

February 23, 2006

Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-60892
Conference Calendar

GARY LEE,

Plaintiff-Appellant,

versus

E.L. SPARKMAN, Warden at Marshall County Correctional Facility;
A.W. HELMIC, Deputy Warden, School Programs; W.M. WILLIAMS,
Assistant Warden; LANCE BUTLER, Attorney, Inmate Lawyer; GWEN
SHAW, Legal Claim Adjudicator,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Mississippi
USDC No. 3:00-CV-107-P

Before GARZA, DENNIS, and PRADO, Circuit Judges.

PER CURIAM:*

Gary Lee, Mississippi prisoner # 39820, has filed a motion for leave to proceed in forma pauperis (IFP) in this appeal of the district court's denial of his FED. R. CIV. P. 60(b) motion for relief from the district court's judgment denying his 42 U.S.C. § 1983 action. The district court denied Lee leave to proceed IFP on appeal, certifying that the appeal was not taken in good faith. By moving for leave to proceed IFP, Lee is

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

challenging the district court's certification. See Baugh v. Taylor, 117 F.3d 197, 202 (5th Cir. 1997); FED. R. APP. P. 24(a)(5).

Lee argues that he has newly discovered evidence showing that the defendants failed to provide him with a copy of the Antiterrorism and Effective Death Penalty Act and thereby denied his right of access to the courts. Lee has not shown that this evidence could not have been discovered through due diligence prior to the district court's initial judgment denying his 42 U.S.C. § 1983 action. Lee has not shown that the district court's denial of his Rule 60(b) motion was an abuse of discretion. See Carimi v. Royal Caribbean Cruise Line, Inc., 959 F.2d 1344, 1345 (5th Cir. 1992).

Lee has failed to show that his appeal involves "'legal points arguable on their merits (and therefore not frivolous).'" Howard v. King, 707 F.2d 215, 220 (5th Cir. 1983) (internal quotation marks omitted). Accordingly, the motion for leave to proceed IFP on appeal is denied and the appeal is dismissed as frivolous. See Baugh, 117 F.3d at 202 & n.24; 5TH CIR. R. 42.2. Lee is cautioned that the dismissal of this appeal as frivolous counts as a strike under 28 U.S.C. § 1915(g). See Adepegba v. Hammons, 103 F.3d 383, 387-88 (5th Cir. 1996). Lee is warned that if he accumulates three strikes under 28 U.S.C. § 1915(g), he will not be able to proceed IFP 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); see FED. R. APP. P. 38; Clark v. Green, 814 F.2d 221, 223 (5th Cir. 1987).

IFP MOTION DENIED; APPEAL DISMISSED; SANCTION WARNING ISSUED.