Expanding the Facts on Appeal: Motions to Remand, Evidentiary Hearings, and Judicial Notice

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I. MOTIONS TO REMAND

After the 56-day period of concurrent jurisdiction, a defendant is required to file a motion to remand in the Court of Appeals in order to return to the trial court and develop the factual record in support of an appellate issue. MCR 7.211(C)(1)(a)(ii). To be entitled to a remand, a defendant must show (by affidavit or offer of proof) that there are facts to support his claims. See MCR 7.211(C)(1)(a). If a motion to remand is granted, further proceedings in the Court of Appeals are stayed until completion of the proceedings in the trial court, unless the Court of Appeals orders otherwise. MCR 7.211(C)(1)(d).

A. Timelines

To be timely, the motion to remand must be filed within the time for filing the appellant's brief on appeal. MCR 7.211(c)(1).

- A motion for extraordinary extension that extends the time to file the brief on appeal also extends time to file a (timely) motion to remand.
- The Court of Appeals, however, may order remand for an evidentiary hearing at any time. MCR 7.216(A)(5); *see also People v LaPlaunt*, 217 Mich App 733 (1996); *People v Krogol*, 419 Mich 900 (1984); *People v Mayes*, 433 Mich 894 (1989).
- When filing an untimely motion, cite the above statute and case law and provide an explanation for the delay.

B. The Offer of Proof

A motion to remand under MCR 7.211(C)(1)(a)(ii) must be supported by affidavit or offer of proof regarding the facts to be established at a hearing. MCR 7.211(C)(1)

- A motion that makes overly general allegations or one that makes allegations without proof will not be granted.
- If you assert that individuals will provide specific testimony, include affidavits from those individuals.

Example Offer of Proof:

- Where a defendant asserts that trial counsel was ineffective for failing to investigate and present a witness at trial, the offer of proof should include an affidavit from the witness establishing his/her favorable testimony, as well as an affidavit or offer of proof addressing trial counsel's failure to investigate the witness prior to trial.

C. What to do if the Motion to Remand is Denied

- Motion for reconsideration. See MCR 2.119(F)
- When appropriate, consider a second motion to remand.

    - E.g. if you continue to investigate and obtain more supporting evidence or uncover additional issues
    - Look at the language of the order denying your motion. Does it leave open the possibility of a renewed motion?
- Seek to supplement the brief on appeal and again request that the Court remand if it finds the record insufficient. Cf. *People v Jackson*, 487 Mich 783 (2010).
- Argue the need for an evidentiary hearing at oral argument.
- Challenge the denial of the Motion to Remand in an Application for Leave to Appeal to the Michigan Supreme Court. See *People v Sparks*, 435 Mich 876 (1990).

II. EVIDENTIARY HEARINGS

If the record made before a defendant is convicted does not factually support claims he wishes to urge on appeal, he should move in the trial court for a new trial or, where the conviction is on a plea of guilty, to set aside the plea, and seek to make a separate record factually supporting the claims. *People v Ginther*, 390 Mich 436, 441–442 (1973). The most common appellate issues requiring evidentiary hearings concern claims of ineffective assistance of counsel and newly discovered evidence.

A. Ineffective Assistance of Counsel

"When a defendant asserts that his assigned lawyer is not adequate or diligent or asserts . . . that his lawyer is disinterested, the judge should hear his claim and, if there is a factual dispute, take testimony and state his findings and conclusion." *Ginther*, 390 Mich at 441–442.

To prevail on an ineffective assistance of counsel claim, a defendant must meet two criteria. He must first "show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not performing as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland v Washington*, 466 US 668, 687 (1984); *People v Pickens*, 446 Mich 298 (1994). In so doing, the defendant must rebut a presumption that counsel's performance was the result of sound trial strategy. *Id.* at 690. Second, the defendant must show the deficient performance was prejudicial. *Id*. at 687. Prejudice is established where there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id*. at 694; *People v LaVearn*, 448 Mich 207 (1995).

