STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL DANIEL CHARO,

Defendant-Appellant.

UNPUBLISHED
December 17, 1996

No. 163186
LC No. 92-001177

Before: Markey, P.J., and Holbrook, Jr., and M.J. Matuzak,* JJ.

PER CURIAM.

Appellant Michael Daniel Charo appeals by leave from a Bay County Circuit Court jury verdict resulting in conviction of forfeiting bond in a criminal proceeding, MCL 750.199a; MSA 28.396(1), raising the issue on appeal whether there was sufficient evidence at trial to support his conviction. We reverse.

Defendant was charged in Bay Circuit Court with delivery of cocaine under 50 grams. Preliminary examination on that charge was scheduled for January 30, 1992, at 2:30 p.m. in the district court. Defendant was not represented by counsel up to that point in the proceedings. The case was called for preliminary examination at 3:20 p.m., fifty minutes late. Defendant was not present in the court, and it is claimed that his $2,500 bail bond was accordingly forfeited. Defendant was charged with violating MCL 750.199a; MSA 28.396(1), commonly known as the absconding on or forfeiting bond statute. After a jury trial, defendant was convicted as charged and sentenced to serve three years probation.

The principal issue on appeal is whether sufficient evidence was presented by the prosecution to survive a motion for a directed verdict, duly made at the close of the prosecution's proofs. Up to that point in the proceedings, the prosecution had adduced the testimony of John Buczek, a Bay City police officer who was involved in the prosecution of defendant on the cocaine charge. Buczek testified that he was present when the case was called for preliminary examination at 3:20 p.m. and that defendant was neither in the courtroom nor in the hallway. Officer Buczek's testimony was the only evidence

* Circuit judge, sitting on the Court of Appeals by assignment.

offered by the prosecution in its case-in-chief, although it additionally offered two exhibits that were introduced into evidence. The first was a set of certified records from the district court, the second was a transcript of the proceedings held on January 30, 1992, when defendant's case was called for preliminary examination.

The most important document is one dated February 3, 1992, signed by the presiding district court judge. This is a form order, the form of which has been approved by the Supreme Court Administrator's office, entitled "Ordering Forfeiting Bail Bond and Notice of Intent to Enter Judgement". The order declares that, because of defendant's failure to appear for preliminary examination as scheduled on January 30, 1992, the bond is forfeited, and it notifies defendant that he has 28 days in which to surrender himself to the court or satisfy the court that he cannot surrender and that the inability to surrender is not his fault. Otherwise the notice indicates that judgment in the full face amount of the bond, plus costs, will be entered.

Because the issue presented concerns the sufficiency of the evidence, and defendant moved for directed verdict at the close of the prosecution's proofs, it is proper to focus only on the evidence adduced in the prosecution's case-in-chief. *People v DeClerk*, 400 Mich 10; 252 NW2d 782 (1977).

The statute under which defendant was charged provides:

> Any person who shall abscond on or forfeit a bond given in any criminal proceedings wherein a felony is charged shall be deemed guilty of a felony. [MCL 750.199a; MSA 28.396(1).]

The prosecution introduced evidence that defendant gave a bond in criminal proceedings in which a felony was charged, namely, the delivery of cocaine. The question is whether any evidence was introduced from which a rational trier of fact could find beyond a reasonable doubt that defendant "absconded on or forfeited" such bond.

The order of forfeiture does not establish that, in fact, a forfeiture occurred and remained in effect at the time of defendant's trial. MCL 767.15; MSA 28.955 provides:

> (a) If such bond or bail be forfeited, the court shall enter an order upon its records directing the disposition of the cash, check, or security within 45 days of the order. The treasurer or clerk, upon presentation of a certified copy of such order, shall dispose of the cash, check, or security pursuant to the order. The court shall dispose of the cash, check, or security pursuant to the order. The court shall set aside the forfeiture and discharge the bail or bond, within one year from the time of the forfeiture judgement, in accordance with subsection (2) if the person who forfeited bond or bail is apprehended, the ends of justice have not been thwarted, and the county has been repaid its costs for apprehending the person.

Under this statute, assuming a forfeiture occurred, defendant would have had one year in which to have the forfeiture set aside, either by surrendering himself or by being apprehended and paying the costs of apprehension, unless the ends of justice were thwarted.

No evidence was introduced to indicate that the ends of justice in the cocaine prosecution were thwarted—for example, no evidence was introduced that the chief witness for the State died, or became incompetent, or that defendant's absence caused a double jeopardy problem which precluded the prosecution from being resolved on the merits. Indeed, according to the lower court record in this case, defendant was arrested March 11, 1992, on the new charges, so the delay was only six weeks or less.

