

April 20, 2004

Charles R. Fulbruge III  
Clerk

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 03-61087  
Conference Calendar

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DAVID WARD,

Plaintiff-Appellant,

versus

GEORGE AGNEW,

Defendant-Appellee.

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Appeal from the United States District Court  
for the Southern District of Mississippi  
USDC No. 3:03-CV-1054-BN  
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Before JOLLY, JONES, and SMITH, Circuit Judges.

PER CURIAM:\*

David Ward, Mississippi state prisoner # 42745, appeals the 28 U.S.C. § 1915(e)(2)(B)(i) dismissal as legally frivolous of his 42 U.S.C. § 1983 lawsuit against George Agnew, retained to serve as Ward's counsel in a criminal matter. Ward contends that the district court erred in dismissing his case because Agnew deprived him of his Sixth Amendment rights. This court reviews the district court's dismissal for abuse of discretion. See Siglar v. Hightower, 112 F.3d 191, 193 (5th Cir. 1997).

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

The district court concluded that Ward's lawsuit was foreclosed by Polk County v. Dodson, 454 U.S. 312, 325 (1981), because Agnew was not acting under the color of state law for the purposes of 42 U.S.C. § 1983 liability. The district court's reliance on Dodson was appropriate; and it is uncontested by Ward on appeal. Since the allegations in Ward's complaint were squarely foreclosed by Dodson, the district court did not abuse its discretion in dismissing his lawsuit as frivolous. See Siglar, 112 F.3d at 193.

Because Ward has not shown that there is a nonfrivolous appellate issue, his appeal is also dismissed as frivolous. See 5TH CIR. R. 42.2; Brinkmann v. Johnston, 793 F.2d 111, 112-13 (5th Cir. 1986).

The dismissal of the appeal as frivolous and the district court's dismissal of Ward's 42 U.S.C. § 1983 action as frivolous both count as "strikes" 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). Therefore, Ward is warned that if he accumulates three "strikes," 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; SANCTIONS WARNING ISSUED.