

14-1908-cr

United States v. McIntosh

1
2 In the
3 United States Court of Appeals
4 For the Second Circuit
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7 AUGUST TERM 2020

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9 ARGUED: OCTOBER 15, 2020

10 DECIDED: JANUARY 31, 2022

11
12 Nos. 14-1908, 14-3922, 17-2623

13
14 UNITED STATES OF AMERICA,
15 *Appellee-Cross-Appellant,*

16
17 *v.*

18
19 LOUIS MCINTOSH, AKA Lou D, AKA Lou Diamond, AKA G,
20 *Defendant-Appellant-Cross-Appellee,*

21
22 EDWARD RAMIREZ, AKA Taz, TERRENCE DUHANEY, AKA Bounty
23 Killer, TURHAN JESSAMY, AKA Vay, QUINCY WILLIAMS, AKA
24 Capone, TYRELL ROCK, AKA Smurf, NEIL MORGAN, AKA Steely,
25 *Defendants.*

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28 Appeal from the United States District Court
29 for the Southern District of New York.
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32 Before: WALKER, LOHIER, *Circuit Judges*, and STANCEU, *Judge*.*

* Senior Judge Timothy C. Stanceu, of the United States Court of International Trade, sitting by designation.

1
2 Louis McIntosh appeals various issues arising from his 2017
3 amended judgment of conviction for Hobbs Act robbery and firearm
4 offenses in the Southern District of New York (Sidney H. Stein, J.). In
5 this opinion, we address two of McIntosh's arguments—first, that the
6 order of forfeiture entered against him should be vacated because the
7 district court failed to enter a preliminary order prior to sentencing,
8 as required by Federal Rule of Criminal Procedure 32.2(b)(2)(B);
9 second, that he was improperly convicted of possessing firearms as a
10 felon, Counts Twelve through Fourteen, because the government did
11 not prove that he knew that he was a felon. As to these issues, we
12 **AFFIRM** the judgment of the district court. We address his remaining
13 arguments in a separate summary order filed concurrently with this
14 opinion.

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19 *Appellee Louis McIntosh.*

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21 (Thomas McKay, Assistant United States
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25 *Appellant United States of America.*

26
27 JOHN M. WALKER, JR., *Circuit Judge:*

28 Louis McIntosh appeals various issues arising from his 2017
29 amended judgment of conviction for Hobbs Act robbery and firearm
30 offenses in the Southern District of New York (Sidney H. Stein, J.). In
31 this opinion, we address two of McIntosh's arguments—first, that the

1 order of forfeiture entered against him should be vacated because the
2 district court failed to enter a preliminary order prior to sentencing,
3 as required by Federal Rule of Criminal Procedure 32.2(b)(2)(B);
4 second, that he was improperly convicted of possessing firearms as a
5 felon, Counts Twelve through Fourteen, because the government did
6 not prove that he knew that he was a felon. As to these issues, we
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8 arguments in a separate summary order filed concurrently with this
9 opinion.

10 BACKGROUND

11 In 2011, Appellant Louis McIntosh and several others were
12 indicted on multiple counts of Hobbs Act robbery and related
13 firearms charges. The charges arose from a series of violent robberies
14 and attempted robberies that occurred between 2009 and 2011. The
15 indictment contained a forfeiture allegation, consistent with 18 U.S.C.
16 § 981(a)(1)(C) and 28 U.S.C. § 2461(c), requiring the forfeiture of all
17 proceeds and property resulting from the offenses.

18 In August 2013, a jury in the Southern District of New York
19 convicted McIntosh on all counts.¹ The district court sentenced
20 McIntosh to 720 months' imprisonment and three years of supervised
21 release. The district court also ordered McIntosh to pay restitution
22 and to forfeit \$75,000 and a BMW that McIntosh had purchased with
23 robbery proceeds.

24 Before imposing forfeiture, Federal Rule of Criminal Procedure
25 32.2(b) requires the district court to "promptly enter a preliminary
26 order of forfeiture setting forth the amount of any money judgment

¹ After jury deliberations, the district court directed a judgment of acquittal on two counts. The district court's order as to those counts has no bearing on the issues discussed in this opinion.

1 . . . [and] directing the forfeiture of specific property.”² “Unless doing
2 so is impractical,” this preliminary order “must” be entered
3 “sufficiently in advance of sentencing to allow the parties to suggest
4 revisions or modifications before the order becomes final.”³ The
5 preliminary order becomes final at sentencing and must be included
6 in the judgment.⁴

7 In this case, the district court did not enter a preliminary order
8 prior to sentencing, apparently because the government did not
9 submit a proposed order. At sentencing, after verbally ordering
10 forfeiture, the district court instructed the government to propose a
11 formal order of forfeiture within one week, which the government
12 also failed to do. As a result, no written order of forfeiture was
13 entered.

