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THE PASTOR, THE BURNING HOUSE, AND THE DOUBLE JEOPARDY CLAUSE: THE TRUE STORY BEHIND *EVANS V. MICHIGAN*

David A. Moran*

On February 20, 2013, the Supreme Court ruled eight–one in *Evans v. Michigan* that the Fifth Amendment Double Jeopardy Clause barred the State of Michigan from retrying my client, Lamar Evans, for the crime of “burning other real property” because the trial judge had granted Evans’s midtrial motion for a directed verdict of acquittal.¹ The Court held that such an acquittal is final, even though the trial judge’s reason for granting that acquittal—that the prosecution was required to prove that the building burned was not a dwelling house and had failed to do so—was completely wrong as a matter of law.

In his dissent, Justice Alito set forth the facts of the case as he distilled them from the Michigan Supreme Court’s opinion: Detroit police officers arrested Evans after they saw him running away from a burning house holding a gasoline can, and Evans subsequently admitted to the officers that he had set the fire.² Alito bitterly complained that Evans had received an “undeserved benefit.”³ The majority opinion, written by Justice Sotomayor, did not deny that a trial judge’s legally erroneous acquittal amounts to a “windfall” for a defendant such as Evans.⁴

Anyone who reads the *Evans* opinions will therefore conclude that this was a case in which the Court was forced to let a manifestly guilty criminal walk free in order to vindicate a constitutional principle. Having argued the case, I am certain that the justices themselves believed that Evans would have been convicted but for the trial judge’s error.

I therefore write this Essay to set the record straight. The true story behind *Evans v. Michigan* is that a man who was probably innocent, and

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1. 133 S. Ct. 1069, 1073 (2013). The trial judge’s error was understandable because she relied on standard jury instructions and the commentary to those instructions—both of which indicated that the prosecution did indeed have to prove that the building burned was not a dwelling house. *See Evans v. Michigan*, 133 S. Ct. at 1073 & n.2.

2. *Id.* at 1082 (Alito, J., dissenting). The Michigan Supreme Court had set forth a slightly more detailed version of the facts in which Evans told the officers that he had burned the house by mistake. *People v. Evans*, 810 N.W.2d 535, 537 (Mich. 2012).

3. *Evans*, 133 S. Ct. at 1084 (Alito, J., dissenting).

4. *Id.* at 1081.

who would almost certainly have been acquitted by the jury, had his trial shortened after it became obvious to the judge that the police had picked up a man who had nothing to do with the fire. In other words, the facts set forth by the Michigan Supreme Court, and repeated by Alito, were grossly misleading. And because I, like Alito, believed the Michigan Supreme Court's version of the facts, I made a silly mistake when I agreed to take the case. That silly mistake cost me thousands of dollars out of my own pocket but taught me a valuable lesson I will never forget.

So here's the real story.

On March 26, 2012, the Michigan Supreme Court issued its decision in *People v. Evans*, ruling four–three that the prosecution could retry Evans, despite his argument that the Double Jeopardy Clause barred retrial. I read the decision online a few hours after it was issued and immediately realized that the decision was impossible to reconcile with several of the U.S. Supreme Court's double jeopardy precedents.

Using the Michigan Supreme Court's electronic database, I looked up Evans's attorney, Jonathan Simon, and called him. When I asked Simon if he planned to file a petition for certiorari with the U.S. Supreme Court, he responded that he was not a member of the Supreme Court Bar. I volunteered to file the petition, with Simon as co-counsel, and Simon agreed to contact Evans to sign a retainer agreement. During my conversation with Simon, he told me a bit more about Evans's confession, as related by the Detroit police officers. According to the officers, Evans had told them that he was a homeless man who burned the vacant house to clear more space on the lot for his encampment.

Following my conversation with Simon, I quickly added two experienced Supreme Court advocates to the team: Richard Friedman, my colleague at the University of Michigan Law School, and Timothy O'Toole, an attorney with Miller & Chevalier in Washington, D.C. We all agreed that the Michigan Supreme Court's decision created a significant split among lower courts on whether a defendant can be retried after the trial court grants a directed verdict based on the prosecution's failure to prove a fact that is not actually part of the charged offense. We also agreed that the case was an excellent vehicle for the issue; there was no question that the judge had granted the directed verdict because the prosecution had failed to prove that the building burned was not a dwelling—a fact that is not actually an element of the charged offense of burning other real property.

About a week after my phone conversation with Simon, he brought Evans to my office to sign a retainer agreement. Given the nature of Evans's alleged confession to the officers, I was expecting a disheveled, mentally ill, homeless man. Instead, a well-dressed, well-groomed, articulate middle-aged man showed up with his beautiful, well-dressed eight-year-old daughter. That should have been my first warning that something was

seriously wrong with the facts in the Michigan Supreme Court's opinion. But the alarm bells did not go off just yet.

