

MAR 19 2009

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STATE OF TENNESSEE,)
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Appellant,)
)
v.) RUTHERFORD COUNTY
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MICHAEL CASPER) No. M2006-02538-SCT-R11-CD
)
Appellee.)

STATE OF TENNESSEE,)
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Appellant,)
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v.) RUTHERFORD COUNTY
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MICHAEL CASPER) No. M2006-02538-SCT-R11-CD
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ON APPEAL BY PERMISSION FROM THE
JUDGMENT OF THE COURT OF CRIMINAL APPEALS

BRIEF OF *AMICUS CURIAE*
NORTH AMERICAN SECURITIES ADMINISTRATORS ASSOCIATION, INC.
IN SUPPORT OF THE APPELLANT

Respectfully submitted,

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IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

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v.

MICHAEL CASPER

Appellee.

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IDENTITY AND INTEREST OF *AMICUS CURIAE*

Introduction

The North American Securities Administrators Association, Inc. ("NASAA") is the non-profit association of state, provincial, and territorial securities regulators in the United States, Canada, and Mexico. It has 67 members, including the securities regulators in all 50 states, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands. Formed in 1919, NASAA is the oldest international organization devoted to protecting investors from fraud and abuse in connection with the offer and sale of securities.

NASAA and its members have a substantial interest in the outcome of this appeal for several reasons. First, the lower court's ruling represents a miscarriage of justice in a case involving serious abuses under state securities law. Appellee Casper committed repeated violations of the Tennessee Securities Act ("Act"), over an extended period of time, by systematically targeting senior citizens and bilking them out of millions of dollars. He ignored his obligation to seek registration under the Act, thus depriving his victims of any disclosure concerning his disciplinary history and his training and experience in the securities field—or lack thereof. Moreover, he committed these crimes not as a low level functionary, but as a principal of the operation. He was the subject of numerous prior enforcement proceedings yet he continued his pattern of illegal and predatory behavior. This is precisely the type of recalcitrant defendant who deserves the full measure of criminal liability that the law can bring to bear.

The lower court's ruling also has a more far-reaching impact by undermining investor protection in Tennessee and potentially elsewhere. It places a heavy burden on prosecutors seeking to enforce the Act. It requires them to prove not only that defendants intentionally committed the acts prohibited under the statute, but that the defendants knew those acts were in violation of the law. This holding, which stands well outside the mainstream of Blue Sky jurisprudence, will make successful criminal prosecution of securities law violations much more difficult, and it will accordingly weaken the deterrent effect of the Act. As a result, in a very real sense, the citizens of Tennessee will be more vulnerable to fraud and abuse in the offer and sale of securities. The decision also sets a bad precedent that may influence courts in

other states that have not yet been called upon to decide the issues presented here. If it has that effect in other jurisdictions, then investor protection will be further eroded.

Finally, unless reversed, the lower court's ruling will also undermine the uniformity of state securities law. The vast weight of authority holds that specific intent is not an element in criminal prosecutions under the state securities acts. The lower court's ruling runs counter to this view and relegates Tennessee to the small minority of states that require proof of specific intent. The adverse consequences are twofold. First, the decision creates a variability in state law that fosters confusion without conferring investor protection benefits. Second, relative to other states, Tennessee is more likely to become an attractive haven for white collar criminals who are willing to run the risk of civil liability as long as criminal prosecution and incarceration are unlikely prospects.

The implications of the lower court's decision are particularly ominous in the current economic climate. Most observers agree that inadequate oversight and weak enforcement have allowed abuses on Wall Street to flourish, in the form of institutional risk-taking as well as massive Ponzi schemes exemplified by the Madoff case. Stronger enforcement—both civil and criminal—is essential for preventing a recurrence of these behaviors and the market upheavals they cause. These remedies are also essential for preventing wide scale abuses *while* our markets rebuild. Hard economic times call for greater vigilance against white-collar crime. Perpetrators feel strong economic pressure to flout the law, investors search desperately for new investments to recover prior losses, and regulators and prosecutors struggle to police the markets with meager budgets. To counteract all of these pressures, enforcement authorities must have the ability to bring successful criminal prosecutions against those who exploit the public. The lower court's opinion needlessly hampers this important effort.

