

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-40061
Conference Calendar

PAUL DOUGLAS KELLY,

Plaintiff-Appellant,

versus

BRUCE MILTON MILLER, Doctor; ET AL.,

Defendants,

BRUCE MILTON MILLER, Doctor; PEARL RUBEN, R.N.;
GARY L. JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL
JUSTICE, INSTITUTIONAL DIVISION; H. ALVIAR, Doctor, South
Regional Medical Facility Administrator; TERRENCE J. MCCARTHY,
Doctor, John Sealy Hospital Galveston, TX; STANLEY D. ALLEN,
Doctor, John Sealy Hospital Galveston, TX,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. G-00-CV-609

June 18, 2002

Before HIGGINBOTHAM, DAVIS, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

Paul Douglas Kelly ("Kelly"), Texas state prisoner # 711287,
appeals the district court's dismissal of his 42 U.S.C. § 1983

* 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that this opinion should not be published and is not precedent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.

civil rights complaint as frivolous. Kelly alleged that the defendants failed to provide adequate medical treatment.

On appeal, Kelly does not contest the district court's determination that he failed to state a cognizable 42 U.S.C. § 1983 action because he alleged that his complaints were pursuant to state tort law. This failure is tantamount to failing to appeal the judgment. See Brinkmann v. Dallas County Deputy Sheriff Abner, 813 F.2d 744, 748 (5th Cir. 1987).

Furthermore, Kelly has abandoned his substantive claim that the defendants provided inadequate medical treatment. See Yohey v. Collins, 985 F.2d 222, 224-25 (5th Cir. 1993). To the extent that Kelly raises new arguments, he has failed to demonstrate plain error in the district court's findings. See United States v. Olano, 507 U.S. 725, 731-37 (1993), see also United States v. Calverley, 37 F.3d 160, 162-64 (5th Cir. 1994)(en banc).

Kelly's appeal is without arguable merit and is dismissed as frivolous. See 5TH CIR. R. 42.2; Howard v. King, 707 F.2d 215, 219-20 (5th Cir. 1983). The dismissal of the appeal as frivolous and the district court's dismissal of Kelly's 42 U.S.C. § 1983 complaint as frivolous each count as a "strike" under the three-strikes provision of 28 U.S.C. § 1915(g). See Adepegba v. Hammons, 103 F.3d 383, 387-88 (5th Cir. 1996); 28 U.S.C. § 1915(e)(2)(B)(i). Kelly is CAUTIONED that if he accumulates three "strikes" under 28 U.S.C. § 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; THREE-STRIKES WARNING ISSUED.