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A Crime Victim's Right to Be "Reasonably Heard": Kenna v. United States District Court

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CASE SUMMARY

A CRIME VICTIM'S RIGHT TO BE "REASONABLY HEARD"

KENNA v. UNITED STATES DISTRICT COURT

INTRODUCTION

In *Kenna v. United States District Court*, the Ninth Circuit held that under the Crime Victim's Rights Act ("CVRA"), a crime victim's right to be "reasonably heard" during sentencing was not limited to written impact statements, but included the right to allocute at any public proceeding.[1] This was an issue of first impression in the Ninth Circuit.[2] "No court of appeals had addressed the scope of this particular CVRA right."[3] Two district courts had considered this issue and had reached contrary decisions.[4] The Ninth Circuit agreed with the United States District Court for the District of Utah that a plausible reading of the CVRA allowed for speaking in court, and upon analysis of the legislative history, concluded that "victims now have an indefeasible right to speak."[5]

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[1] Kenna v. U.S. Dist. Court for the Cent. Dist. of Cal., 435 F.3d 1011, 1016 (9th Cir. 2006). 18 U.S.C. § 3771 (a) states: "Rights of crime victims. --A crime victim has the following rights: . . . (4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding." 18 U.S.C.A. § 3771 (West 2007).

[2] *Kenna*, 435 F.3d at 1017.

[3] *Id.* at 1013.

[4] *Id. Compare* United States v. Degenhardt, 405 F. Supp. 2d 1341, 1345 (D. Utah 2005) (CVRA grants victims a right to speak), *with* United States v. Marcello, 370 F. Supp. 2d 745, 748 (N.D. Ill. 2005) (CVRA does not grant victims a right to speak in all situations).

[5] *Kenna*, 435 F.3d at 1015-16.

I. FACTS AND PROCEDURAL HISTORY

Moshe and Zvi Leichner defrauded victims of nearly $100 million while claiming to invest the victims' money in foreign currency.[6] Sixty-plus victims proffered written victim impact statements, and several, including petitioner Kenna, spoke at Moshe's sentencing about the effects of the defendants' actions.[7] Moshe received a sentence of 240 months in prison.[8]

Three months later Zvi was sentenced.[9] The district court heard statements from the prosecutor and the defendant in accordance with Federal Rule of Criminal Procedure 32(i)(4).[10] However, the district court denied the victims an opportunity to speak.[11] The court stated, in part, "I listened to the victims the last time. . . . I don't think there's anything that any victim could say that would have any impact whatsoever. . . . There just isn't anything else that could possibly be said."[12] "Zvi was sentenced to 135 months in prison."[13] "Kenna filed a timely petition for writ of mandamus" in accordance with the CVRA.[14]

II. NINTH CIRCUIT ANALYSIS

Circuit Judge Alex Kozinski, writing for the court, addressed the issue of whether or not a district court could prohibit or limit a crime victim's speech to be "reasonably heard" under the CVRA.[15]

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[6] *Id.* at 1012-1013. Both "pleaded guilty to two counts of wire fraud and one count of money laundering." *Id.* at 1013.

[7] Kenna v. United States, 435 F.3d 1011, 1013 (9th Cir. 2006).

[8] *Id.*

[9] *Id.*

[10] *Id.* Federal Rule of Criminal Procedure 32(i)(4) states:

> Opportunity to Speak. (A) By a Party. Before imposing sentence, the court must: (i) provide the defendant's attorney an opportunity to speak on the defendant's behalf; (ii) address the defendant personally in order to permit the defendant to speak or present any information to mitigate the sentence; and (iii) provide an attorney for the government an opportunity to speak equivalent to that of the defendant's attorney.

FED. R. CRIM. P. 32(i)(4).

[11] *Kenna*, 435 F.3d at 1013.

[12] *Id.* One victim objected stating that there were residual, second and third impacts that had developed over the ninety days since they had been in court. The district judge informed the victims that those developments could be brought to his attention by the prosecutor and did not let the victims speak. *Id.*

[13] Kenna v. United States, 435 F.3d 1011, 1013 (9th Cir. 2006).

[14] *Id.* Kenna "[sought] an order vacating Zvi's sentence, and commanding the district court to allow the victims to speak at the resentencing." *Id.*

[15] *Id.* at 1013-18.

