

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

In re:

SUE ANTROBUS and
KEN ANTROBUS,

Petitioners.

No. 08-4002
(D.C. No. 2:07-CR-307-DAK)
(D. Utah)

ORDER
Filed January 11, 2008

Before **HARTZ, TYMKOVICH, and GORSUCH**, Circuit Judges.

This is an original proceeding in the nature of mandamus under the Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771(d)(3). Sue and Ken Antrobus, the parents of Vanessa Quinn, request that Ms. Quinn be recognized as a victim of Mackenzie Glade Hunter's crime of transferring a handgun to a juvenile in violation of 18 U.S.C. § 922(x)(1). Mr. Hunter is scheduled to be sentenced on Monday, January 14, 2008.

I

On February 12, 2007, Sulejman Talovic murdered five people, including Ms. Quinn, and injured four others at the Trolley Square Shopping Center in Salt Lake City, Utah. One of the guns Talovic used in his rampage was a handgun that

he had purchased from Mr. Hunter in the summer of 2006, when Talovic was a “juvenile” as defined in § 922(x). Talovic was killed on the scene.

Mr. Hunter pleaded guilty to two charges. Only one count, that of transferring a handgun to a juvenile, is relevant to this action. After the plea hearing, the Antrobuses sought to have Ms. Quinn declared a victim of Mr. Hunter’s crime so that they, on her behalf, could assert certain rights provided by the CVRA. *See* 18 U.S.C. § 3771(a)(4) (establishing “[t]he right to be reasonably heard” at the sentencing); *id.* § 3771(d)(6) (establishing “[t]he right to full and timely restitution as provided in law”). The district court denied the motion. *United States v. Hunter*, No. 2:07CR307DAK, 2008 WL 53125 (D. Utah Jan. 3, 2008). In doing so, it proceeded on the basis that the handgun sold by Mr. Hunter killed Ms. Quinn, *id.* at *1, though Mr. Hunter asserts before us that this fact is not discernible from the record of this case. The district court also indicated that other allegations were unsupported, particularly whether Talovic remarked to Mr. Hunter or in Mr. Hunter’s hearing that he intended to commit a bank robbery, but stated that its ruling would not change even assuming such facts. *Id.* at *4.

As permitted by the CVRA, 18 U.S.C. § 3771(d)(3), the Antrobuses filed a petition for a writ of mandamus seeking review of the district court’s decision. Pursuant to this court’s order, Mr. Hunter filed a response.

II

Standard of Review

The Supreme Court has made it clear that mandamus is a “drastic” remedy that is “to be invoked only in extraordinary situations.” *Allied Chem. Corp. v. Daiflon, Inc.*, 449 U. S. 33, 34 (1980) (per curiam). “[T]he writ of mandamus has traditionally been used in the federal courts only to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.” *Id.* at 35 (quotations omitted). Petitioners must show that their right to the writ is “clear and indisputable.” *Id.* (quotations omitted).

The Antrobuses argue that, even though the CVRA provides for mandamus review, this court should apply those standards that would apply on normal appellate review. *See In re W.R. Huff Asset Mgmt. Co., LLC*, 409 F.3d 555, 562-63 (2d Cir. 2005); *Kenna v. U.S. Dist. Ct.*, 435 F.3d 1011, 1017 (9th Cir. 2006). We respectfully disagree, however, with the decisions of our sister circuit courts.

Congress could have drafted the CVRA to provide for “immediate appellate review” or “interlocutory appellate review,” something it has done many times. Instead, it authorized and made use of the term “mandamus.”

[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and

the meaning its use will convey to the judicial mind unless otherwise instructed.

Morissette v. United States, 342 U.S. 246, 263 (1952). Mandamus is the subject of longstanding judicial precedent. “We assume that Congress knows the law and legislates in light of federal court precedent.” *Bd. of County Comm’rs v. U.S. E.E.O.C.*, 405 F.3d 840, 845 (10th Cir. 2005). Applying the plain language of the statute, we review this CVRA matter under traditional mandamus standards.

