

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

**DAVID BUNN, ET AL.,
PLAINTIFFS**

vs.

**CHIEF KEVIN GLEASON, ET AL,
Defendants**

) **CIVIL ACTION NO. 3:06-CV12238-MAP**

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JUNE 5, 2008

MOTION TO RECONSIDER

On May 23, 2008, the Court granted Scott Haley's Motion to Dismiss for Insufficient Service. The Plaintiffs respectfully file this Motion to Reconsider the Decision.

I. INTRODUCTION

Scott Haley moved to dismiss Plaintiffs' claims against him, asserting that he did not receive service of process until two years after this suit commenced, beyond the 120-day period allowed under Fed. R. Civ. P. 4(m). The court in granting the Motion to Dismiss addressed the issue of whether "the Plaintiffs have either demonstrated good cause for this failure or otherwise provided some reason for the court to extend the time limit for serving process up to March 31, 2008, when Haley was served."

The Court held that the Plaintiffs should not be granted an extension of time to serve Scott Haley because: (1) Haley did not waive his insufficiency of process argument; (2) Plaintiffs did not provide an explanation for their failure to serve Haley that constitutes good cause for the lack of service; (3) the delay of service has had a substantial impact, resulting in an irrevocably lost opportunity for Haley to record his recollection of these incidents and prepare for litigation and the potential prejudice to

Haley equals or exceeds the prejudice to Plaintiffs from dismissing these claims, especially since Plaintiffs may still continue to pursue their charges against the other defendants.

The Plaintiffs respectfully ask the Court to reconsider its' decision on two issues that support the granting of Scott Haley's Motion to Dismiss. New information and evidence was obtained through the deposition testimony of Scott Haley on May 30, 2008, which supports the Plaintiffs' current request for this Motion to Reconsider. First, the Plaintiffs seek the reconsideration of the decision because Scott Haley would not be prejudiced if the case were to proceed against him because: (1) He has an accurate and comprehensive memory of the events leading up to the drafting of the search warrant at issue in this case; (2) He has an accurate and comprehensive memory of the actual search of the property that is at issue in this case; (3) He had repeated and detailed conversations with police officials and state prosecutors about the search warrant and the actual search that in late 2005 and 2006; and (4) He currently maintains a file on the search and raid of 90 Maybrook that contains the information he had for the investigation on the property and the raid.

Secondly, the Plaintiffs further respectfully seek this reconsideration because the Plaintiffs are highly prejudiced without Scott Haley as a defendant because even though the Plaintiffs may still continue to pursue their charges against the other defendants, following the conclusion of Scott Haley's deposition, it appears that Haley was the sole actor in the drafting of the search warrant, which is the main issue of this action.

II. FACTS

The Plaintiffs adopt the facts as set forth in the Court's decision and makes the addition of the following newly obtained facts to support this Motion to Reconsider.

During the his deposition, Scott Haley testified:

- (1) He remembered the raid on the plaintiffs' property without reviewing his file.

13 Q. When he mentioned that the Bunns were
14 bringing a ridiculous suit against him, did you know
15 who he was talking about?

16 A. Well, I knew who the Bunns were.

17 Q. How did you know that?

18 A. Well, because I went out there with a
19 search warrant and participated in going to the --
20 I knew who the Bunns were.

21 Q. So, when Chief Gleason mentioned that
22 they were bringing a ridiculous suit against him, you
23 didn't have to look at your file to remember who the
24 Bunns were?

1 A. No.

(Deposition of Scott Haley, p. 17, line 13 through p. 18, line 1.)

- (2) He maintains a comprehensive file on the raid.

17 Earlier you mentioned that you reviewed
18 your file, and is that file for the search of that
19 property?

20 A. That file contains some information
21 about that property and the people involved there.

22 Q. And that's the file you reviewed prior to
23 today's deposition?

24 A. Yes.

1 Q. Is there any other file that is
2 maintained for the search on 90 Maybrook Road in
3 Holland?

4 A. Is there any other file?

5 Q. Yes.

6 A. I would say there's only one file.

7 Q. And that's the file that we just talked
8 about?

9 A. Yes.

10 Q. What's in that file?
11 A. I have some informant information in
12 that file, names, telephone numbers. I have some
13 notes in that file. I have a written statement
14 from the informant in that file. I have copies of
15 photocopied money that we used in the buys. I
16 still have the envelopes with the drugs in the
17 file that the buy was made, drugs are still in it.
18 I have some background information in the file on
19 the Bunns, pictures of them. I have sketches of
20 the Bunn house made by the informant. And some
21 personal notes in there.

