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United States v. Squirrel

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UNITED STATES V. SQUIRREL

Under the Mandatory Victims Restitution Act of 1996 (MVRA),[1] "the court shall order, in addition to . . . any other penalty authorized by law, that the defendant make restitution to the victim of the offense or, if the victim is deceased, to the victim's estate."[2] The MVRA applies, however, only to "crimes of violence, certain offenses against property, and crimes related to tampering with consumer products due to which a victim has suffered either a physical or pecuniary loss."[3] Until recently, the United States Court of Appeals for the Fourth Circuit had not addressed in a published opinion whether a restitution order under the MVRA was appropriate against someone who is an accessory after the fact.[4] Last year, the Fourth Circuit held in *United States v. Squirrel*[5] that accessories after the fact were not liable under MVRA because their actions after the crime had not directly and proximately caused the victim's loss.[6]

In *Squirrel*, the victim, Tamara Susan Seay, was drinking with Terence Howard Roach and Joshua Brent Squirrel at a friend's home on the night of January 13, 2006.[7] The three went into a back room, where their friends believed they engaged in sexual activities.[8] Roach and Squirrel then left the house.[9] Seay came out of the room upset, and the owner of the house called Roach and Squirrel to come pick her up.[10] Eventually, Roach and a third friend, Michael Edward Slee, returned to pick her up.[11] When Roach and Slee reached the house, Seay was placed in the car, intoxicated and unconscious.[12] "Roach instructed Slee to drive towards Bryson City and directed [Slee] through the Deep Creek area and onto a gravel road."[13] Once they stopped, "Roach picked up Seay, who was still [unconscious in the back of the car], and carried her into the woods."[14] Roach placed Seay in a creek, "and the cold water awakened her."[15]

"Slee saw Seay stand up, then, when he was not looking, heard her scream."[16] He looked again to see her falling to the ground.[17] Slee "then saw

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1. Pub. L. No. 104-132, 110 Stat. 1227 (codified as amended in scattered sections of 18 U.S.C.).
2. 18 U.S.C. § 3663A(a)(1) (2006).
3. United States v. Squirrel, 588 F.3d 207, 212 (4th Cir. 2009).
4. *Id.* at 213.
5. 588 F.3d 207 (4th Cir. 2009).
6. *See id.* at 215–16.
7. *Id.* at 208–09. The facts surrounding the charges in the case were summarized in a Presentence Report, which the defendants did not object to and which the district court ultimately adopted as its own. *Id.* at 208 & n.1.
8. *Id.* at 209.
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*

Roach shoot Seay[,]" and "Slee ran to [the] car."[18] As he was running, he looked to see Roach walking toward Seay.[19] As he entered the car, Slee heard another shot.[20]

Roach got into the car and "told Slee to drive to Squirrel's residence."[21] On the way to Squirrel's house, Roach threw two used shell casings out the window.[22] Upon arriving at Squirrel's house, Slee told Squirrel that Roach had shot Seay.[23]

That night, Roach gave his gun to Squirrel and directed that Squirrel "get rid" of it.[24] "Squirrel threw the revolver into the woods for the night, recovered it the next morning, and gave it to another individual to hold for him."[25] That individual turned the gun over to the police and hikers found Seay's body on January 15, 2006.[26]

The United States District Court for the Western District of North Carolina sentenced all three defendants based upon their stipulations that the facts in the Presentence Report provided a factual basis to support each defendant's guilty plea.[27] The court sentenced Squirrel to seventy months in prison, Slee to fifty-seven months, and Roach to two life terms.[28] The court ordered restitution in the amount of $5,645 for funeral and related expenses and added the following paragraph to each judgment:

> This restitution does not include restitution which the court will order paid for the use and benefit of [Jailyn] Byrd, infant daughter of the deceased murder victim. The amount and schedule for payment of same will be determined by the Court after considering a recommended report to be filed by the U.S. Probation Office within the next ninety (90) days. The Probation Officer will contact Tribal Authorities, defense counsel for the three (3) co-defendants and the U.S. Attorney for recommendations.[29]

Nearly two months after the last of the sentencing hearings, a United States Probation Officer submitted the requested documents, and the court held a hearing to determine the restitution due Seay's estate.[30] Seay was a member of

18. *Id.*
19. *Id.* at 209–10.
20. *Id.* at 210.
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.* at 209.
25. *Id.*
26. *Id.* at 208–09.
27. *Id.* at 210.
28. *Id.*
29. *Id.* at 210–11 (alteration in original) (internal quotation marks omitted).
30. *Id.* at 211.