Friedman and I explained to Evans that the retainer agreement included our promise to represent him for free and to cover all costs of the litigation. After reading it, Evans signed the retainer. We next handed him the affidavit of indigency that a litigant must fill out to move to proceed *in forma pauperis* in the Supreme Court. Evans filled out the multipage form and then left with his daughter.

After Evans left, Friedman and I looked at the form Evans had filled out and quickly came to a stunning realization: *Lamar Evans was not indigent*. From reading his answers on the form, we learned that, far from being a homeless man living on a vacant lot in Detroit, Evans was the pastor of a church in Toledo, Ohio, where he lived with his wife and child in a home in which they had substantial equity. We also learned that Pastor Evans and his wife both earned substantial incomes at their jobs, had some money in the bank, and owned several cars. In short, not only was Evans not homeless and destitute, he was solidly middle class.

It took a few minutes for Friedman and me to grasp what had just happened. We had signed a binding contract promising to represent a man in the Supreme Court for free because we had *assumed* that he was indigent. If he were indigent, the Court would waive the filing fee and we could file the certiorari petition on standard letter-size paper. But he wasn't indigent. We were now contractually obligated to file the petition for him and personally absorb the costs of paying a printing company thousands of dollars to print the petition and the appendix in booklet format as required by the Court for all non-indigent petitioners.

This realization raised a new question: If Evans was a pastor living a middle-class lifestyle with his family in Ohio, and not a homeless man living in Detroit, what *really* happened when the vacant house burned? It was definitely time for me to read the trial transcript. Here's what I learned:

At the beginning of the trial, held over three days in February 2009, the defense attorney, Henry Scharg, introduced his client as "Pastor Evans." Scharg explained that his client had been in the neighborhood on the evening of the fire to lead a service in the home of Bernadine Bell, a neighbor of the vacant house that burned.⁵ Bell, Scharg told the jury, would testify that Evans could not have started the fire because he was conducting a service in her home when the fire began.⁶ Defense counsel also promised to call another neighbor, Reginald Davis, who had called 911 to report the fire and

5. Transcript of Trial Volume I at 86, *People v. Evans*, No. 08-13567 (Mich. 3d Jud. Cir. Ct. Feb. 20, 2009) [hereinafter Volume I].

6. *Id.* at 87.

would testify that he saw the man who firebombed the house jump into a car and drive away before the police arrived.⁷

Of course, Bell and Davis never got the opportunity to testify because the judge acquitted Evans before the defense began its case. But defense counsel's opening statement indicated that Evans intended to present a substantial challenge to the prosecution's claim that he started the fire.

The prosecution's first two witnesses, Detroit police officers Jermaine Owens and Cyril Davis, related the story that the Michigan Supreme Court and Alito subsequently treated as undisputed fact. Both officers testified that, on the evening of September 22, 2008, they saw Evans running away from a burning house carrying a can of gasoline, they apprehended him after he dropped the gasoline can, and Evans subsequently confessed to the officers that he was a homeless man who had "burned the house down because he needed a full vacant lot."⁸ The officers admitted, however, that Evans did not smell of gasoline when they arrested him and transported him to the police station.⁹ Owens also admitted that after finding the gasoline can several houses from where Evans was arrested, he did not attempt to preserve it to be tested for fingerprints.¹⁰

The prosecution's third police witness, Lieutenant Christopher Smith, told a very different story. Smith, an arson specialist, first confirmed that his investigation of the fire scene showed that gasoline had been used to start the fire inside the vacant house.¹¹ Indeed, Smith agreed that there was a significant odor of gasoline when he entered the house after the fire had been extinguished.¹² Smith then described his interrogation of Evans later that night. In sharp contrast to his supposed confession to Owens and Davis, Evans had insisted to Smith that he was temporarily staying with his aunt who lived in the neighborhood and that he had not started the fire.¹³ Evans explained that the officers had tackled him when he was walking down the

7. *Id.* at 84–85, 87. In his opening statement, Scharg referred to the neighbor as "Clifford Davis," but later corrected the name to "Reginald Davis." *Id.* at 167.

8. *Id.* at 93, 123–24 (testimony of Officer Owens); *id.* at 139–44, 147, 159 (testimony of Officer Davis).

9. *Id.* at 122–23 (testimony of Officer Owens); Transcript of Trial Volume II at 10, *People v. Evans*, No. 08-13567 (Mich. 3d Jud. Cir. Ct. Feb. 20, 2009) [hereinafter Volume II] (testimony of Officer Davis).

10. Volume I at 121, 127. Owens claimed that one could not get fingerprints off of the gasoline can because of its texture, but he admitted that he had earlier testified that he did not bother to preserve the gasoline can because he had seen Evans carrying it. *Id.* at 127–28.

11. Volume II at 45–53.

12. *Id.* at 77.

