

STATE OF MICHIGAN
IN THE SUPREME COURT

THE PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

v.

STEVEN J. HOCH,
Defendant-Appellee.

Supreme Court
No. 137908

Court of Appeals
No. 269739

Circuit Court
No. 05-003002-FH

DEFENDANT-APPELLEE'S SUPPLEMENTAL ARGUMENT AFTER
COURT'S MAY 1, 2009 ORDER

PROOF OF SERVICE

137908
DFAE's SUPP

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STATEMENT OF APPELLATE JURISDICTION

Defendant-Appellee does not contest that this Court has jurisdiction pursuant to MCR 7. 302(C)(4).

QUESTION PRESENTED

WHAT EFFECT DOES MCR 7.210(B)(2) HAVE, WHERE THE PLAIN LANGUAGE OF THE RULE, AS PRESENTLY CONSTITUTED, DOES NOT ALLOW FOR PRACTICAL, REAL WORLD COMPLIANCE AND PROVIDES NO EXPRESS ALTERNATIVE PROCESSES?

Defendant-Appellant answers	“no”
Plaintiff-Appellee would answer	“yes”

STATEMENT OF FACTS

Background.

A more detailed recitation of the background facts may be found in Defendant-Appellee's previously-filed answer to the application. In short, Steven Hoch was convicted by a Macomb County Circuit Court jury of the four offenses of unarmed robbery, MCL 750.530; fourth-degree flee and elude an officer, MCL 257.602a(2); larceny (under the value of \$200.00) from a motor vehicle (second offense), MCL 750.356a(2)(a); and driving while license suspended, second offense, MCL 257.904((3)(a) (Trial transcript ("TT"), 2/27/2006, p. 3). Mr. Hoch was sentenced by Judge Donald Miller as an habitual fourth offender under sentencing guidelines of a level E – III, with a range of 29 to 114 months, to 114 to 180 months for the unarmed robbery conviction; 24 to 48 months for the flee and elude; and 234 days on the remaining two offenses, with credit for 234 months (Sentence transcript, 4/06/2006, pp. 32-33; 46-47).

Mr. Hoch appealed by right to the Court of Appeals and raised four issues through counsel and, also, five issues in his *pro se* Standard 4 supplemental brief. The Court of Appeals on October 30, 2008 issued its opinion reversing the cause for a new trial on the basis that "Judge Miller indisputably responded to the jury's question regarding a substantive legal issue in the absence of defendant or his counsel, and off the

record,” and that prejudicial constitutional error necessitated reversal (*People v Steven James Hoch*, unpublished pre curiam opinion of the Court of Appeals decided October 30, 2008 (Docket No. 269739), p. 5).

Plaintiff-Appellant applied for leave to appeal in this Court in December, 2008 and the Court on May 1, 2009 issued an Order directing the Clerk to schedule oral argument. Additionally, in the Order Justices Corrigan and Young directed that the parties address the applicability and effect of MCR 7.210(B)(2).

Mr. Hoch believes the previously-filed answer to the application addressed the substantive issue, and focuses his attention here on MCR 7.210(B)(2).

ARGUMENT

THE PLAIN LANGUAGE OF MCR 7.210(B)(2), AS PRESENTLY CONSTITUTED, DOES NOT ALLOW FOR PRACTICAL, REAL WORLD COMPLIANCE AND PROVIDES NO EXPRESS ALTERNATIVE PROCESSES.

By its plain language, MCR 7.210(B)(2) directs that an appellant shall, within 14 days after filing the claim of appeal, serve and file a proposed statement of facts. MCR 7.210(B)(2)(a). The Rule provides no alternative mechanism. The instant case provides a good example of how strict compliance is not practicable, and how an appellant may, in an effort both to substantially comply with the Rule and to protect the appellant's rights on appeal, present to the reviewing a record adequate for review.

Mr. Hoch's Claim of Appeal issued April 14, 2006 was filed April 18, 2006; the order also assigned appellate counsel and ordered the production of certain transcripts. Those specific transcripts were filed May 22, 2006. When the initially-ordered transcripts were filed the 14-day time-period specified under MCR 7.210(B)(2)(a) had already expired.

