IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit

F I L E D
December 10, 2009

Charles R. Fulbruge III
Clerk

No. 09-10144
Summary Calendar

JASON KYLE RICHARDS,

Plaintiff-Appellant

v.

DISTRICT ATTORNEY'S OFFICE, for the 266th Judicial District Court; JOHN TERRILL, District Attorney of Erath County, 266th Judicial District Court, in his individual and official capacity; TOMMY BRYANT, Sheriff of Erath County, in his individual and official capacity; DUBLIN POLICE DEPARTMENT; CHRIS BAKER, Sargent of The Dublin Police Department, in his individual and official capacity; JOHN/JANE DOE,

Defendants-Appellees

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:08-CV-468

Before JONES, Chief Judge, and GARZA and BENAVIDES, Circuit Judges

PER CURIAM:[*]

Jason Kyle Richards, Texas prisoner # 1037098, appeals the district court's dismissal of his pro se, in forma pauperis (IFP) civil rights complaint under

[*] Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

28 U.S.C. §§ 1915(e)(2)(B) and 1915A(b)(1). We review de novo the district court's dismissal. *Geiger v. Jowers*, 404 F.3d 371, 373 (5th Cir. 2005).

Richards was seeking DNA evidence related to his conviction and 20-year sentence for second degree aggravated sexual assault. The district court determined that the claims against the various defendants to produce DNA evidence related to Richards's conviction were barred by *Heck v. Humphrey*, 512 U.S. 477 (1994) and *Kutzner v. Montgomery County*, 303 F.3d 339, 340-41 (5th Cir. 2002). On appeal, Richards does not argue that he was not seeking to challenge his conviction through the DNA evidence. He simply asserts that the evidence he seeks may not be sufficient to exonerate him. As found by the district court, Richards's request for DNA evidence pursuant to 42 U.S.C. § 1983 is necessarily intertwined with a determination of the merits of a challenge to his conviction and is barred by *Heck*. *See Kutzner*, 303 F.3d at 341.

The appeal is without arguable merit and is thus frivolous. *See Howard v. King*, 707 F.2d 215, 219-20 (5th Cir. 1983). Because the appeal is frivolous, it is dismissed. *See* 5TH CIR. R. 42.2. The district courts dismissal of Richards's complaint and this court's dismissal of his appeal both count as strikes for purposes of 28 U.S.C. § 1915(g). *See Adepegba v. Hammons*, 103 F.3d 383, 387-88 (5th Cir. 1996). Richards is cautioned that if he accumulates three strikes under § 1915(g), he will not be able to proceed IFP in any civil action or appeal filed while he is incarcerated or detained in any facility unless he "is under imminent danger of serious physical injury." § 1915(g).

APPEAL DISMISSED; SANCTION WARNING ISSUED.