

October 24, 2006

Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 06-40112
Conference Calendar

AMOS FENNELL,

Plaintiff-Appellant,

versus

SCHWEITZER, Judge; KIRK SISTRUNK, District Attorney; ROY
QUINTANILLA, Judge,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 3:05-CV-548

Before JOLLY, DeMOSS, and STEWART, Circuit Judges.

PER CURIAM:*

Amos Fennell, Texas prisoner # 146234, appeals the district court's dismissal of his 42 U.S.C. § 1983 complaint for failure to state a claim and as frivolous pursuant to 28 U.S.C. § 1915(e)(2). We review a dismissal for failure to state a claim de novo and we review a dismissal as frivolous for abuse of discretion. Morin v. Moore, 309 F.3d 316, 319 (5th Cir. 2002); Harper v. Showers, 174 F.3d 716, 718 (5th Cir. 1999).

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

Fennell claims that he was retried on a case that had previously been dismissed by Judge Schweitzer. He asserts that Judge Schweitzer made false statements and falsified state documents.

Fennell does not address the district court's determination that Judge Schweitzer is entitled to judicial immunity. See Stump v. Sparkman, 435 U.S. 349, 357-60 (1978). He has therefore waived the issue. See Yohey v. Collins, 985 F.2d 222, 224-25 (5th Cir. 1993).

Fennell's 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 court's dismissal of Fennell's § 1983 lawsuit and this court's dismissal of this appeal count as two strikes for purposes of 28 U.S.C. § 1915(g). See Adepegba v. Hammons, 103 F.3d 383, 388 (5th Cir. 1996). Fennell has accumulated at least two other strikes. See Fennell v. Sistrunk, No. 06-40090 (5th Cir. Aug. 28, 2006) (unpublished). As he has at least three strikes under § 1915(g), Fennell is barred from proceeding 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 Adepegba, 103 F.3d at 388; § 1915(g).

APPEAL DISMISSED; 28 U.S.C. § 1915(g) BAR IMPOSED.