

June 21, 2005

Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-20832
Conference Calendar

CORNELIUS WHEELER,

Plaintiff-Appellant,

versus

Captain CHARLES T. SPIVEY, Captain Ellis Unit; ROBERT
D. TUCKER; JANET E. EBNER, Counsel Substitute,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:04-CV-3631

Before WIENER, BENAVIDES, and DENNIS, Circuit Judges.

PER CURIAM:*

Cornelius Wheeler, Texas prisoner # 757968, appeals from the dismissal of his 42 U.S.C. § 1983 suit pursuant to Heck v. Humphrey, 512 U.S. 477, 489-90 (1994), for failure to state a claim. Wheeler also moves for appointment of counsel. Wheeler alleges that his disciplinary conviction has been invalidated and that the application of Heck to prison disciplinary proceedings is unconstitutional. We review the district court's dismissal de novo. Harris v. Hegmann, 198 F.3d 153, 156 (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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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.

Wheeler has not provided evidence in support of his allegation that his disciplinary conviction has been overturned or declared invalid, and we have held Heck applicable to prison disciplinary proceedings. See Clarke v. Stalder, 154 F.3d 186, 189 (5th Cir. 1998) (en banc). Wheeler consequently has not shown erroneous the district court's dismissal of his complaint for failure to state a claim.

Wheeler's appeal is without arguable merit and is therefore frivolous. See 5TH CIR. R. 42.2; Howard v. King, 707 F.2d 215, 219-20 (5th Cir. 1983). Both the district court's dismissal and this court's dismissal of the instant appeal count as strikes for purposes of 28 U.S.C. § 1915(g). See 28 U.S.C. § 1915(e)(2); Adepeqba v. Hammons, 103 F.3d 383, 387 (5th Cir. 1996). Wheeler is CAUTIONED that if he accumulates three strikes under § 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; SANCTION WARNING ISSUED; MOTION FOR APPOINTMENT OF COUNSEL DENIED.