(Deposition of Scott Haley, p.15, line 17 through p. 16, line 16.)

3) He remembers how he was first contacted by the Holland Police Department.

Q. Do you recall how you were first
23 contacted regarding the property at 90 Maybrook?
24 A. I was called from Holland that they
1 had a problem with a marijuana dealer on the lake,
2 and that they had a lot of information and an
3 informant to supply.

(Deposition of Scott Haley, p.19, line 23 through p.20, line 3.)

4) He remembers the details of the raid.

18 So, I
19 specifically called for the State Police to bring
20 marked units along and the Holland brought marked
21 units, and I'm sure the first two or three
22 vehicles in the driveway were narcotic officers
23 getting into the driveway and getting to the house
24 first and then followed up within like 100 feet or

(Deposition of Scott Haley, Page 127, lines 18-24)

1 A. I remember that I was in that house.
2 Q. Do you remember anything about being in
3 that house?
4 A. I remember there was like three big
5 floors. I remember there was some young people
6 there. And I remember finding a ton of
7 paraphernalia and a lot of marijuana and
8 fragments. I remember Dodge running around. I

9 remember everything was -- everybody was very
10 cordial and it was very low key. Just that kind
11 of stuff.

12 Q. Do you remember if the -- you said there
13 was three floors. Was the top floor searched?

14 A. I believe everything was searched.
15 Our search warrant was for the whole house. So,
16 we wouldn't have just searched -- I think there
17 was like a full basement and a first floor and a
18 second floor. So, I don't really know if you
19 would call it a third floor.

20 Q. Did you use any K-9s or anything for the
21 search of the house?

22 A. I do believe we had a K-9. I just
23 don't know who brought one.

(Deposition of Scott Haley, Page 112, lines 2-11)

5) He remembers detailed information about the informant he used.

Q. How did you get that information that he
1 had been in and out of the hospital?

2 A. My informant told me in the process
3 of this that the old man was really sick and that
4 he -- I remember him saying there was an IV in his
5 arm at times, and that I know on the third day
6 that he wasn't in the house and I recorded that
7 father was in the hospital.

8 So, our informant kept us abreast
9 when he went in there as to the condition of the
10 father and where he was and what was going on if
11 he knew.

(Deposition of Scott Haley, Page 112, lines 2-11)

6) He remembered why he did not arrest anyone during the raid.

22 Do you recall why you decided not to?

21 A. Oh, yeah. I do recall.

22 Q. What was that?

23 A. Kids in the house, tons of evidence
24 to record, everybody's very cooperative and decent
1 at the scene, and there was no reason not to have
2 to summons them into court. If they were fighting
3 and were, you know, having all sorts of other
4 problems, they would have been gone, but they were
5 cooperative and had children and we had a lot of
6 evidence and things to document and take care of.

7 So, there was a decision to summons. We don't
8 arrest if we don't have to, but most cases, we do
9 have to.

(Deposition of Scott Haley, pp. 68, line 22 through p.69, line 9).

7) He remembered why the criminal charges were eventually dropped in August 2005.

Q. Do you know what happened to the criminal
1 charges against Christena Dodge and Judith Bunn?

2 A. I know they dismissed them.

3 Q. Did you ever try to get the charges
4 reissued?

5 A. No. I think I was part of them being
6 dismissed.

7 Q. What does that mean?

8 A. It meant that the prosecution had to
9 make a decision on whether to give up certain
10 information on informants and this and that and
11 they had to make a decision on whether -- what
12 they were going to do with the case. If I
13 remember correctly, the Bunns filed numerous
14 motions, delayed prosecution for several months
15 with like health issues and all that kind of
16 stuff, and months later, I can't say how long, but
17 I know several months later, might have been a
18 year or two later, after we were at the house, the
19 prosecution, prosecutors talked to me about the
20 case and we made a decision not to go forward with
21 or not to give up certain information in the case,
22 and as a result of that, the case went south.

(Deposition of Scott Haley, p 82, lines 1-22.)

8) He testified that the raid itself left its mark in his memory because it was unusual and it was the only search warrant he executed in the Town of Holland.