14 After the entry of judgment, McIntosh timely appealed. In
15 2016, on the government’s unopposed motion, we remanded the case
16 pursuant to *United States v. Jacobson*⁵ and instructed the government,
17 if it wished to pursue forfeiture, to ask the district court to enter a
18 formal order of forfeiture. The government then filed a proposed
19 order, and McIntosh raised several challenges in response.

20 On August 8, 2017, the district court denied McIntosh’s
21 objections and entered a preliminary order for forfeiture. The order
22 required McIntosh to pay \$75,000 in forfeiture and to turn over the
23 BMW, with funds from the sale of the car being credited against the

² Fed. R. Crim. P. 32.2(b)(2)(A).

³ Fed. R. Crim. P. 32.2(b)(2)(B).

⁴ Fed. R. Crim. P. 32.2(b)(4)(A)-(B).

⁵ 15 F.3d 19 (2d Cir. 1994).

1 \$75,000.⁶ The order was included in an amended judgment filed the
2 same day. McIntosh timely appealed the amended judgment.

3 DISCUSSION

4 I

5 On appeal, McIntosh challenges the forfeiture order, which he
6 says should be vacated because the district court failed to enter a
7 preliminary forfeiture order before sentencing, as required by Federal
8 Rule of Criminal Procedure 32.2(b)(2)(B). We disagree.

9 Nothing in the federal rules sets forth the consequences of a
10 failure by the district court to issue the preliminary order prior to
11 sentencing. We find the Supreme Court's decision in *Dolan v. United*
12 *States*, however, to be instructive.⁷ There, in a restitution case, the
13 Supreme Court laid out a framework for analyzing "the consequences
14 of [a] missed deadline" when not specified in the relevant statute.⁸
15 The Court described three kinds of deadlines: "jurisdictional rules"
16 that present an absolute prohibition; "claims-processing rules" that
17 can bar certain actions but also may be waived; and "time-related
18 directives" that are "legally enforceable but [do] not deprive a judge
19 or other public official of the power to take the action to which the
20 deadline applies if the deadline is missed."⁹

21 The *Dolan* Court concluded that a 90-day statutory deadline to
22 order restitution was a time-related directive. The Court considered

⁶ In our accompanying summary order, we vacate the \$75,000 restitution on other grounds and remand the case to the district court for recalculation.

⁷ 560 U.S. 605 (2010).

⁸ *Id.* at 610.

⁹ *Id.* at 610-11.

1 a number of relevant circumstances. It stated that when “a statute
2 does not specify a consequence for noncompliance with its timing
3 provisions, federal courts will not in the ordinary course impose their
4 own coercive sanction.”¹⁰ It examined the text and structure of the
5 statute and determined that the deadline “is primarily designed to
6 help victims of crime secure prompt restitution rather than to provide
7 defendants with certainty as to the amount of their liability.”¹¹ The
8 Court was mindful that preventing restitution would harm victims,
9 “who likely bear no responsibility for the deadline’s being missed and
10 whom the statute also seeks to benefit.”¹² This suggested that the
11 deadline is not meant to be a firm prohibition. The Court also cited
12 other cases in which deadlines were interpreted flexibly in order to
13 preserve their purpose or to avoid disproportionately benefiting
14 convicted defendants.¹³ Finally, it noted that defendants who wished
15 to avoid delay were always free to remind the district court of the
16 statutory deadline.¹⁴ Taken together, these circumstances led the
17 Supreme Court to conclude that the restitution deadline is a time-
18 related directive. As a result, so long as the district court makes clear
19 prior to the deadline expiring that it intends to impose restitution, “a
20 sentencing court that misses the 90-day deadline nonetheless retains
21 the power to order restitution.”¹⁵

22 We think the considerations that pertained to the restitution
23 order in *Dolan* similarly apply to the Rule 32.2(b) deadline for

¹⁰ *Id.* at 611 (internal quotation marks omitted).

¹¹ *Id.* at 613.

¹² *Id.* at 613-14.

¹³ *Id.* at 614-15.

¹⁴ *Id.* at 616.

¹⁵ *Id.* at 608.

1 forfeiture. The Fourth Circuit adopted this view a year after *Dolan*
2 when, in *United States v. Martin*, it applied *Dolan*'s considerations to a
3 previous version of Rule 32.2(b) and found its deadline to be a time-
4 related directive.¹⁶ For several reasons, we agree with the reasoning
5 in *Martin* and believe it applies with equal force to the current version
6 of the rule.

