

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 00-40761  
(Summary Calendar)

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CLYDE NUBINE,

Plaintiff-Appellant,

versus

A.M. STRINGFELLOW; WAYNE SCOTT;  
GARY JOHNSON, Warden; ALAN B. POLUNSKY,

Defendants-Appellees.

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Appeal from the United States District Court  
for the Southern District of Texas  
(C-00-CV-129)  
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November 28, 2000

Before HIGGINBOTHAM, WIENER, and BARKSDALE, Circuit Judges.

PER CURIAM:\*

Plaintiff-Appellant Clyde Nubine, Texas state prisoner # 398312, appeals the magistrate judge's dismissal of his civil rights claims as frivolous and for failure to state a claim under 28 U.S.C. § 1915(e)(2)(B)(i) and (ii). The shackling of Nubine during transport constituted a rational security measure. See Jackson v. Cain, 864 F.2d 1235, 1243-44 (5th Cir. 1989). Nubine's allegations of conspiracy and retaliation are conclusional and thus fail to give rise to a 42 U.S.C. § 1983 claim. See Babb v. Dorman, 33 F.3d 472, 476 (5th Cir. 1994).

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

Nubine argues that 42 U.S.C. § 1997e(e) is unconstitutional but admitted at his Spears<sup>1</sup> hearing that his challenge to § 1997e(e) was "theoretical." Nubine lacks standing to challenge that statute.

Nubine contests the magistrate judge's denial of his request for a temporary restraining order (TRO). We have no jurisdiction to review a denial of an application for a TRO. Faulder v. Johnson, 178 F.3d 741, 742 (5th Cir. 1999).

Because this appeal is frivolous, it is DISMISSED. See Howard v. King, 707 F.2d 215, 219-20 (5th Cir. 1983); 5th Cir. R. 42.2.

The dismissal as frivolous of this appeal and the magistrate judge's dismissal as frivolous of Nubine's action each count as a "strike" for purposes of 28 U.S.C. § 1915(g). See Adepegba v. Hammons, 103 F.3d 383, 387-88 (5th Cir. 1996). We caution Nubine that once he accumulates three strikes, he may not proceed in forma pauperis 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. See § 28 U.S.C. 1915(g).

APPEAL DISMISSED; SANCTION WARNING ISSUED.

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<sup>1</sup> Spears v. McCotter, 766 F.2d 179 (5th Cir. 1985).