

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

---

No. 97-20399  
Conference Calendar

---

JAMES MCQUEEN BYRD,

Plaintiff-Appellant,

versus

CARL CLEMENTS,

Defendant-Appellee.

- - - - -  
Appeal from the United States District Court  
for the Southern District of Texas  
USDC No. H-96-CV-3669  
- - - - -

February 11, 1998

Before SMITH, EMILIO M. GARZA, and DeMOSS, Circuit Judges.

PER CURIAM:\*

James McQueen Byrd, # 414415, appeals the district court's dismissal of his 42 U.S.C. § 1983 complaint as frivolous pursuant to 28 U.S.C. § 1915(e)(2)(B)(i). Byrd's motion for default judgment is DENIED. Byrd argues that defendant Carl Clements used excessive force and that the beating was cruel and unusual punishment, but he makes no argument regarding the district court's holding that Clements was not a state actor.

---

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

We have reviewed the record and the district court's opinion and find no reversible error. See Byrd v. Clements, No. H-96-3669 (S.D. Tex. Apr. 15, 1997). We further hold that Byrd's appeal is without arguable merit and is 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. We caution Byrd that any additional frivolous appeals filed by him or on his behalf will invite the imposition of sanctions. To avoid sanctions, Byrd is further cautioned to review any pending appeals to ensure that they do not raise arguments that are frivolous.

MOTION DENIED; APPEAL DISMISSED; SANCTION WARNING ISSUED.