep notes, but that's what happened.

*The Defendant:* The -- the only reason that it concerns me so much is I -- the defense wanted an assault instruction and a specific intent instruction given to the jury. And we got a copy of all the written instructions that the jury had in the jury room. And they didn't have the assault instruction or the specific intent in the packet made up for them to -- and it says right in the assault instruction, assault cannot happen by accident, but they didn't have in there and they asked for further instruction.

*The Court:* I'm sure that Judge Olzark, at the conclusion of the instructions to the jury, asked defense counsel and the prosecutor whether they were satisfied with the instructions. And I -- I wasn't there.

*The Defendant:* They were -- they were. And they were satisfied --

*The Court:* (Interposing) They were satisfied.

*The Defendant:* -- verbally.

*The Court:* End of argument.

Sentencing Transcript, pages 38-40.

without any verbatim record, the Court of Appeals held that Judge Miller committed reversible error.

There is no question in this case that *MCR 7.210(B)(2)* was applicable. Whatever Judge Miller did in response to the jury's question was never recorded.<sup>7</sup> So no transcript is available. *MCR 7.210(B)(2)* states that in such cases the appellant "shall" file a settled statement of facts. Thus, the Defendant had a mandatory obligation to file a settled statement of facts.

Generally, when a court rule places a mandatory obligation on a party to do some act to perfect its appeal, the failure to do so results in dismissal of the appeal or forfeiture of the issue sought to be raised. Certainly, if the Defendant had been the appellant in a civil case his failure to follow *MCR 7.210(B)(2)* would have resulted in forfeiture of the issue. See, *Admiral Ins. Co. v Columbia Cas. Ins. Co.*, 194 Mich App 300, 304-305; 486 NW2d 351 (1992). A criminal defendant who fails to comply with *MCR 7.210(B)(2)* however, is usually given an opportunity to have his appeal remanded so that he can comply. See, *People v Wheatley*, 478 Mich 905; 732 NW2d 530 (2007). In other instances the reviewing court may examine what record is available to determine whether it is sufficient to evaluate the defendant's claim. See, *People v Federico*, 146 Mich App 776; 381 NWd2 819 (1985). Or, the reviewing court may find

that the defendant's right to a meaningful review is impeded by his inability to obtain a transcript and requires a new trial. See, *People v Horton (After Remand)*, 105 Mich App 329, 331; 306 NW2d 500 (1981). Thus, if the People had objected to the Defendant's failure to comply with *MCR 7.210(B)(2)*, the Court of Appeals would have had those four options.

In this case, the Court of Appeals chose two of its four options. The Court found that the absence of a record denied the Defendant an opportunity for meaningful review and required a new trial.<sup>8</sup> The Court also evaluated the Defendant's claim based upon what record was available and found the Judge Miller erred in failing to reinstruct the jury.<sup>9</sup> While the People did not raise the Defendant's failure to comply with *MCR 7.210(B)(2)* in their Brief on Appeal, the People did point out to the Court of Appeals that the Defendant had not preserved the issue for appeal. The People noted that it was odd that when the Defendant raised the issue at sentencing defense counsel said nothing. Thus, it would appear that the Court of Appeals rejected the other options of holding the Defendant's failure to file a settled statement of facts against him or remanding the matter for him to do so.

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<sup>7</sup> Judge Miller's courtroom is equipped with a video recorder and so does not utilize a court reporter.

<sup>8</sup> Court of Appeals Opinion pages 11-12.

<sup>9</sup> Court of Appeals Opinion pages 12-13.

In its Order directing the parties to file supplemental briefs, the Court asked for a discussion on the applicability and effect of *MCR 7.210(B)(2)*. As to the Court's first question of applicability, the People would submit that the answer is easily answered. As previously stated, *MCR 7.210(B)(2)* does apply to this case. As to the Court's second question of effect, the People would submit that it should have no effect. The People say this for several reasons. First, the People are confident that neither the Court of Appeals nor this Court will ever rule that a criminal defendant's failure to comply with *MCR 7.210(B)(2)* results in forfeiture of an issue when the issue involves a communication between the trial court and the jury. Secondly, the People are confident that the second option rejected by the Court of Appeals, the option of remanding for compliance with *MCR 7.210(B)(2)*, would have made no difference in this case. The People say this because the People believe that remand would produce a settled statement of facts similar to Judge Miller's statement at sentencing. That is, Judge Miller told the jury to rely on their notes, the jury instructions, and their recollection of the testimony. Thus, the Court of Appeals would have been left with the same two options it was presented with without compliance with *MCR 7.210(B)(2)*: (1) Whether the record that was available was sufficient to evaluate the Defendant's claim; and, (2) Whether the Defendant's right to a meaningful review was impeded by his inability to obtain a transcript and required a new trial.

Since the People believe that the Defendant's failure to comply with *MCR 7.210(B)(2)* would have had no effect on the Court of Appeals decision in this case, the People would submit that the Court's grant of its Application for Leave should be determined on the basis of the People's Brief in Support of Application. That is, the trial court's action of answering the jury's question by telling the jury that it should rely on the instructions it had been given did not require reversal even though the Defendant was not present in the courtroom because the trial court did not reinstruct the jury.

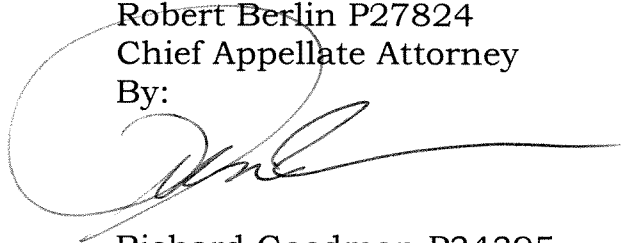
**RELIEF REQUESTED**

The Plaintiff-Appellant requests that this Honorable Court **GRANT** the Plaintiff-Appellant's Application For Leave To Appeal.

Respectfully submitted,

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Macomb County, Michigan

Robert Berlin P27824  
Chief Appellate Attorney  
By:

A handwritten signature in black ink, appearing to read 'Richard Goodman', is written over the text 'By:'. The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Richard Goodman P34395  
Assistant Prosecuting Attorney

DATED: June 12, 2009.