A. THE LEGISLATIVE INTENT OF "REASONABLY HEARD"

Kenna and the district court disagreed as to the scope of the CVRA right to be "reasonably heard."[16] Kenna argued that if he so chose, he was "entitled to speak in open court [during] Zvi's sentencing."[17] The district court countered that "reasonably heard" vested judges with discretion about how to receive victim's statements.[18] The Ninth Circuit found "none of the textual arguments dispositive" and concluded that both readings were plausible and that the statute was ambiguous.[19]

To resolve the ambiguity the court analyzed the statute's legislative history.[20] When the Senate considered the CVRA in 2004, the primary sponsors, Senators Jon Kyl and Dianne Feinstein, indicated that the term "reasonably" should not provide an excuse for denying a victim the opportunity to directly address the court.[21] Further, the Senators stated that the very purpose of the debated section of the CVRA was "to allow the victim to appear personally and directly address the court."[22]

The Ninth Circuit found that the statements of the CVRA sponsors and the committee reports for the proposed amendment to the Constitution demonstrated a clear congressional intent to allow victims the right to speak and noted that the statute was enacted "to make victims full participants in the criminal justice system."[23] The court asserted that its interpretation of the CVRA "puts crime victims on the same footing" as "prosecutors and defendants [who] already have the right to speak at sentencing."[24] The court further stated that the language of the statute

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[16] *Id.* at 1013.

[17] *Id.*

[18] *Id. See also* Crime Victim's Rights Act, 18 U.S.C.A. § 3771(d)(2) (West 2007):

> Multiple crime victims. -- In a case where the court finds that the number of crime victims makes it impracticable to accord all of the crime victims the rights described in subsection (a), the court shall fashion a reasonable procedure to give effect to this chapter that does not unduly complicate or prolong the proceedings.

18 U.S.C.A. § 3771(d)(2) (West 2007).

[19] Kenna v. United States, 435 F.3d 1011, 1015 (9th Cir. 2006).

[20] *Id.*

[21] *Id.*

[22] *Id.* The Ninth Circuit conceded that "floor statements are not given the same weight as some other types of legislative history," but noted that "floor statements made by the sponsors of legislation are given considerably more weight," particularly where no other legislator provides a contrary view. *Id.* The court also "note[d] that the CVRA passed as a compromise" after a prolonged "effort to amend the Constitution to protect victim's rights." *Id.* at 1016. The proposed constitutional amendment provided nearly identical language to that enacted in the CVRA. *Id.* "The Senate Report on the amendment notes that: . . . '[V]ictims should always be given the power to determine the form of the statement.'" *Id.* (citing S. Rep. No 108-191, at 38 (2003)).

[23] *Kenna* at 1016.

[24] *Id. See also* FED. R. CRIM. P. 32(i)(4)(A).

created "an indefeasible right to speak."[25] If a victim chooses to speak at more than one criminal sentencing, a court cannot deny allocution simply because the court believes "'[t]here just isn't anything else that could possibly be said.'"[26] The court ultimately granted Kenna's petition for the writ of mandamus.[27]

B. THE SCOPE OF THE OPINION

Senior Circuit Judge Daniel Friedman agreed with the holding that under the CVRA, the district court could not justify its refusal to permit the victims to speak at Zvi's sentencing.[28] However, he filed an opinion *dubitante* to express concern about "the seemingly broad sweep of the opinion."[29] Judge Friedman was concerned that the opinion provided "an absolute right to speak at sentencing" and stated that he would prefer to leave the issue open and issue an opinion with a more limited scope.[30]

III. IMPLICATIONS OF THE DECISION

The Ninth Circuit's decision appears to promote the purpose of the CVRA. Crime victims in the Ninth Circuit can no longer be denied the right to allocute at "any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding."[31] The district court must consider the effects of crimes upon victims at the time of decision regarding punishment, and allowing victims to speak in court enables this consideration.[32]

However, 18 U.S.C. § 3771(d)(2) does grant the court the authority to create a reasonable procedure to avoid unduly complicated or lengthy proceedings.[33] Given the broad scope of the decision, the opinion failed to address how this section applies.

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[25] Kenna v. United States, 435 F.3d 1011, 1016 (9th Cir. 2006).

[26] *See id.* (describing how victims now have the same rights as defendants).

[27] *Id.* at 1018.

[28] *Id.* (Friedman, J., *dubitante*).

[29] *Id.*

[30] *Id.* In addition, Judge Friedman raised a similar concern regarding the scope of the writ issued and would leave it up to the district court to determine whether other victims may speak. *Id.* at 1019.

[31] 18 U.S.C.A. § 3771(a)(4) (West 2007).

[32] Kenna v. United States, 435 F.3d 1011, 1016-17 (9th Cir. 2006).

[33] 18 U.S.C.A. § 3771(d)(2) (West 2007).

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