the Eastern Band of the Cherokee Indians (the Tribe)[31] and therefore received per capita payments based on gaming revenues generated by the Tribe.[32] Based on these payments, lost earnings, and Seay's projected normal life expectancy, the court amended the judgment and held the defendants jointly and severally liable under the MVRA in the additional amount of $1,459,854.22 for lost future earnings and lost tribal income.[33] Squirrel and Slee appealed the amended restitution award on four grounds, but the Fourth Circuit held that the defendants had waived two of the grounds in their plea agreements.[34] The court, therefore, granted appeal on the remaining two issues: (1) whether "the district court erred in finding that Fourth Circuit jurisprudence sufficiently allowed for the imposition of the $1,459,854.22 restitution award against Squirrel and Slee in their capacities as accessories-after-the-fact to Roach's murder of Seay"; and (2) whether "the district court erred when it found that the plea agreements of Squirrel and Slee allowed for the imposition of the $1,459,854.22 restitution award."[35]

The court held that neither the MVRA nor the defendants' plea agreements allowed the court to impose joint and several liability in the amount of $1,459,854.22 on the two defendants who were only accessories after the fact.[36] The first issue the court addressed was whether an order of restitution under the MVRA is appropriate when the underlying offense is for accessory after the fact.[37] Although there were no published Fourth Circuit opinions on point, the court did analyze an unpublished case that had addressed the issue.[38]

In *United States v. Quackenbush*,[39] the defendant was an accessory after the fact to a bank robbery.[40] After the robbery, the defendant drove the robbers to various locations, helped them hide from the authorities, and helped them to spend the stolen money.[41] The district court held the defendant jointly and severally liable for an amount of restitution that included all of the losses to the bank as well as losses resulting from a prerobbery carjacking in which the defendant played no role.[42] On appeal, the government conceded that the portion of the restitution order relating to the prerobbery carjacking could not be sustained because "the losses to those victims were not linked to [the

31. *Id.* at 208.
32. *Id.* at 211 n.4.
33. *Id.* at 211.
34. *Id.*
35. *Id.*
36. *See id.* at 216, 218.
37. *Id.* at 212.
38. *See id.* at 213 (citing United States v. Quackenbush, 9 F. App'x 264 (4th Cir. 2001) (per curiam)).
39. 9 F. App'x 264 (4th Cir. 2001) (per curiam).
40. *Id.* at 265.
41. *Id.*
42. *Id.* at 265, 266 n.2.

defendant's] offenses."[43] Therefore, "the sole issue on appeal [was] whether the district court erred in imposing restitution [under the MVRA] against Quackenbush in the full amount of the bank's losses where the basis for Quackenbush's conviction was his conduct as an accessory-after-the-fact."[44] The Fourth Circuit held that Quackenbush could be liable because his harboring of the criminals and spending of the money directly contributed to the bank's inability to recover the stolen money.[45]

The *Squirrel* court, however, distinguished the facts of *Quackenbush*.[46] In *Squirrel*, the Fourth Circuit noted that Squirrel's and Slee's actions "did nothing to cause or increase the financial harm to Seay's estate."[47] The court emphasized that the plain language of the MVRA allows for restitution based only on loss "directly and proximately caused by the defendant's offense conduct."[48] In *Squirrel*, however, the murder caused the loss to the victim's estate.[49] While Squirrel hid the gun and Slee drove the getaway car, their conduct did nothing to increase the harm to the estate because the actions occurred after the murder.[50] As the government conceded in its brief, "[n]either Squirrel nor Slee directly caused [Seay] to be 'more dead' than she already was."[51] Unlike the actions of the accessory after the fact in *Quackenbush*, who helped make it impossible for the bank to recover its money, the defendants in *Squirrel* did nothing to exacerbate the victim's losses.[52]

The second issue the court addressed in *Squirrel* was whether "the district court's reliance upon [the defendants'] plea agreements as an alternative basis for its restitution order holding them jointly and severally liable to Seay's estate for her lost future income from the Tribe and her lost future wages" was proper.[53] Although the defendants agreed in their plea agreements to pay restitution for all harm flowing "directly or indirectly" from their "relevant conduct,"[54] the court found that this language did not expand their liability such that it required payment of lost future income to Seay's estate.[55]

Under well-settled Fourth Circuit jurisprudence, courts interpret plea agreements by drawing upon fundamental principles of contract law.[56] However, the Fourth Circuit has noted that "'[b]ecause a defendant's fundamental and

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43. *Id.* at 266 n.2 (internal quotation marks omitted).
44. *Id.* at 266.
45. *Id.* at 269.
46. United States v. Squirrel, 588 F.3d 207, 215 (4th Cir. 2009).
47. *Id.*
48. *Id.* (citing 18 U.S.C. § 3663A(a)(1)–(2) (2006); S. REP. NO. 104-179, at 19 (1995), *reprinted in* 1996 U.S.C.C.A.N. 924, 932).
49. *See id.* at 216.
50. *See id.* at 209, 216.
51. *Id.* at 214 (alteration in original) (internal quotation marks omitted).
52. *Id.* at 215.
53. *Id.* at 216.
54. *Id.* (internal quotation marks omitted).
55. *See id.* at 218.
56. *See id.* at 217 (citing United States v. Jordan, 509 F.3d 191, 195–96 (4th Cir. 2007)).