The Work Of State Securities Regulators

The U.S. members of NASAA are the state agencies responsible for administering state securities laws, a body of law that first emerged nearly 150 years ago. *See generally* LOUIS LOSS & JOEL

SELIGMAN, SECURITIES REGULATION 31-34 (3d ed. 1989).¹ Their principal responsibilities fall into two distinct categories: regulation and enforcement. Regulation encompasses preventive measures such as registering broker-dealers and their agents to help ensure that they have the integrity and competence to deal fairly with the public; registering securities offerings to ensure adequate disclosure is made to investors; and establishing standards of conduct and remedial sanctions to ensure that industry participants refrain from exploiting the public. State securities regulators regard the failure to satisfy broker registration requirements and the failure to register securities offerings as serious violations. These forms of misconduct strike at the heart of our regulatory system because they deprive everyday citizens of critical information they need to avoid unscrupulous brokers and bad investments.

Equally important is the states' enforcement role: protecting the nation's investors by bringing enforcement actions against the firms and individuals who have ignored their registration obligations, failed to register their securities offerings, or committed fraud and other sales abuses in the offer and sale of securities. For nearly a century, state securities regulators have tirelessly pursued those who violate state securities laws, from the con artist operating a local Ponzi scheme to the Wall Street brokerage firm engaged in dishonest practices on a national scale. Each year, state securities regulators file thousands of administrative, civil, and criminal enforcement actions under their securities codes seeking a wide range of punitive and remedial sanctions, including injunctions, fines, restitution orders, registration revocations, and criminal convictions accompanied by fines and jail terms. *See, e.g., NASAA Member Enforcement Statistics.*²

Without question, the most effective deterrent against securities law violations is the threat of criminal prosecution and the punishments that come with it, including prison terms, fines, and restitution orders. In some states, NASAA members have direct authority to bring criminal prosecutions for violations of the securities laws; in many others, such as Tennessee, NASAA members work closely with

¹ Tennessee is a member of NASAA through the Securities Division of the Department of Commerce & Insurance. The Tennessee Attorney General has jurisdiction to bring criminal actions for violations of the Tennessee Securities Act.

² Available at http://www.nasaa.org/issues___answers/enforcement___legal_activity/1002.cfm.

their attorney general or their district attorney to bring criminal cases. As the enforcement statistics cited above show, from 2004 to 2007, NASAA members initiated over 8,300 enforcement actions—many of them criminal prosecutions—resulting in \$178 million in fines, \$1.8 billion in restitution orders, and 2,764 years of incarceration.

NASAA's Role In Supporting Its Members

Since 1919, NASAA has supported both the regulatory and the enforcement work of its members. For example, NASAA and the Financial Industry Regulatory Authority jointly operate the Central Registration Depository (“CRD”). The CRD system enables state and federal regulators to register broker-dealer firms and their agents electronically. It also enables members of the public to check the background information, disciplinary history, and licensing status of their brokers, via the web or through direct contact with state securities regulators.

In the securities registration area, in order to promote efficient capital formation, NASAA has helped develop standardized registration procedures for small, regional securities offerings. These procedures, such as the “Small Company Offering Registration” program, assist issuers by designating a lead state to review the proposed offering, establishing uniform review criteria, and setting firm deadlines for responses by state regulators. This approach reflects the states’ modern approach to securities registration, which alleviates the regulatory burden on industry while preserving a significant measure of protection for investors.³

In support of the states’ enforcement mission, NASAA offers training for investigators and attorneys and coordinates multi-state enforcement actions. In addition, through associations of prosecutors such as the National District Attorneys Association and the National Association of Attorneys General, NASAA promotes an understanding of securities law and facilitates the prosecution of securities law violations.

