

December 17, 2004

Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-40471
Conference Calendar

DAVID J. DAVIS,

Plaintiff-Appellant,

versus

H.C. BRYANTT; KENNETH LEE,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 6:03-CV-564-JKG

Before KING, Chief Judge, and DeMOSS and CLEMENT, Circuit Judges.

PER CURIAM:*

David J. Davis, Texas state prisoner # 582332, is appealing the magistrate judge's dismissal as frivolous of his 42 U.S.C. § 1983 complaint. Davis argues that the magistrate judge erred in determining that his allegations did not reflect that prison officials acted with deliberate indifference to his safety in making his housing assignment.

Davis has not addressed the magistrate judge's determination that Davis failed to exhaust his administrative remedies prior to filing suit or the dismissal of his complaint on that basis.

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

An appellant's brief must contain an argument on the issues that are raised so that this court may know what action of the district court is being complained of. Al-Ra'id v. Ingle, 69 F.3d 28, 31 (5th Cir. 1995). Because Davis has briefed no argument with respect to the magistrate judge's determination that he failed to exhaust administrative remedies prior to filing suit, he has waived any such argument. See Yohey v. Collins, 985 F.2d 222, 224-25 (5th Cir. 1993); FED. R. APP. P. 28(a)(9). This court need not address the magistrate judge's alternative basis for dismissal.

Davis's appeal is without arguable merit and, thus, 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 magistrate judge's dismissal of the present case and this court's dismissal of the appeal count as two strikes against Davis for purposes of 28 U.S.C. § 1915(g). See 28 U.S.C. § 1915(g); see, e.g., Adepegba v. Hammons, 103 F.3d 383, 387-88 (5th Cir. 1996). Davis is CAUTIONED that if he accumulates three strikes he may not 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.