

February 17, 2004

Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 03-10927
Conference Calendar

JAMES KEVIN KELCH,

Plaintiff-Appellant,

versus

JOHNSON COUNTY SHERIFF DEPARTMENT;
BOB ALFORD, Sheriff; COUNTY COMMISSIONERS COURT;
R.C. MCFALL, Commissioner; TROY THOMPSON, Commissioner,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:03-MC-26-A

Before HIGGINBOTHAM, EMILIO M. GARZA, and PRADO, Circuit Judges.

PER CURIAM:*

James Kevin Kelch, Texas prisoner #1008891, filed a state court action against the defendants, alleging, inter alia, that he had been mistreated while in custody. He then filed a notice of removal seeking to have the case removed to federal court, which the district court denied.

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

As found by the district court, only a defendant may remove a civil action from state court to federal court. McKenzie v. United States, 678 F.2d 571, 574 (5th Cir. 1982); 28 U.S.C. § 1441(a). Kelch's appeal is without arguable merit, is frivolous, and is therefore DISMISSED. See Howard v. King, 707 F.2d 215, 219-20 (5th Cir. 1983); 5TH CIR. R. 42.2.

This court's dismissal of the instant appeal counts as a "strike" for purposes of 28 U.S.C. § 1915(g). See Adepegba v. Hammons, 103 F.3d 383, 385-87 (5th Cir. 1996). Kelch is CAUTIONED that if he accumulates three strikes under 28 U.S.C. § 1915(g), he will not be able to 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; STRIKE WARNING ISSUED.