

April 3, 2003

Charles R. Fulbruge III
Clerk

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 03-10034
Summary Calendar

BRUCE WAYNE WORTHY,

Plaintiff-Appellant,

versus

DONALD R. SCOGGIN, Attorney at Law,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Texas
(3:02-CV-2233-N)

Before BARKSDALE, DEMOSS, and BENAVIDES, Circuit Judges.

PER CURIAM:*

Bruce Wayne Worthy, Texas prisoner #912272, appeals, *pro se*, the dismissal of his 42 U.S.C. § 1983 civil rights action for failure to state a claim, pursuant to 28 U.S.C. § 1915(e)(2), because the defendant, Worthy's trial attorney, was not a state actor for purposes of § 1983. Apparently misunderstanding the basis for the dismissal, Worthy contends only that he should have been permitted to voluntarily dismiss his suit without prejudice, allowing him to refile after he is able to meet the requirements of

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

Heck v. Humphrey, 512 U.S. 477 (1994). He does not challenge the district court's ruling that he failed to state a claim for which relief could be granted because Scoggin is not a state actor for purposes of 42 U.S.C. § 1983. By failing to do so, Worthy has waived the sole ground for appeal. See **Yohey v. Collins**, 985 F.2d, 222, 224-25 (5th Cir. 1993). The appeal is thus without arguable merit and is dismissed as frivolous. See **Howard v. King**, 707 F.2d 215, 219-20 (5th Cir. 1983); 5TH CIR. R. 42.2.

The district court's dismissal of Worthy's complaint counts as a "strike" for purposes of 28 U.S.C. § 1915(g), as does this court's dismissal of the instant appeal. See **Adepegba v. Hammons**, 103 F.3d 383, 387 (5th Cir. 1996). Worthy is cautioned that, if 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". 28 U.S.C. § 1915(g).

APPEAL DISMISSED; THREE-STRIKES WARNING ISSUED