B. Newly Discovered Evidence

A new trial may be granted on the ground of newly discovered evidence. *People v Cress*, 468 Mich 678, 692 (2003). Where this relief is warranted, a defendant must show:

(1) the evidence itself, not merely its materiality, is newly discovered. *Id*. In order for evidence to be considered newly discovered, the defendant and trial counsel must not have been aware of the existence of the evidence at trial. *See People v Dickson*, 217 Mich App 400, 409-10 (1996).

(2) the newly discovered evidence is not cumulative. *Cress*, 468 Mich at 692. "[N]ewly discovered evidence is not cumulative [when] defendant did not … present evidence of the same kind to the same point at trial." *People v Grissom*, 492 Mich 296, 320 n 41 (2012).

(3) the party could not, using reasonable diligence, have discovered and produced the evidence at trial, *Cress*, 468 Mich at 692; and,

(4) the new evidence makes a different result probable on retrial. *Cress*, 468 Mich at 692.

C. The Judge's Role in Evaluating Credibility

In order to assess whether there would be a reasonable probability of a different outcome, the trial court must first determine whether the evidence is credible, by considering "all relevant factors tending to either bolster or diminish the veracity of the witness's testimony." *People v Johnson/Scott*, 502 Mich 541, 566–67 (2018). "A trial court's credibility determination is concerned with whether a *reasonable juror* could find the testimony credible on retrial"— not whether the judge herself finds it credible. *Id.*at 567 (emphasis in original) Next, where the new evidence cannot be deemed so inherently incredible that no reasonable juror would believe it, the trial court must consider whether a reasonable juror would find the new evidence sufficiently credible, when considered in combination with the evidence presented at trial, to create a reasonable probability of a different outcome. *Id*.

III. JUDICIAL NOTICE

Courts may take judicial notice of adjudicative and legislative facts. Adjudicative facts are the facts of a particular case, *i.e.* those that normally are presented to the trier of fact, whereas legislative facts are those "which have relevance to legal reasoning and the lawmaking process, whether in the formulation of a legal principle or ruling by a judge or court or in the enactment of a legislative body." FRE 201, Advisory Committee Notes. Generally, legislative facts are those that a court relies on when developing a particular law or policy and involve material unrelated to the activities of the parties. *Qualley v Clo-Tex International, Inc.*, 212 F3d 1123 (CA 8, 2000).

MRE 201 governs judicial notice of adjudicative facts, not legislative facts. MRE 201(a). A court has discretion whether to take judicial notice of adjudicative facts. MRE 201(c). A court may take judicial notice of adjudicative facts at any stage of the proceeding, MRE 201(e), but parties, on request, have right to be heard on the propriety of taking judicial notice. MRE 201(d). When a court takes judicial notice of a fact at trial, it must instruct the jury in a civil case that the judicially-noticed fact is conclusive and instruct a jury in a criminal case that it may, but is not required to, accept the fact as conclusive. MRE 201(f).

Under MRE 201, an adjudicative fact is one "not subject to reasonable dispute" because it is either "generally known within the territorial jurisdiction of the trial court" or "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." MRE 201(b).

Examples of facts of which the Court of Appeals has determined are appropriate for judicial notice are:

- Court records, *In re Contempt of Calcutt*, 184 Mich App 749 (1990),
- The DSM-IV and its content, *People v Kahley*, 277 Mich App 182 (2007),
- That the City of Detroit is located in Wayne County, *People v Stokes*, 312 Mich App 181 (2015), and
- That no football game between Washington and Dallas, or any other professional football team, was televised on December 24, 1976, *People v Burt*, 89 Mich App 293 (1979).

Examples of facts the Court of Appeals has held are not subject to judicial notice are:

- How long a toilet takes to cycle after being flushed, *People v US Currency*, 158 Mich App 126 (1986), and
- The configuration of a multi-family flat (whether a flat has access to the basement), *People v Toodle*, 155 Mich App 539 (1986).

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