ATTORNEY PELLETIER:

3 Q. Was there anything that you can think of,
4 sitting here today, and I do realize that it's five
5 years after this raid, that was unusual about this
6 particular raid as distinct from the other hundreds of
7 raids or --

8 A. The most unusual thing was that this
9 went very smooth, nothing was broken, nobody got

10 hurt, and we didn't even arrest anybody at the
11 scene, okay, which is highly unusual in a drug
12 thing.
13 This was, to be sitting here five
14 years later, is a shock to me because it went so
15 smooth. Nobody hurt. Nobody -- nothing. And not
16 even an arrest taken out of the place in
17 handcuffs. Highly unusual. Drug raids are
18 usually tumultuous. They're, you know, on and on
19 and on. This one was absolutely just the
20 opposite.

(Deposition of Scott Haley, p.124, line 3 through 20.)

14 Q. Have you ever executed a search warrant
15 in Holland, Massachusetts?

16 A. Yes.

17 Q. Have you executed a search warrant in the
18 year 2008 in Holland, Massachusetts?

19 A. 2008? No, I don't think so.

20 Q. How about 2007?

21 A. I have to guess that the only search
22 warrant I've done is 2003.

23 MS. LYNCH: Well, you shouldn't
24 guess.

1 THE WITNESS: 2003.

2 MS. O'NEIL-BAKER: If you want to
3 make an objection, you can.

4 MS. LYNCH: Well, I don't think you
5 want the witness to guess.

6 THE WITNESS: My answer is that I've
7 done hundreds of search warrants in the area.

8 Without being able to delve into records which
9 would take me a long time, I can't answer all
10 those.

11 Q. (By Ms. O'Neil-Baker) Okay. Do you
12 recall doing more than one search warrant in Holland?

13 A. No, I don't recall that.

14 Q. Do you recall executing a search warrant
15 on 90 Maybrook Road in Holland, Massachusetts?

16 A. Yes.

(Deposition of Scott Haley, p.14, line 13 through p. 14 line 16).

9) Gleason had no participation in the drafting of the search.

Q. (By Ms. O'Neil-Baker) When you drafted
14 the affidavit for the search warrant that you signed,
15 did you review that with Chief Gleason?
16 A. No.
17 Q. Why not?
18 A. He doesn't know anything about it.
(Deposition of Scott Haley, p. 57.)

Q. (By Ms. O'Neil-Baker) Prior to having
20 the search warrant issued on March 25, 2003, did you
21 give Chief Gleason a copy of the paperwork you were
22 submitting?
23 A. I don't think he had anything to do
24 with the search warrant. I'm sure he didn't.
(Deposition of Scott Haley, p.58.)

10) Chief Gleason testified that he had a detailed conversation with Scott Haley after
the criminal charges were dismissed, in August 2005.

Q. Did Agent Haley give you an explanation
22 of why he didn't think that the charges should be
23 reissued?
24 A. We had a long talk about the case in
1 general. And what Sergeant Haley told me was
2 that -- trying to recall. I can't recall his
3 exact wording. But it wasn't a big case and that
4 the Bunns had moved out of town at the time and we
5 got rid of a drug dealer.
(Deposition of Chief Gleason, p. 160, line 22 through p. 161, line 5).

Q. (By Ms. O'Neil-Baker) You testified that
12 you spoke with Agent Haley after the criminal charges
13 were dismissed about whether to refile -- reissue the
14 charges, correct?
15 A. Yes.
16 Q. And you're sure it was after the charges
17 were dismissed?
18 A. Well, I wouldn't --
19 MS. PELLETIER: Why would he want to
20 reissue the charges if they hadn't been
21 dismissed? It doesn't make any sense. You've
22 asked him the same question three times.

23 Q. (By Ms. O'Neil-Baker) You talked with
 24 Sergeant Haley about the detail of the case about
 1 reissuing the charges?
 2 A. Yes.
 3 Q. And that was after August of 2005?
 4 A. I don't --
 5 MS. PELLETIER: He has testified
 6 several times he doesn't know when the charges
 7 were dismissed. So, now you're adding that
 8 date in as if he knows that's when the charges
 9 were dismissed. Objection.
 10 Q. (By Ms. O'Neil-Baker) But you're certain
 11 it was after?
 12 A. After what?
 13 Q. The charges were dismissed.
 14 A. Yes.

(Deposition of Chief Gleason, p. 162, through p. 163, line 14).

