

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit

FILED

August 15, 2008

No. 07-20575
Summary Calendar

Charles R. Fulbruge III
Clerk

CARY O SMITH

Plaintiff-Appellant

v.

DR STANLEY D ALLEN

Defendant-Appellee

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:07-CV-2028

Before JOLLY, BENAVIDES, and HAYNES, Circuit Judges.

PER CURIAM:*

Cary O. Smith, Texas prisoner # 732505, appeals the dismissal of his 42 U.S.C. § 1983 action against Stanley D. Allen, a doctor with the University of Texas Medical Branch. Smith asserted that Allen denied him proper medical treatment in violation of his constitutional rights. The district court held that Smith's allegations failed to state a claim on which relief could be granted and dismissed the action pursuant to 28 U.S.C. § 1915(e)(2)(B).

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

Smith argues that the district court erred by: dismissing his complaint without holding a hearing; citing a prior unsuccessful civil rights action that he had brought; not allowing discovery; and determining that he had not established deliberate indifference to his serious medical needs. Smith admits that he has had two surgeries for his shoulder condition and states that these surgeries were not successful in alleviating his problems. His assertion that Allen denied him medical treatment is based on Allen's determination that Smith is not a candidate for additional shoulder surgery. Smith's disagreement with this determination is insufficient to establish a constitutional violation. See *Farmer v. Brennan*, 511 U.S. 825, 839-41, 847 (1994); *Varnado v. Lynaugh*, 920 F.2d 320, 321 (5th Cir. 1991).

Smith'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. The dismissal of this appeal as frivolous counts as a strike under § 1915(g), as does the district court's dismissal of Smith's complaint. See *Adepegba v. Hammons*, 103 F.3d 383, 387-88 (5th Cir. 1996). Because Smith's prior action in *Smith v. Largent*, H-02-CV-1489 (S.D. Tex. 2003), was dismissed for failure to state a claim, he now has accumulated three strikes. § 1915(g). Accordingly, Smith is barred from proceeding IFP in any civil action or appeal filed while he is detained or incarcerated in any facility unless he "is under imminent danger of serious physical injury." § 1915(g); see *Adepegba*, 103 F.3d at 387-88.

APPEAL DISMISSED; 28 U.S.C. § 1915(g) BAR IMPOSED.