

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

JAVIER O. SALAS et al.,

Defendants and Appellants.

B159750

(Los Angeles County
Super. Ct. No. BA204220)

ORDER MODIFYING OPINION
AND DENYING REHEARING

[NO CHANGE IN JUDGMENT]

THE COURT:

It is ordered that the opinion filed herein on June 21, 2004, be modified as follows:

1. On page 21, subheading B., the words “Section 25110” are deleted and is changed to “Selling Unregistered, Nonexempt Securities” so subheading B. reads:

B. Selling Unregistered, Nonexempt Securities Includes a Knowledge Requirement

2. The last line of the first full paragraph on page 21, beginning “is an element of” delete the word “a” before “such,” and after the word “crimes,” and at the end of that paragraph, add as footnote 18 the following footnote, which will require renumbering of all subsequent footnotes:

¹⁸. Nothing in our discussion is intended to suggest that knowledge of, or criminal negligence in not knowing, the facts that render securities nonexempt undermines the burden of proof set forth in section 25163.

3. On page 23, in the third paragraph, line 3, after the word “*knowing*” delete the words “*the facts,*” and on page 24, line 1, before the word “removed,” add the words “the securities were unregistered and the facts that,” so that the sentence reads, as follows:

In light of these legal principles, we hold that appellants could not have intentionally sold unregistered and nonexempt securities unless they sold such securities *knowing* (or lacking that knowledge as a result of criminal negligence) that the securities were unregistered and the facts that removed the securities from the section 25102, subdivision (f) exemption.

[The text of the original footnotes remains unchanged.]

4. On page 27, the first full paragraph, beginning “The trial court’s instructions to the jury” is deleted and the following paragraph is inserted in its place:

The trial court’s instructions to the jury were defective. They did not advise the jury that the People were required to prove that appellants knew, or were criminally negligent in not knowing, that the securities were unregistered and that it was a defense to the charge that appellants did not know, or were criminally negligent in not knowing, the facts making the securities nonexempt. (*Simon, supra*, 9 Cal.4th at p. 522.) Nor did the trial court instruct that appellants needed only to raise a reasonable doubt that they sold nonexempt securities. The trial court instructed that it was no defense to the charge of selling unregistered, nonexempt securities that appellant acted in good faith. The jury might have concluded that appellants were acting in good faith if they were unaware of the facts that made their conduct criminal (i.e., that there were more than 35 investors), but in light of that instruction, it was required to find appellants guilty. Therefore, on remand, the trial court must correct its instruction.

5. On page 27, subheading D., the words “on the Elements of Section 25110” are deleted so subheading D. reads:

D. Although the Trial Court Erred in Instructing the Jury, the Error Was Harmless as to Salas, But Not as to Patrick

6. On page 27, the second full paragraph, beginning “Having concluded that the jury instructions were erroneous” is deleted in its entirety.

7. On page 27, underneath subheading “1. *Salas*,” and before “The parties stipulated that,” add the following sentence: “Even under the more stringent beyond a reasonable doubt standard set forth in *Chapman v. California* (1967) 368 U.S. 18, 23-24, the instructional error was harmless as to Salas.” The paragraph now reads:

Even under the more stringent beyond a reasonable doubt standard set forth in *Chapman v. California* (1967) 368 U.S. 18, 23-24, the instructional error was harmless as to Salas. The parties stipulated that the investments in 201 Boylston Street Associates were securities and that no application to register them had been filed. In light of the stipulations, by finding appellants guilty of selling unregistered, nonexempt securities within the meaning of section 25102, subdivision (f), the jury necessarily found that the securities were not exempt. In order to make that finding, it had to have concluded that one or more of the requirements for exemption was unsatisfied.

8. On page 32, the last paragraph, delete the second through the fifth sentences, and replace with the following:

He testified that he believed the investments he was soliciting were exempt from registration, thereby indicating that he knew the securities were unregistered. But he was merely a salesman for whom there was no evidence that he knew facts making the investments nonexempt. He had no control or

management authority for AJOI which might impose upon him the duty to make certain that the exemption requirements were met or render him criminally negligent for not knowing those facts. Even under the more lenient *People v. Watson* (1956) 46 Cal.2d 818, 836 standard, we cannot say that there is no reasonable probability that had the jury been properly instructed regarding the knowledge requirements, the verdict would have been different.

There is no change in the judgment.

Respondent's petition for rehearing is denied.