

FILED

February 23, 2005

Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-60467
Conference Calendar

GERALD WAYNE MCCAIN,

Plaintiff-Appellant,

versus

JOHN BEARRY, Dr., Medical Director,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Mississippi
USDC No. 4:04-CV-49-MN

Before BARKSDALE, GARZA, and STEWART, Circuit Judges.

PER CURIAM:*

Gerald Wayne McCain, Mississippi prisoner No. R8568, proceeding pro se, moves for leave to proceed in forma pauperis (IFP) in an appeal of the district court's final judgment that dismissed his 42 U.S.C. § 1983 complaint. The motion for IFP challenges the district court's certification that McCain's appeal is not taken in good faith. Baugh v. Taylor, 117 F.3d 197, 202 (5th Cir. 1997).

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

McCain's disagreement with the conservative medical treatment that he has received for a congenital condition does not allege a constitutional violation. Norton v. Dimazana, 122 F.3d 286, 292 (5th Cir. 1997). Thus, McCain has not shown that the district court erred in certifying that an appeal would not be taken in good faith or that he will present a nonfrivolous issue on appeal. Howard v. King, 707 F.2d 215, 220 (5th Cir. 1983). Accordingly, the motion for leave to proceed IFP is DENIED, and the appeal is DISMISSED as frivolous. Baugh, 117 F.3d at 202 n.24; 5TH CIR. R. 42.2.

The dismissal of this appeal and the district court's dismissal of McCain's complaint for failure to state a claim count as strikes under the Prison Litigation Reform Act. Adepegba v. Hammons, 103 F.3d 383, 387 (5th Cir. 1996). McCain is CAUTIONED that if he accumulates three strikes under 28 U.S.C. § 1915(g), he will not be able to proceed IFP 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).

MOTION FOR LEAVE TO PROCEED IFP DENIED; APPEAL DISMISSED;
SANCTION WARNING ISSUED.