7 First, Rule 32.2 "does not specify a consequence for
8 noncompliance with its timing provisions."¹⁷ Second, the Federal
9 Rules Advisory Committee's notes on the revised rule make clear that
10 the deadline to enter the preliminary order is intended to give the
11 parties time "to advise the court of omissions or errors in the order
12 before it becomes final" because there is limited opportunity to do so
13 after judgment is finalized.¹⁸ At the same time, the comments make
14 no mention of an interest in giving defendants certainty as to the
15 amount to be forfeited before sentencing. This focus on accuracy, not
16 the defendant's repose, is consistent with the substantive purpose of
17 forfeiture, which is to "deprive criminals of the fruits of their illegal
18 acts and deter future crimes."¹⁹ Third, because forfeited funds
19 frequently go to the victims of the crime, preventing forfeiture due to
20 the missed deadline would tend to harm innocent people who are not
21 responsible for the oversight.²⁰ Fourth, consistent with examples
22 cited in *Dolan*, interpreting the deadline rigidly here would
23 disproportionately benefit defendants. And finally, as in *Dolan*, a
24 defendant concerned about possible delays or mistakes can remind

¹⁶ 662 F.3d 301 (4th Cir. 2011).

¹⁷ *Dolan*, 560 U.S. at 611 (internal quotation marks omitted).

¹⁸ Fed. R. Crim. P. 32.2(b) advisory committee's note to 2009 amendment.

¹⁹ *Martin*, 662 F.3d at 309.

²⁰ *Id.*

1 the district court of the preliminary order requirement any time
2 before sentencing.

3 Our analysis is reinforced by the decisions of sister circuits that
4 have also found the Rule 32.2(b) deadline to be non-jurisdictional.²¹
5 Thus, we conclude that Rule 32.2(b)(2)(B) is a time-related directive.
6 Accordingly, the district court's failure to enter a preliminary order in
7 time does not render the forfeiture invalid.

8 McIntosh raises several counterarguments, none of which are
9 persuasive. He cites an Eleventh Circuit case for the proposition that
10 "strict compliance with the letter of the law by those seeking forfeiture
11 must be required."²² But Rule 32.2(b)(2)(B) governs the conduct of the
12 district court, not the litigants. The issue here is whether the district
13 court had the authority to enter the order despite its failure to comply
14 with the timing requirements, not whether the government should
15 have been more diligent. Even if the government bears some
16 responsibility for the mistake, Rule 32.2(b)(2)(B)'s status as a time-
17 related directive means that it is not a fatal one.

18 McIntosh also asserts that forfeiture is unlike restitution, which
19 was at issue in *Dolan*, because restitution is intended to assist the
20 victims of crimes. It is true that forfeiture and restitution serve
21 different purposes: restitution is for "remediating a loss," while
22 forfeiture is for "disgorging a gain."²³ But that distinction is less
23 material here. Forfeiture also serves other important purposes, and
24 we see no reason why, for purposes of timing, restitution and

²¹ See *United States v. Carman*, 933 F.3d 614, 617 (6th Cir. 2019); *United States v. Cereceres*, 771 F. App'x 803, 804 (9th Cir. 2019); *United States v. Farias*, 836 F.3d 1315, 1330 (11th Cir. 2016).

²² *United States v. \$38,000.00 in U.S. Currency*, 816 F.2d 1538, 1547 (11th Cir. 1987).

²³ *United States v. Torres*, 703 F.3d 194, 196 (2d Cir. 2012).

1 forfeiture should be treated differently under these circumstances.

2 McIntosh next argues that he was prejudiced by the delay
3 because his BMW lost value while the forfeiture issue was litigated.²⁴
4 But McIntosh knew that the district court would order forfeiture, and
5 as the district court pointed out, he could have sought an
6 interlocutory sale of the car if he had wished to preserve its value.
7 Doing so would have been consistent with the structure of the rule,
8 which permits the sale of property prior to sentencing but only with
9 the defendant's consent.²⁵ McIntosh also argues that the government
10 alone is responsible for preserving the value of seized assets, but for
11 support he cites only to an inapposite customs statute.²⁶ McIntosh has
12 not demonstrated prejudice sufficient to void the forfeiture order.