In any event, the foregoing statute does not apply because defendant did not post cash, check, or securities, but a surety bond provided by Kozy Bail Bonds Company. MCL 765.15; MSA 28.902 does not apply to surety bonds. *People v Evans*, 434 Mich 314; 454 NW2d 105 (1990). This also means that the district court could not properly have forfeited defendant's bail. When a surety bond is posted, MCL 765.29; MSA 28.916 provides:

> In addition to any other method available, it is hereby provided that whenever default shall be made in any recognizance in any court of record, the same shall be duly entered of record by the clerk of said court and thereafter said court, upon the motion of the Attorney General, prosecuting attorney, or city attorney, may give the surety or sureties 20 days notice, which notice shall be served upon said surety or sureties in person or left at his or their last known place of residence. Said surety or sureties shall be given opportunity to appear before the court on a day certain and show cause why judgment should not be entered against him or them for the full amount of such recognizance.

The record below indicates that the district court did not follow either statutory procedure for forfeiting a bond. The court did not allow defendant one year in which to be apprehended or to submit himself to the jurisdiction of the court and have the forfeiture set aside, see MCL 765.15; MSA 28.902, nor did it issue notice to the surety, prior to forfeiture, setting forth a day certain to appear and show cause why judgment should not be entered, see MCL 765.29; MSA 28.916. The form created by the Supreme Court Administrator's Office simply does not accord with any known statutory procedure for forfeiting a bail bond in criminal cases.

Accordingly, there was insufficient evidence that defendant's bond was "forfeited," which is one way of prosecuting a charge under MCL 750.199a; MSA 28.396(1) and a directed verdict was appropriate as to the issue of forfeiture.

The other prong allows the prosecution to succeed if it can prove that defendant absconded on a bond. Only once has a Michigan appellate court defined that term:

> "Absconding," in the eye of the law, means something more than a temporary absence for health. It involved a design to withdraw clandestinely, to hide or conceal one's self, for the purpose of avoiding legal proceedings. The court not only found an absence of such intent, but the facts found are consistent with the absence of such intent.

McMorran v Morre, 113 Mich 101, 104; 71 NW 505 (1897). *McMorran* indicates absconding required proof that the defendant intended to, and did, "withdraw clandestinely," or hide or conceal himself for the purpose of avoiding legal proceedings. Absconding is therefore clearly different in character from forgetting to attend a scheduled court proceeding while on bond, or from leaving before one's case is called, from impatience or other rash motivation, after appearing at the appointed time.

There was absolutely no proof that defendant could not readily have been found and apprehended in his usual haunts, i.e., at his regular place of residence or his regular place of employment or both. No evidence was introduced that defendant left the jurisdiction of the court or the boundaries of the State. The only evidence introduced was that defendant was not present in court when his case was called fifty minutes after the time specified in the notice to appear. That may have been a foolish act by defendant, it may have been a contempt of court or even a violation of the contractual conditions of his bond, but was not a felony. When proceeding under the absconding prong of this bifurcated statute, the prosecution must prove that defendant did in fact abscond. *People v Litteral,* 75 Mich App 38; 254 NW2d 643 (1977).

Defense counsel moved for a directed verdict at the close of prosecutor's proofs. At that point, the only proofs were the testimony of Officer Buczek, who testified that defendant had said he was in court at the scheduled time for the preliminary examination, and the transcript of the January 30, 1992, proceeding which indicated that the case was called 50 minutes after defendant was scheduled to be in court and defendant was not present. At this point, no issue of credibility was presented since no defense witness or rebuttal witness had testified. Even taking the facts in a light most favorable to the prosecutor, the prosecution did not establish its case and it was not a fair inference to assume that defendant was not present at 2:30 p.m.

The issue of the standard to be applied in a felony prosecution for forfeiture of a bond has been addressed in *People v Rorke,* 80 Mich App 476; 264 NW2d 30 (1978), which held that "a felony prosecution for forfeiture of a bond requires a minimal showing that a defendant recklessly neglected or disregarded a known obligation to appear and defend." Reviewing the record before us it cannot be reasonably argued that a showing was made that Defendant recklessly neglected or disregarded his obligation to appear and defend as the testimony of Officer Buczek indicates. Defendant asserts that he was present in court at the appointed time even though he apparently made the decision to leave at some time before the case was called fifty minutes after the scheduled time. Hence, there was no evidence, when the prosecution rested, either that defendant absconded while on bond for a felony charge, or that the bond defendant posted in conjunction with a felony charge had been *validly* forfeited (let alone that any purported forfeiture remained in effect).

Where, as here, the proofs adduced at trial are insufficient to create a jury submissible issue of fact in a criminal prosecution, the only proper appellate remedy is to reverse the conviction and order that defendant be discharged. Double jeopardy precludes a remand for retrial or any other means of supplementing the proofs. *Burks v United States,* 437 US 1; 98 S Ct 2141; 57 L Ed 2d 1 (1978). It is again important to note that defendant's motion for directed verdict, properly made at the close of prosecution's proofs, after the prosecution rested its case-in-chief, limits the evidence which may be

considered to that introduced up to that point in the trial; whatever evidence was later developed in the trial may not be considered, either by the trial court or this Court, in evaluating whether the motion for directed verdict should have been granted. *People v Garcia,* 398 Mich 250, 256; 247 NW2d 547 (1976).

Reversed.

/s/ Michael J. Matuzak