STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED October 1, 2013
v	No. 302795 Genesee Circuit Court
CHASON WILLIAM-GREGORY POINTER, Defendant-Appellee.	LC No. 10-026419-FH

Before: FORT HOOD, P.J., and METER and MURRAY, JJ.

PER CURIAM.

ON REMAND

The prosecution appeals as of right from an order directing a verdict of acquittal. In an earlier unpublished opinion, we concluded that the trial court erred in failing to let the case go forward on the basis of defendant's possession of more than 12 marijuana plants. *People v Pointer (Pointer I*), unpublished opinion per curiam of the Court of Appeals, issued October 11, 2012 (Docket No. 302795), slip op at 3-4. In an order entered April 29, 2013, the Michigan Supreme Court, in lieu of granting leave, vacated our decision and remanded for reconsideration in light of *Evans v Michigan* (*Evans III*), 568 US ___; 133 S Ct 1069; 185 L Ed 2d 124 (2013). *People v Pointer* (*Pointer II*), 493 Mich 967; 829 NW2d 211 (2013). We hold that the United States Supreme Court's reversal of the Michigan Supreme Court's decision in *People v Evans* (*Evans II*), 491 Mich 1; 810 NW2d 535 (2012), vacated 493 Mich 959 (2013), now compels the conclusion that retrial of defendant in this case is barred by federal constitutional double-jeopardy principles.[1] Accordingly, we affirm the result in the trial court, regardless of the merits of the decision to direct a verdict of acquittal.

[1] The Fifth Amendment double-jeopardy protections are deemed to apply to the states through operation of the Due Process Clause of the Fourteenth Amendment. *Benton v Maryland*, 395 US 784, 794; 89 S Ct 2056; 23 L Ed 2d 707 (1969).

I. FACTUAL BACKGROUND

Defendant was charged with manufacturing 20 or more but less than 200 marijuana plants, MCL 333.7401(2)(d)(*ii*).[2] At trial, defendant invoked his status as a registered patient under the Michigan Medical Marihuana Act (MMMA), MCL 333.26421 *et seq*.,[3] and moved for a directed verdict on the grounds that the prosecution failed to present evidence to show that he possessed more than the 2.5 ounces of usable marijuana that a registered patient may possess under the MMMA and also failed to establish a precise plant count, leaving in doubt whether he possessed more than the 12 marijuana plants allowed under the act. See MCL 333.26424(a). The trial court held that the prosecution had presented sufficient evidence to show that defendant possessed more than 12 plants, but further held that the prosecution had to *also* prove that the amount of usable marijuana in defendant's possession exceeded 2.5 ounces. The trial court ultimately granted defendant's motion for a directed verdict because the prosecution failed to establish this second point.

We reversed the acquittal, concluding that the trial court misinterpreted the law and that defendant could be convicted if he possessed more than 12 plants *or* more than 2.5 ounces of useable marijuana. *Pointer I*, slip op at 3. Relying on the Michigan Supreme Court's holding in *Evans II*, we stated:

> "[W]hen a trial court grants a defendant's motion for a directed verdict on the basis of an error of law that did not resolve any factual element of the charged offense, the trial court's ruling does not constitute an acquittal for the purposes of double jeopardy and retrial is therefore not barred." [*Id.*, slip op at 4, quoting *Evans II*, 491 Mich at 25.]

We must now determine whether the trial court's directed verdict of acquittal bars retrial in light of the United States Supreme Court's holding in *Evans III*.

II. *EVANS*

In *Evans*, the defendant was charged with burning "other real property," in violation of MCL 750.73, for burning an unoccupied home. *Evans III*, 133 S Ct at 1073. Evans moved for a directed verdict of acquittal, relying on the Michigan Criminal Jury Instructions, which provided as an element of the offense "'that the building was not a dwelling house.'" *Id*., quoting CJI2d 31.3. Evans argued that MCL 750.72, criminalizing common-law arson, requires that the structure be a dwelling house, and a charge under MCL 750.73 covers all other real property that is *not* a dwelling house. *Evans III*, 133 S Ct at 1073. The trial court agreed; because the

---

[2] MCL 333.7401 was amended after defendant's trial, but the amendment did not affect the provision at issue.