constitutional rights are implicated,'" courts scrutinize plea agreements more closely than typical commercial contracts and will "'hold the Government to a greater degree of responsibility than the defendant for imprecisions or ambiguities.'"[57] In *Squirrel*, the Fourth Circuit found that the language in the plea bargain did not cover the conduct at issue and that even the government did not intend to expand the defendants' restitutory liability to the extent ultimately ordered by the district court.[58] In fact, at the restitution hearing, the government's counsel told the court that "'it hadn't even occurred to me to ask for this amount of restitution when engaging in the plea discussions . . . . I was waiting for the presentence report, . . . and was expecting it to cover minimal expenses.'"[59] The Fourth Circuit, therefore, concluded that the additional restitution was not within the scope of the original plea bargain.[60]

Prior to *Squirrel*, the Fourth Circuit had not published an opinion addressing whether a court could hold accessories after the fact jointly and severally liable for restitution under the MVRA.[61] In criminal law, a well defined test with clear parameters is important for the quick and efficient resolution of cases. That is exactly what the Fourth Circuit created here. In future cases involving accessories after the fact and MVRA restitution, courts in the Fourth Circuit can apply the test articulated in *Squirrel* and tailor restitution awards accordingly.

In applying the *Squirrel* test, courts should determine whether the accessory after the fact directly and proximately caused any financial loss to the victim or the victim's estate.[62] If the answer is yes, the court should hold the accessory after the fact liable for restitution under the MVRA.[63] If the answer is no and the accessory after the fact—like Squirrel or Slee—did nothing to cause financial harm to the victim or to the victim's estate, then an imposition of liability for restitution under the MVRA is improper.[64] This simple test, articulated by the Fourth Circuit in *Squirrel*, will lead to an equitable and effective resolution of MVRA restitution cases throughout the circuit.

There are two additional implications for the government in cases involving MVRA restitution. First, if the government wishes to impose restitutory liability under the MVRA on accessories after the fact, it may do so through a plea agreement.[65] A plea agreement can modify the restitution allowed under the

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57. *Id.* (quoting *Jordan*, 509 F.3d at 195–96).
58. *See id.* at 217–18.
59. *Id.*
60. *See id.* at 218.
61. *See id.* at 213.
62. *See id.* at 215.
63. *See id.*
64. *See id.* at 216.
65. *See id.* at 217 ("Squirrel and Slee acknowledge that the MVRA permits a plea agreement to broaden the scope of a defendant's conduct which would subject him to an order of restitution . . . .").

MVRA[66] but only if the plea agreement makes it clear that the parties intended this result.[67] As *Squirrel* makes clear, ambiguous language will be strictly construed against the government and will likely defeat restitutory liability.[68]

Additionally, the government may be able to obtain MVRA restitution if it can convince defendants to plead to offenses that go beyond being accessories after the fact. For instance, in *Squirrel*, Slee did more than just drive the getaway vehicle; he drove Roach and Seay to the crime scene.[69] He knew that Seay owed Roach drug money and that Roach had reason to be upset.[70] He was with Roach as Roach carried Seay to the creek, set her down, pushed her, and shot her the first time.[71] These actions more directly and proximately caused the murder than Slee's actions after the murder. Had the government charged Slee as an accessory before the fact and had Slee pleaded guilty to that crime, then the government might have been able to impose MVRA restitutory damages on Slee as well as Roach.[72] *Squirrel* demonstrates, however, that the court will look only at the actions relating to the charged offenses and not at actions relating to offenses not charged. The government, therefore, must be conscious of the charges to which defendants plead because these actions alone are the ones the court will evaluate in determining a defendant's liability under the MVRA.

Not only does *United States v. Squirrel* provide courts with a bright line test to use in deciding cases of restitutory liability under the MVRA, it will also assist the government in future MVRA cases. The government now knows what it must do to impose liability under the MVRA. If the government cannot secure a plea agreement in which the defendant agrees to an expansion of the scope of the MVRA, then the government can achieve the same result if they secure a plea in which the defendant is more than simply an accessory after the fact.

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66. *See* 18 U.S.C. § 3663A(a)(3) (2006) ("The court shall also order, if agreed to by the parties in a plea agreement, restitution to persons other than the victim of the offense.").

67. *See Squirrel*, 588 F.3d at 216–17.

68. *See id.* at 217 ("'We thus hold the Government to a greater degree of responsibility than the defendant for imprecisions or ambiguities in plea agreements.'" (quoting United States v. Jordan, 509 F.3d 191, 196 (4th Cir. 2007))).

69. *Id.* at 209.

70. *Id.*

71. *See id.* Slee must have been with Roach as these events occurred; otherwise, there would have been no reason for him to "[run] to his car." *Id.*

72. This situation would be more akin to the situation in *Quackenbush*. The totality of Slee's actions may have contributed to Seay's death just as Quackenbush's actions contributed to the bank's inability to recover the money. *See* United States v. Quackenbush, 9 F. App'x 264, 269 (4th Cir. 2001) (per curiam).