

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-10292
Conference Calendar

DANNIE LEE MITCHELL,

Plaintiff-Appellant,

versus

DAVID LANEHART, Attorney at Law; CHUCK LANEHART, Chappell &
Lanehart, P.C.; COUNTY OF LUBBOCK,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 5:00-CV-61-C

August 24, 2000

Before KING, Chief Judge, and POLITZ and WIENER, Circuit Judges.

PER CURIAM:*

Dannie Lee Mitchell, Texas prisoner # 644127, appeals the district court's dismissal of his 42 U.S.C. § 1983 civil rights action as frivolous pursuant to 28 U.S.C. § 1915. He argues that the defendants conspired to deprive him of his constitutional rights, that he was deprived of the right to effective assistance of counsel at the time of his plea bargain, and that as a result, his guilty plea was not knowing and voluntary. He seeks damages and expungement of his 1993 robbery conviction. Mitchell 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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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.

essentially challenging his robbery conviction in this § 1983 action. Because Mitchell has not shown that his robbery conviction has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal, or called into question by a federal court's issuance of a writ of habeas corpus, Mitchell is precluded from filing a § 1983 action to recover damages for the allegedly unconstitutional conviction by Heck v. Humphrey, 512 U.S. 477, 486-87 (1994).

Mitchell's appeal is without arguable merit and is thus, frivolous. See Howard v. King, 707 F.2d 215, 219-20 (5th Cir. 1983). Accordingly, Mitchell's appeal is DISMISSED. See 5TH CIR. R. 42.2. Mitchell's "Motion to Confirm to the Evidence" is DENIED.

The district court's dismissal of Mitchell's § 1983 complaint as frivolous and the dismissal of this appeal as frivolous count as two separate strikes for purposes of 28 U.S.C. § 1915(g). See Adepegba v. Hammons, 103 F.3d 383, 388 (5th Cir. 1996)(dismissal in district court and subsequent dismissal as frivolous of appeal count as two strikes). Mitchell is cautioned that once 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 § 1915(g).

APPEAL DISMISSED; MOTION DENIED; SANCTION WARNING ISSUED.