Analysis

The CVRA defines a “crime victim” as “a person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia.” 18 U.S.C. § 3771(e). While acknowledging that Ms. Quinn undeniably was a crime victim, the district court held that she was not a victim of the particular crime to which Mr. Hunter pleaded guilty because Mr. Hunter’s offense and Talovic’s rampage were “too factually and temporally attenuated.” *Hunter*, 2008 WL 53125, at *4. Following the rationale of *United States v. Sharp*, 463 F. Supp. 2d 556 (E.D. Va. 2006), the district court determined that Talovic’s actions were an “independent, intervening cause” of Ms. Quinn’s death. *Id.* at *5.

This is a difficult case, but we cannot say that the district court was clearly wrong in its conclusion. The only court that has decided an analogous case under the CVRA held that the movant was not a “crime victim” under that statute. *See*

Sharp, 463 F. Supp. 2d 556. Based on its factual finding that Mr. Hunter was unaware of Talovic’s intentions for the firearm,¹ to find for the Antrobuses we would have to determine that selling a gun to a minor is the proximate cause of any resulting injury to third persons. This area of the law, however, is not well-developed and is evolving. While authority is mixed in the common law context, some courts have held as a matter of law that proximate cause does not exist between a sale of a firearm to a person statutorily disqualified from making the purchase and later injuries to a third person through use of the firearm. *See, e.g., Robinson v. Howard Bros. of Jackson, Inc.*, 372 So.2d 1074, 1076 (Miss. 1979). Others have held that proximate cause can be found in some such circumstances but may not (as would be required here) found on a *per se* basis. *See, e.g., Olson v. Ratzel*, 278 N.W.2d 238, 250, 249-51 (Wis. Ct. App. 1979); *Phillips v. Roy*, 431 So.2d 849, 853 (La. Ct. App. 1983). Such questions have not yet been decided in this jurisdiction. Finally, at most the statute Mr. Hunter violated

¹ “Even at the time the gun was sold, Hunter had no knowledge as to Talovic’s intentions. And, after the gun was sold, Hunter had no contact with Talovic.” *Hunter*, 2008 WL 53125, at *4; *see also id.* at *5 (“[T]here is no indication that he spoke to Talovic about his intentions. At most, Hunter surmised that Talovic might use [the gun] to rob a bank.”). One might question whether, with additional discovery, the Antrobuses might have been able to determine whether, in fact, Mr. Hunter knew about Talovic’s intentions and what such knowledge might mean for the foreseeability to Mr. Hunter of Talovic’s crimes. However, petitioners have not sought mandamus on the basis that the district court should have afforded them such discovery. Accordingly, the issue is not before us and we must take as true the district court’s finding that Mr. Hunter was not aware of Talovic’s intentions.

indicates the foreseeability of the foolish (or, sadly, as here, worse) use of firearms by juveniles. But such foreseeability does not obviously extend to an individual who employs a gun only after becoming an adult as a matter of law. And here, the Antrobuses have not shown that Talovic was still a juvenile when he committed the murders more than seven months after purchasing the handgun from Mr. Hunter. *See* 18 U.S.C. § 922(x)(5) (defining juvenile as a “person who is less than 18 years of age”). In light of these circumstances, we cannot say that the Antrobuses’ right to the writ is “clear and indisputable.” *Allied Chem. Corp.*, 449 U.S. at 35 (quotations omitted).

III

The Antrobuses’ motion to proceed in forma pauperis is GRANTED. Their Motion to Strike Anticipated Defense Objection to Petition for Writ of Mandamus and Renewed Motion to Strike Defense Objection are DENIED. Their alternative motion for leave to supplement the record is GRANTED and their proffered exhibit is accepted for filing under seal. Their alternative motion for order directing the government to supplement the record is DENIED. Mr. Hunter’s

motion to unseal the portions of his presentence report that were submitted as Exhibit D to his response is GRANTED. The petition for a writ of mandamus is DENIED.

