

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

United States v. McIntosh

United States v. McIntosh, 24 F.4th 857 (2d Cir. 2022) · No. 14-1908, 14-3922, 17-2623 · Decided January 25, 2023

SUMMARY

In *United States v. McIntosh*, the Second Circuit held that the failure to enter a preliminary forfeiture order before sentencing, as required by Federal Rule of Criminal Procedure 32.2(b)(2)(B), does not invalidate the forfeiture; the deadline is a non-jurisdictional time-related directive. The court also held that a *Rehaif* error—failure to instruct the jury that the defendant knew he was a felon for purposes of 18 U.S.C. § 922(g)—is subject to plain-error review, and McIntosh failed to show that he would have presented evidence that he did not know his felon status, as required by *Greer v. United States*. The Second Circuit affirmed the district court's judgment on both issues.

CASE DETAILS

COURT	United States Court of Appeals for the Second Circuit
WRITING FOR THE COURT	John M. Walker, Jr.; Raymond J. Lohier, Jr.; Timothy C. Stanceu
JURISDICTION	Federal
DECIDED	January 25, 2023
DOCKET	14-1908, 14-3922, 17-2623
DISPOSITION	affirmed
PROCEDURAL POSTURE	Appeal from the United States District Court for the Southern District of New York (Sidney H. Stein, J.) after amended judgment of conviction.
STANDARD OF REVIEW	For the forfeiture issue, de novo review of the interpretation of Rule 32.2(b); for the Rehaif issue, plain error review because McIntosh did not object.
PRECEDENTIAL VALUE	Published
PARTIES	Louis McIntosh v. United States of America

TOPICS

- criminal procedure
- sentencing
- appellate procedure
- standard of review
- harmless error

PRACTICE AREAS

Criminal Law

Forfeiture

Firearms Offenses

QUESTIONS PRESENTED

1. Whether the order of forfeiture should be vacated because the district court failed to enter a preliminary order prior to sentencing as required by Federal Rule of Criminal Procedure 32.2(b)(2)(B)
2. Whether McIntosh was improperly convicted of possessing firearms as a felon (Counts 12-14) because the government did not prove that he knew he was a felon, in light of *Rehaif v. United States*

HOLDINGS

1. Rule 32.2(b)(2)(B) is a time-related directive, not a jurisdictional rule or claims-processing rule, and the district court's failure to comply with its timing requirements does not render the forfeiture invalid.
2. McIntosh cannot establish plain error under *Greer v. United States* because he offered no evidence that he did not know he was a felon, and there is no reasonable probability that the outcome would have been different.

KEY QUOTATIONS

"Nothing in the federal rules sets forth the consequences of a failure by the district court to issue the preliminary order prior to sentencing." (5)

"We think the considerations that pertained to the restitution order in Dolan similarly apply to the Rule 32.2(b) deadline for forfeiture." (7)

"Thus, we conclude that Rule 32.2(b)(2)(B) is a time-related directive. Accordingly, the district court's failure to enter a preliminary order in time does not render the forfeiture invalid." (8)

*"McIntosh's argument is foreclosed by the recent Supreme Court decision *Greer v. United States*." (12)*

"McIntosh has offered no such evidence. Consequently, we have 'no basis to conclude that there is a 'reasonable probability' that the outcome would have been different absent the Rehaif error,' and so we cannot find plain error." (12)

FACTUAL BACKGROUND

In 2011, McIntosh and others were indicted for multiple counts of Hobbs Act robbery and related firearms charges arising from a series of violent robberies between 2009 and 2011. A jury convicted McIntosh on all counts in 2013. The district court sentenced him to 720 months' imprisonment and ordered forfeiture of \$75,000 and a BMW purchased with robbery proceeds. The district court failed to enter a preliminary forfeiture order before sentencing as required by Rule 32.2(b)(2)(B).

PROCEDURAL HISTORY

McIntosh was convicted by a jury in 2013 on all counts of a multi-count indictment for Hobbs Act robbery and firearm offenses. The district court entered judgment in 2017 after remand for forfeiture proceedings. McIntosh

appealed, and the case was remanded by the Supreme Court for reconsideration in light of *United States v. Taylor*. The Second Circuit reissues this opinion addressing two issues: forfeiture timing and Rehaif error.

DISPOSITION

affirmed

CASES CITED

- *United States v. Taylor*, 142 S. Ct. 2015 (2022)
- *Dolan v. United States*, 560 U.S. 605 (2010)
- *United States v. Martin*, 662 F.3d 301 (4th Cir. 2011)
- *United States v. Carman*, 933 F.3d 614 (6th Cir. 2019)
- *United States v. Cereceres*, 771 F. App'x 803 (9th Cir. 2019)
- *United States v. Farias*, 836 F.3d 1315 (11th Cir. 2016)
- *United States v. \$38,000.00 in U.S. Currency*, 816 F.2d 1538 (11th Cir. 1987)
- *United States v. Torres*, 703 F.3d 194 (2d Cir. 2012)
- *United States v. Qurashi*, 634 F.3d 699 (2d Cir. 2011)
- *Rehaif v. United States*, 139 S. Ct. 2191 (2019)
- *Greer v. United States*, 141 S. Ct. 2090 (2021)
- *United States v. Nouri*, 711 F.3d 129 (2d Cir. 2013)
- *United States v. Jacobson*, 15 F.3d 19 (2d Cir. 1994)
- *McIntosh v. United States*, 143 S. Ct. 399 (2022)