³ See generally

http://www.nasaa.org/Industry_Regulatory_Resources/Corporation_Finance/ (NASAA webpage describing coordinated registration programs).

Finally, NASAA offers legal analysis and policy considerations to the courts as *amicus curiae* in significant enforcement actions and other cases involving the interpretation of the securities laws and the rights of investors. In its briefs, NASAA addresses legal issues ranging from the remedies available to state securities regulators to the elements that investors must prove to recover damages for securities fraud. *See* Online Compendium of NASAA Amicus Briefs.⁴

The Assistance That NASAA Can Offer To The Court

By virtue of NASAA's knowledge and experience in the field of securities regulation and enforcement, the association can assist this Court in correctly deciding the legal issues presented in this appeal, in understanding the significance of the lower court's decision in the larger context of state securities regulation, and in weighing the impact of the case on investor protection in Tennessee and throughout the country.

ARGUMENT

The lower court erred in holding that a criminal conviction for violations of the registration provision in Section 48-2-109 of the Tennessee Securities Act requires a finding of specific intent. The court ignored dispositive language in the statute itself, which demonstrates that the legislature clearly did not intend to equate "willfulness" with specific intent. Similarly, the court did not avail itself of legislative history affirming that specific intent, or "knowledge that the law was being violated," is simply not a required element. In addition, the lower court failed to consult a large body of persuasive decisions issued by state courts throughout the country interpreting similar statutory language and rejecting a specific intent requirement in criminal cases. Finally, the lower court gave no weight to the underlying remedial purposes of the Act—indeed failed to consider those investor protection policies at all. Compounding these omissions was the court's reliance on a small number of cases decided under federal law, outside the realm of securities, on clearly distinguishable grounds. For all of these reasons, this Court should reverse the decision of the court below and hold that criminal convictions under the Act do not require proof of specific intent.

⁴ Available at http://www.nasaa.org/issues_answers/enforcement_legal_activity/968.cfm.

I. THE HOLDING OF THE COURT OF CRIMINAL APPEALS RUNS COUNTER TO THE PLAIN LANGUAGE AND LEGISLATIVE HISTORY OF THE TENNESSEE SECURITIES ACT.

Read in its entirety, the plain language of Section 48-2-123(a) of the Tennessee Securities Act (“Section 123(a)”) confirms that the Tennessee legislature did not intend to impose a specific intent requirement. The legislative history of Section 123(a) supports this conclusion. Even more compelling is the legislative history of the Uniform Securities Act of 1956 (“Uniform Act”), which Tennessee used as a model. It removes any doubt that the progenitor of Section 123(a) was never intended to incorporate the element of specific intent.

A. The statutory language imposing criminal liability for violations of the Tennessee Securities Act contains no specific intent wording.

The first and most important guide to the meaning of any statute is the wording of the statute itself. “The cardinal rule of statutory construction is to effectuate legislative intent,” *Browder v. Morris*, 975 S.W.2d 308, 311 (Tenn. 1998), and to ascertain that intent, courts “must initially look to the language of the statute itself . . . ,” *id.*

The provision at issue in this appeal contains the following two sentences:

Any person who willfully violates any provision of this part or who willfully violates any rule or order under this part commits a Class D felony. No person may be imprisoned for the violation of any rule or order if the person proves that the person had no actual knowledge of the rule or order.

Tenn. Code Ann. § 48-2-123(a) (West 2008).

The wording and structure of this provision confirm that the Tennessee legislature understood the distinction between violations that are merely willful, in the sense of purposeful or deliberate, and violations committed with specific intent or actual knowledge of the standard being violated. In the second sentence, the legislature chose to incorporate a specific intent standard by adding the phrase “actual knowledge of the rule or order.” It did so for the sole and limited purpose of establishing an affirmative defense against incarceration for violations of rules and orders. As to violations of the Act, it