Entered for the Court

A handwritten signature in cursive script, reading "Elisabeth A. Shumaker", with a long horizontal flourish extending to the right.

ELISABETH A. SHUMAKER, Clerk

Tymkovich, J., concurring.

We live in a post-Columbine High School massacre world. In that world, juveniles are willing to procure guns and use them to commit violent, horrific crimes. In this case, the previously unthinkable act of random killing took place in a mall in Salt Lake City. Sulejman Talovic was the shooter and he used a handgun and shotgun to kill five people. One of the murder weapons was procured from Mackenzie Hunter, and used to kill Vanessa Quinn. I write separately because the process in this case failed to adequately support the rights of crime victims such as Ms. Quinn as guaranteed by the CVRA.

Two issues are presented for review. The first is the standard of review. The Second and Ninth Circuits have applied a relaxed standard for resolving appeals under the CVRA. The Ninth Circuit, for example, would “issue the writ whenever [it] find[s] that the district court’s order reflects an abuse of discretion or legal error.” *Kenna v. U.S. Dist. Ct.*, 435 F.3d 1011, 1017 (9th Cir. 2006). The Second Circuit holds that in reviewing a petition under the CVRA, we should review factual determinations for clear error, legal issues de novo, and the resolution of the application for a writ for abuse of discretion. *In re W.R. Huff Asset Mgmt. Co., LLC*, 409 F.3d 555, 562 (2d Cir. 2005). We part company with these circuits and apply the traditional standard of review for petitions of mandamus.

Whatever the mandamus standard, the central issue is whether Vanessa Quinn's parents may seek to have her declared as a "crime victim" under the CVRA. Applying traditional rules of "but-for" and "proximate" causation, they argue that the district court should have concluded that she was a victim. In my view, the district court and the government erred in failing to permit the Antrobuses reasonable access to evidence which could support their claim. With this information, the Antrobuses may have been able to demonstrate the requisite causal connection between Hunter's crime and Ms. Quinn's murder. The government's cooperation is mandated by the CVRA, which requires the government to "make their best efforts to see that crime victims are notified of, and accorded, the rights" set forth in the Act. 18 U.S.C. § 3771(c)(1).

Here is what the Antrobuses might have demonstrated given the government's cooperation. First of all, the victim must be "directly" harmed by the crime. This encompasses a "but-for" causation notion that is met here.

In addition, the harm must "proximately" result from the crime. That is the more difficult issue, but the record suggests that the following evidence could be developed to show that Talovic's crime was a reasonably foreseeable result of the illegal gun sale. (1) Hunter knew Talovic was a minor and could not legally purchase a gun in the first place; (2) the murder weapon was previously stolen; (3) Hunter heard Talovic's intent to commit bank robbery, a crime of violence where the use of a gun could reasonably result in a shooting; and, finally; (4) the shooting was not so remote in time as to be unforeseeable. I do not think it matters that Talovic committed a crime that is different

from what he told Hunter; only that the crime could obviously and likely lead to violence. The language included in the indictment in fact makes clear that the government believed Hunter knew that Talovic “intended to carry or otherwise possess, or discharge or otherwise use the handgun in the commission of a crime of violence.” If the intervening cause was foreseeable then proximate cause can be established.¹

Taken together, these facts could establish that Ms. Quinn was a crime victim for purposes of the CVRA. This evidence may well be contained in the government’s files. Sadly, the Antrobuses were not allowed a reasonable opportunity to make a better case.

¹ The CVRA limits its causal nexus to traditional standards. *See, e.g., Restatement (Second) of Torts* §§ 302, 390, 449; and *see McDermott v. Midland Management, Inc.*, 997 F.2d 768, 770 (10th Cir. 1993) (“[L]iability will still attach despite the existence of an intervening cause where the intervening cause was foreseen or might reasonably have been foreseen.”).