[3] Although the statutes use the spelling "marihuana," we use the more common spelling "marijuana" in this opinion.

building at issue *was* a dwelling house, the trial court granted Evans's motion for directed verdict. *Id*.

On appeal, "it was 'undisputed that the trial court misperceived the elements of the offense with which [Evans] was charged and erred by directing a verdict.'" *Id*. at 1073-74, quoting *People v Evans* (*Evans I*), 288 Mich App 410, 416; 794 NW2d 848 (2010), vacated 493 Mich 959 (2013). This Court reversed Evans's acquittal and held, in part:

> Because the trial court never resolved, or even addressed, a factual element necessary to establish a conviction for burning other real property, and instead based the directed verdict solely on the determination that the prosecution had failed to present any evidence establishing a nonelement of the offense, double jeopardy principles do not preclude further prosecution of the charged offense. [*Id*. at 423.]

The Michigan Supreme Court agreed. *Evans II*, 491 Mich at 25. However, the United States Supreme Court reversed the Michigan Supreme Court's decision, reasoning:

> There is no question the trial court's ruling was wrong; it was predicated upon a clear misunderstanding of what facts the State needed to prove under State law. But that is of no moment. [Case law] instruct[s] that an acquittal due to insufficient evidence precludes retrial, whether the court's evaluation of the evidence was "correct or not," and *regardless of whether the court's decision flowed from an incorrect antecedent ruling of law*. [*Evans III*, 133 S Ct at 1075-1076 (citations omitted; emphasis added).]

The United States Supreme Court in *Evans* held that a midtrial acquittal based on the trial court's erroneous addition of a statutory element is an acquittal for double-jeopardy purposes. *Id*. at 1073.

III. APPLICABILITY OF *EVANS* TO THE INSTANT CASE

A. RETROACTIVITY

This Court has not sought, and the parties have not proposed to offer, supplemental briefing in this case regarding the retroactivity of *Evans III*. However, we conclude that *Evans III* is to be applied retroactively to the instant case.

"[E]x post facto principles are applicable to the judiciary by analogy through the Due Process Clauses of the Fifth and Fourteenth Amendments." *People v Doyle*, 451 Mich 93, 100; 545 NW2d 627 (1996). Retroactive application of a judicial decision will only violate due process when it acts as an ex post facto law, which is a law "that makes an action done before the passing of the law, and which was *innocent* when done, criminal; and punishes such action, or that *aggravates a crime*, or makes it *greater* than it was, when committed." *Id*. (internal quotation marks and citation omitted; emphasis in original). "'[P]rospective application of a holding is appropriate when the holding overrules settled precedent or decides an issue of first impression whose resolution was not clearly foreshadowed." *People v Parker*, 267 Mich App 319, 326-27; 704 NW2d 734 (2005) (internal quotation marks and citations omitted). No

concerns about retroactive application exist in the instant case. The United States Supreme Court in *Evans III* repeatedly presented its double-jeopardy analysis as a simple reiteration of its longstanding jurisprudence. *Evans III*, 133 S Ct 1074-1076.

In addition, the Michigan Supreme Court's remand order calling for application of *Evans III* included no suggestion that the decision might be sidestepped for having only prospective application, implying that *Evans III* should be applied retroactively. *Pointer II*, 493 Mich at 967. We also note that the parties have argued the double-jeopardy issue throughout the current appellate process. See *City of Westland v Kodlowski*, 298 Mich App 647, 671; 828 NW2d 67 (2012).

B. APPLICATION

In light of the United States Supreme Court's decision in *Evans III*, we are compelled to affirm the trial court's acquittal of defendant in the instant case and to disallow retrial.

The instant case involves a substantially similar situation to that in *Evans*. The trial court in *Evans* directed a verdict of acquittal on the grounds that the prosecution had failed to prove what the court erroneously thought was an element of the charged crime. *Evans III*, 133 S Ct at 1073. In this case, the trial court likewise directed a verdict of acquittal on the grounds that the prosecution had failed to prove an element that in fact did not have to be proven. This was an acquittal based on a misapprehension of the law and an application of that misapprehension to the facts (i.e., an apparent lack of evidence concerning whether defendant possessed 2.5 ounces of useable marijuana), and *Evans III* indicates that double-jeopardy principles bar retrial. *Evans III*, 133 S Ct at 1081.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Patrick M. Meter
/s/ Christopher M. Murray