13 McIntosh also points to the structure of Rule 32.2 to argue that
14 the preliminary order deadline must be interpreted strictly. Should
15 the court forget to include the forfeiture order in the final judgment,
16 Rule 32.2(b)(4)(B) permits the judgment to be corrected under Rule 36,
17 which governs the correction of clerical errors. From this provision,
18 McIntosh infers that all the other requirements of the rule, which do
19 not have related correction provisions, are strictly enforceable. But
20 Rule 32.2(b)(4)(B) simply makes clear that forgetting to incorporate
21 the order in the final judgment is a clerical error and should be treated
22 as such. It sheds no light on the treatment of procedural errors.
23 Indeed, the statute at issue in *Dolan* similarly stated that a sentence

²⁴ See *United States v. Qurashi*, 634 F.3d 699, 705 (2d Cir. 2011) (noting that *Dolan* permits us to take into account claimed prejudices resulting from delays).

²⁵ Fed. R. Crim. P. 32.2(b)(4)(A); Fed. R. Crim. P. 32.2(b) advisory committee's note to 2000 amendment.

²⁶ 19 U.S.C. § 1612 (requiring the prompt sale of property seized under customs law).

1 containing an order of restitution can “subsequently be . . . corrected
2 under Rule 35.”²⁷ This provision, however, did not transform the
3 statute’s other requirements into ironclad limits, and neither does
4 reference to Rule 36 in Rule 32.2(b)(4)(B) do so here.

5 Finally, we reject McIntosh’s claim that he should be credited
6 for the value of the BMW at the time it was seized, not its eventual
7 sale price. He cites no authority directly supporting this point,
8 instead relying on statutes that require the government or courts to
9 preserve the value of seized assets. The statutes he cites deal with
10 protecting the interests of lienholders and others with claims on the
11 property, not the individual subject to the forfeiture order.²⁸ Crediting
12 defendants for property depreciation that occurred during litigation
13 and which defendants could likely prevent by requesting a sale
14 would, in most cases, undermine forfeiture’s deterrent value and
15 possibly shortchange victims.

16 II

17 McIntosh also contests his convictions on Counts Twelve
18 through Fourteen for possessing a firearm as a felon. At trial,
19 McIntosh stipulated that he had been convicted of a crime punishable
20 by a year or more in prison, but the stipulation did not state that he
21 was aware of this fact when he possessed the firearms. The
22 government, meanwhile, offered no evidence suggesting that
23 McIntosh was aware of his felon status, but McIntosh did not object.

24 In *Rehaif v. United States*, the Supreme Court held that the
25 relevant statutes required the government to show “that the
26 defendant knew he possessed a firearm and also that he knew he had

²⁷ 18 U.S.C. § 3664(o)(1)(A).

²⁸ See 19 U.S.C. § 1612; Fed. R. Civ. P., Supp. Rule G(7)(b); 18 U.S.C. § 981(g)(6).

1 the relevant [felon] status when he possessed it.”²⁹ On appeal,
2 McIntosh argues that the district court committed plain error when it
3 failed to instruct the jury about the knowledge element of these
4 counts. Plain error arises when, among other requirements, “there is
5 a reasonable probability that the error affected the outcome of the
6 trial.”³⁰

7 McIntosh’s argument is foreclosed by the recent Supreme
8 Court decision *Greer v. United States*.³¹ In *Greer*, the Supreme Court
9 held that, to establish plain error under *Rehaif*, a defendant must
10 “make an adequate showing on appeal that he would have presented
11 evidence in the district court that he did not in fact know he was a
12 felon when he possessed firearms.”³² McIntosh has offered no such
13 evidence. Consequently, we have “no basis to conclude that there is
14 a ‘reasonable probability’ that the outcome would have been different
15 absent the *Rehaif* error,” and so we cannot find plain error.³³

16 McIntosh argues that the district court’s failure to instruct the
17 jury on the point should, on its own, be enough to establish plain
18 error. But *Greer* has made clear that “*Rehaif* errors fit comfortably
19 within the general rule that a constitutional error does not
20 automatically require reversal of a conviction.”³⁴ McIntosh “must

²⁹ 139 S. Ct. 2191, 2194 (2019).

³⁰ *United States v. Nouri*, 711 F.3d 129, 139 (2d Cir. 2013) (quotation mark omitted).

³¹ 141 S. Ct. 2090 (2021).

³² *Id.* at 2097.

³³ *Id.*

³⁴ *Id.* at 2100 (quotation marks omitted).

1 satisfy the ordinary plain-error test.”³⁵ He has not done so here, and
2 so we affirm the district court on Counts Twelve through Fourteen.

3 **CONCLUSION**

4 For the foregoing reasons, as to the issues discussed above, we
5 **AFFIRM** the judgment of the district court.

³⁵ *Id.*