III. DISCUSSION

Where a party has failed to provide proper service, Rule 4 specifies the court's options: If a defendant is not served within 120 days after the complaint is filed, the court . . . Must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period. Fed. R. Civ. P. 4(m). Thus, a plaintiff may escape dismissal in the face of insufficient service in two circumstances: where there is "good cause for the failure," or even if there is no good cause shown, where the court in its discretion decides to grant the plaintiff more time to effect service. *Id.*; see also Advisory Committee's Notes on Fed. R. Civ. P. 4 ("The [1993 amendment] explicitly provides that the court shall allow additional time if there is good cause for the plaintiff's failure to effect service in the prescribed 120 days, and authorizes the court to relieve a plaintiff of the consequences of an application of this subdivision even if there is no good cause shown."); *Riverdale Mills Corp. v. U.S. Dep't*

of Transp. Fed. Aviation Admin., 225 F.R.D. 393, 395 (D. Mass. 2005).

The Court in its decision focused on the issue of whether “the Plaintiffs have either demonstrated good cause for this failure or otherwise provided some reason for the court to extend the time limit for serving process up to March 31, 2008, when Haley was served.”

The Plaintiffs’ argument, as previously stated in the initial opposition, is that their failure to serve Haley in a timely manner should not lead to dismissal of the charges against him because they legitimately believed that Haley had waived any insufficiency of service defense. The Court held that “Haley’s affidavit makes clear that Rapinchuk’s motion to dismiss did not in fact waive his insufficiency of process argument. . . . Rapinchuk was not acting as Haley’s attorney, and thus her motion filed on behalf of her clients is not attributable to Haley on any theory, especially given that he did not know of his status as a defendant or Rapinchuk’s representation that he was her client.” The Plaintiffs do not dispute the Court’s finding on this issue.

The Court also held that “in this case the failure of service means that Haley faces significant prejudice should his motion to dismiss be denied. His affidavit attests that he currently has ‘very little memory’ of the events underlying the charges against him.” The Court analyzed the second step which relies on “a number of factors, including whether ‘(a) the party to be served received actual notice of the lawsuit; (b) the defendant would suffer . . . prejudice; and (c) plaintiff would be severely prejudiced if his complaint were dismissed.’” Riverdale Mills Corp. v. U.S. Dep’t of Transp. Fed. Aviation Admin., 225 F.R.D. 393, 395 (D. Mass. 2005) (quoting In re Sheehan, 253 F.3d 507, 512 (9th Cir. 2001)).

The court held that the “delay has had a substantial impact, resulting in an irrevocably lost opportunity for Haley to record his recollection of these incidents and prepare for litigation.” Ultimately the Court based its decision on that “the potential prejudice to Haley equals or exceeds the prejudice to Plaintiffs from dismissing these claims, especially since Plaintiffs may still continue to pursue their charges against the other defendants.”

The newly obtained evidence in the form of ScottHaley’s direct testimony demonstrates that Haley has an accurate and comprehensive memory of the events leading up to the drafting of the search warrant at issue in this case and the raid itself without the use of notes or documents. Specifically he remembers: (1) how he was first contacted by the Holland Police Department; (2) detailed information about the informant he used; (3) the details of the raid; (4) why he did not arrest anyone during; and (5) how it was an unusual raid and different from the 100s of raids he has performed.

He had detailed conversations with Chief Gleason and prosecutors discussing the case more than two and half years after the actual events and remembered the details of the raid enough during those conversations to make decisions regarding whether to prosecute the case or re-issue the criminal charges.

This testimony demonstrates that Scott Haley is not at a disadvantage and is not prejudiced due to any effect the lack of proper service has on his memory. Further, Haley was told by Chief Gleason about the lawsuit itself prior to him receiving notice from his current counsel in February, 2008.

The Plaintiffs however are prejudiced by the dismissal of Scott Haley. While the

Court is correct in that Chief Gleason is a viable defendant, Scott Haley's testimony illustrates that he was the sole person involved in the drafting of the search warrant, and that Chief Gleason had nothing to do with the warrant.

Scott Haley will not be prejudiced by the late service of process. No discovery had occurred in this case until after Haley's present counsel had filed an appearance. His counsel was notified of any and all deposition dates and was invited to attend. The Plaintiffs, however, are prejudiced because Haley is the actor in the drafting of the search warrant that forms the basis of the Plaintiffs' Fourth Amendment claim.

CONCLUSION

In light of the testimony obtained on May 30, 2008, through the deposition of Scott Haley, the Plaintiffs respectfully request that the Court reconsider its' prior decision granting Scott Haley's Motion to Dismiss.

THE PLAINTIFFS,

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CERTIFICATE OF SERVICE

I hereby certify that this document was electronically filed through the CM/EFC system and transmitted to Nancy Pelletier and Carole Lynch on June 5, 2008.

/s/ Erin I. O'Neil-Baker
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