

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-5746
Summary Calendar

TRACY L. SHEETS, ET AL.,
DOUGLAS LAWRENCE SHEETS,
Plaintiff-Appellant,
Plaintiffs,
versus
U.S.A., ETC.,
Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Texas
(92-CV-449)

(January 5, 1993)

Before POLITZ, Chief Judge, KING and WIENER, Circuit Judges.

PER CURIAM:*

Douglas Lawrence Sheets appeals a dismissal without prejudice of his civil motion for return of seized property and the denial of mandamus concerning the same issues. We affirm.

Douglas Sheets and his wife Tracy L. Sheets filed a civil

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

motion under Fed.R.Crim.P. 41(e) for the return of property and to suppress evidence seized by the F.B.I. Additionally, their "next friend," Raymond Lee Clifton, filed a petition for writ of mandamus on their behalf, also seeking Rule 41(e) relief. Clifton is not an attorney at law.

After 120 days had passed, the district court ordered the Sheets to show cause why their claims should not be dismissed under Fed.R.Civ.P. 4(j) for failing to serve the defendants. The Sheets responded that they had not intended to file a civil action. The district court construed this explanation as a motion to voluntarily dismiss the civil action and granted the motion, dismissing the civil action without prejudice.¹ Douglas Sheets timely appealed.²

¹In the alternative, the district court impliedly found procedural issues in Rule 41(e) cases to be governed by the Federal Rules of Civil Procedure. Accord **Hunt v. U.S. Department of Justice**, 2 F.3d 96 (5th Cir. 1993). Under those rules, if a plaintiff does not serve a defendant with the summons and complaint within 120 days of filing, the action will be dismissed absent a showing of good cause for the failure. Fed.R.Civ.P. 4(j). Because the Sheets failed to serve the defendant in the instant case and did not show good cause, the court alternatively dismissed without prejudice pursuant to Rule 4(j). This discussion provides both an alternative basis for the district court's holding and the answer to Sheets' claim that the clerk's alleged misfiling of his motion denied him due process.

²Clifton occasionally has been treated as a party in this matter, but his appeal has been dismissed for want of prosecution. As he is not an attorney, he may not act on behalf of any other person. In addition, Tracy Sheets, who failed to file and sign a notice of appeal despite notice, is not a proper party on appeal. She seeks reinstatement of her appeal in a motion carried with this case, but we previously rejected her request. **Tracy L. Sheets v. U.S.A.**, No. 92-5746 (Feb. 3, 1993). We may not revisit this issue. See also **Mikeska v. Collins**, 928 F.2d 126 (5th Cir. 1991). Her motion is denied.

We will not reject the district court's decision absent an abuse of discretion.³ Sheets' previous representation that the motion for return of property was not intended to be a civil matter may be read as a motion for voluntary dismissal and provides the basis for the district court's dismissal of the civil action without prejudice.

With regard to the petition for mandamus, Sheets must show that he has a clear right to the relief sought, that the defendant has a clear duty to perform the action in question, and that no other adequate remedy is available.⁴ Sheets has not demonstrated any of the required elements; the district court correctly denied mandamus relief.⁵

AFFIRMED.

³**System Signs Supplies v. U.S. Department of Justice**, 903 F.2d 1011 (5th Cir. 1990) (Rule 4(j) dismissal reviewed for abuse of discretion); **Matter of Hester**, 899 F.2d 361 (5th Cir. 1990) (denial of mandamus relief reviewed for abuse of discretion).

⁴**Green v. Heckler**, 742 F.2d 237 (5th Cir. 1984).

⁵The petition for writ of mandamus was not filed as a separate action, but was docketed with the Rule 41(e) action and was carried as a motion. The district court's order respecting the Rule 41(e) action, though not specifically discussing mandamus, disposed of that accompanying petition. See **Davis v. United States**, 961 F.2d 53 (5th Cir. 1991).