Initial assigned appellate counsel moved to withdraw and the undersigned was assigned as substitute appellate counsel September 13, 2006 [see the Court of Appeals' docket entries; a copy is attached as Appendix A]. The undersigned determined that additional transcripts were required to protect Mr. Hoch's right to appeal, and learned that one

of the previously-filed volumes of transcript was likely incomplete, for it did not contain a re-instruction of the jury. The court reporter was contacted in December, 2006 concerning the missing transcript, and a motion for leave to file late transcripts was also filed and granted in January, 2007. In March, 2007 the court reporter, David Cucinella, ascertained that there was no record for the re-instruction; that information was then provided to Court of Appeals. The 14-day time-period specified under MCR 7.210(B)(2)(a), by the time the missing re-instruction had been discovered and verified by Mr. Cucinella, had already expired almost 11 months previously. Strict compliance with the Rule was not possible.

Primary concerns in any appeal, Mr. Hoch suggests, are to protect and present the meritorious issues to the reviewing court, comply with applicable rules, and, also, to maintain efficiency and judicial economy. Strict compliance with MCR 7.210(B)(2)(a), on its face, would by necessity mean Mr. Hoch's constitutional right to appeal could not be presented. Substantial compliance with the perceived aim of the Rule, that is, to ensure that the reviewing court has an adequate record from which to review the claimed error on appeal, by necessity becomes the practicable, real world alternative to strict compliance.

An appellant who does not comply with the Rule, or who fails to

present an adequate record to the Court of Appeals, runs the risk of either having the issue deemed abandoned, or having the issues subject to plain error review. See, for example, *People v Johnson*, 173 Mich App 706; 434 NW2d 218(1988); *People v Carines*, 460 Mich 750; 597 NW2d 130 (1999); and, by analogy, *People v Elston*, 462 Mich 751, 761; 614 NW2d 595 (2000)(“As the appellant below, defendant bore the burden of furnishing the reviewing court with a record to verify the factual basis of any argument upon which reversal was predicated”); also, addressing an ineffective assistance of counsel claim, *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973)(“If the made before a defendant is convicted does not factually support claims he wishes to urge on appeal, he should move in the trial court ... Without record evidence supporting the claims, neither the Court of Appeals nor we have a basis for considering them”).

Where a record is sufficient to allow the reviewing court to evaluate the claims in an appeal, then the defendant’s constitutional right to appeal is protected. See *People v Audison*, 126 Mich App 829, 834-835; 338 NW2d 235 (1983)(“if the surviving record is sufficient to allow evaluation of defendant’s claims on appeal, defendant’s right is satisfied; the sufficiency of the record depends upon ‘the questions which must be asked of it’”). *Id.* at 835, quoting *People v Wilson (On Rehearing)*, 96 Mich App 792, 797; 293 NW2d 710 (1980).

In the instant case we have the trial court's finding; Judge Miller stated on the record that 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*" (ST, p. 39)(emphasis supplied). Mr. Hoch at that same proceeding advised the court that neither he nor his counsel were present when Judge Miller charged the jury (*Id.* at p. 38). Mr. Cucinella ascertained there was no record of Judge Miller's instruction to the jury. The identity of the 'stand-in' counsel was unknown. A record adequate for review exists; that is, we know from Judge Miller his version, we know that neither Mr. Hoch nor his attorney of record were present, we know that no contemporaneous record of the re-instruction to the jury was made, and we know Judge Miller failed to address the substance of the jury question about inadvertent assault. By providing the Court of Appeals with an adequate record to address the issue Mr. Hoch substantially complied with the purpose of the Court Rule. Strict compliance was impossible, for the missing portion of the transcript could not be ascertained until well-beyond the short time-limit contained

within Rule.

While strict compliance was not feasible, the existing portions of the record were adequate for the Court of Appeals' majority to correctly assess and rule upon Mr. Hoch's claims.

Mr. Hoch respectfully suggests that to avoid confusion in other cases, the Rule should be amended to present practical alternative mechanisms for settling the record.

RELIEF REQUESTED

WHEREFORE, defendant-appellee Steven James Hoch requests this Honorable Court deny the Plaintiff-Appellant's application for leave to appeal.

Respectfully submitted,



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Dated: June 10, 2009