13. *Id.* at 61–62; Transcript of Trial Volume III at 25–26, *People v. Evans*, No. 08-13567 (Mich. 3d Jud. Cir. Ct. Feb. 20, 2009) [hereinafter Volume III].

street, and that he had not said anything to the two arresting officers.¹⁴ Smith agreed with Owens and Davis that Evans did not smell of gasoline or any other accelerant.¹⁵ Smith also testified that he sent the gasoline can to a crime lab for testing, but no latent prints were found.¹⁶

Smith admitted that he did not speak with Bell or her children, in whose home Evans insisted he was at the time of the fire, before seeking a warrant for Evans.¹⁷ Nor did he ever speak with the other neighbor, Davis.¹⁸ Smith testified that he did eventually speak with Bell, and she confirmed that Evans had been inside her house at the time of the fire.¹⁹

Besides the two arresting officers and Smith, the prosecution presented only two other witnesses, neither of whom incriminated Evans.²⁰ Thus, at the conclusion of the prosecution's case, the judge and jury had heard from two officers who claimed to have arrested a man carrying a gasoline can from a gasoline-caused house fire, but who did not smell of gasoline. They had heard the officers testify that the man confessed to setting the fire because he was homeless and needed the lot. But they had also heard conflicting testimony from a lieutenant, who testified that the man insisted that he was staying with a relative in the neighborhood, had not started the fire, and had not confessed to the officers. They had heard the lieutenant confirm that no fingerprints were found on the gasoline can (found several houses from where Evans was arrested). And they had heard that a neighbor had claimed that Evans was in her house when the fire started and that another neighbor had reported a car driving away from the scene before the police arrived. Finally, from defense counsel's opening statement, they had heard that those two neighbors were scheduled to testify for Evans.

When I spoke to Evans's trial counsel, he confirmed what was, by then, obvious to me: he never should have moved for a directed verdict, as Evans was going to be acquitted. The judge's decision to terminate the trial for any reason was understandable. Having sat through three days of trial and

14. Volume II at 62; Volume III at 25–26.

15. Volume III at 27.

16. *Id.* at 58, 60.

17. Volume II at 84–86.

18. *Id.* at 86–88, 94.

19. *Id.* at 95–96; Volume III at 34.

20. A neighbor, Ricco Johnson, testified to seeing the officers tackle and arrest a man, but stated that he had never seen Evans before. Volume II at 12–18. In addition, Oscar DeMoss testified that he was in the process of purchasing the vacant house and had begun moving his possessions into the house shortly before the fire. Volume III at 78–79. It was DeMoss's testimony that led the trial court to conclude that the prosecution had failed to prove that the burned property was not a dwelling house and that, therefore, Evans was entitled to a directed verdict of acquittal. *Id.* at 93–94.

knowing that the defense was about to present even more exculpatory evidence, the judge must have decided that enough was enough.

The judge's decision to grant Scharg's motion for directed verdict should have meant that Evans's ordeal was over. But, of course, it wasn't; despite a long line of Supreme Court precedents holding that an acquittal is final even if based on legal error, the Michigan courts permitted the prosecution to appeal the judge's acquittal.²¹ Evans remained in limbo for nearly four more years, until the Supreme Court had the final word.

I have learned two lessons from this story. First, sometimes decisions designed to serve another purpose also result in substantive justice. I find it ironic that the Supreme Court reaffirmed that the Double Jeopardy Clause protects even the most manifestly unjust acquittal from reversal in a case in which the acquittal turned out to be entirely just. I have every reason to believe that the trial judge granted Evans's motion for acquittal because she wanted to do justice for a man who was probably innocent. The Supreme Court also achieved substantive justice, even if none of the justices who voted with the majority knew it when they issued the decision.

The second and more important lesson I have learned is to be more skeptical about the facts set forth in a judicial decision. As an appellate advocate, I had become too accustomed to simply accepting as true the facts stated in judicial opinions. After all, perhaps the surest way to guarantee that the Supreme Court will deny a petition for a writ of certiorari is to argue with the facts as stated by the lower court. Therefore, my petition on behalf of Evans simply accepted the facts as set forth by the Michigan Supreme Court, even though they made Evans seem patently guilty. Having accepted those facts as true in the petition, I could not argue that those facts were wrong when I briefed and argued the case to the Court.

Accepting those facts as true did not hurt Evans at all; the double jeopardy issue did not turn in the least on whether Evans was an arsonist or an innocent bystander. But unquestionably accepting those facts as true did cost me. Because it did not occur to me that the lower court's facts might not be accurate, I assumed that my client would be indigent. That assumption ended up costing me thousands of dollars in filing and printing fees. That is a small price to pay for the second lesson I learned but should have known already: never trust that the facts set forth in a court's opinion tell the whole story.

I won't make that mistake again.

21. See *Evans v. Michigan*, 133 S. Ct. 1069, 1074 (2013) ("It has been half a century since we first recognized that the Double Jeopardy Clause bars retrial following a court-decreed acquittal, even if the acquittal is 'based upon an egregiously erroneous foundation.'") (quoting *Fong Foo v. United States*, 369 U.S. 141, 143 (1962) (per curiam)); *id.* (citing six Supreme Court cases decided between 1978 and 2005 for the proposition that "[o]ur cases have applied *Fong Foo's* principle broadly").