

January 5, 2004

Charles R. Fulbruge III  
Clerk

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 03-60628  
Summary Calendar

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VICTOR B. KEARLEY,

Plaintiff-Appellant,

versus

J. STEWART PARRISH; JOHN DOES,

Defendants-Appellees.

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Appeal from the United States District Court  
for the Southern District of Mississippi  
USDC No. 4:03-CV-190-BN  
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Before JONES, BENAVIDES, and CLEMENT, Circuit Judges.

PER CURIAM:\*

Victor B. Kearley, Mississippi prisoner #16946, appeals the district court's dismissal of his 42 U.S.C. § 1983 complaint as frivolous. Kearley's claim that counsel's actions in defending him were done under color of state law, thereby making counsel liable under 42 U.S.C. § 1983 for ineffective assistance, is without merit. Polk County v. Dodson, 454 U.S. 312 (1981). Nor has Kearley stated a 42 U.S.C. § 1983 conspiracy claim upon which

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

relief could be granted, as he has failed to plead the operative facts upon which his claim is based. See Lynch v. Cannatella, 810 F.2d 1363, 1369-70 (5th Cir. 1987); see also Kane Enters. v. MacGregor (USA) Inc., 322 F.3d 371, 374 (5th Cir. 2003).

Because Kearley did not allege in the district court that the state public defender system was unconstitutional, this court need not consider this claim. See Leverette v. Louisville Ladder Co., 183 F.3d 339, 342 (5th Cir. 1999). Kearley's argument that the district judge lacked jurisdiction due to an administrative order of reassignment to another judge is without merit.

Kearley's appeal is without merit and is therefore DISMISSED as frivolous. See Howard v. King, 707 F.2d 215, 219-20 (5th Cir. 1983); 5TH CIR. R. 42.2. The dismissal of this appeal as frivolous and the dismissal of the complaint by the district court as frivolous both count as a strike for purposes of 28 U.S.C. § 1915(g). See Adepegba v. Hammons, 103 F.3d 383, 388 (5th Cir. 1996). Kearley is therefore CAUTIONED that once he accumulates three strikes, he will not be permitted 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).

All outstanding motions are DENIED.

APPEAL DISMISSED; THREE-STRIKES WARNING ISSUED; MOTIONS DENIED.