

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 00-20981  
Conference Calendar

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PATRICK WASHINGTON,

Plaintiff-Appellant,

versus

TOMMY THOMAS; ET AL.,

Defendants,

TOMMY THOMAS,

Defendant-Appellee.

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Appeal from the United States District Court  
for the Southern District of Texas  
USDC No. H-99-CV-102  
- - - - -

June 18, 2001

Before WIENER, DeMOSS, and DENNIS, Circuit Judges.

PER CURIAM:\*

Patrick Washington, Texas prisoner #888936, appeals the dismissal of his 42 U.S.C. § 1983 complaint for failure to state a claim upon which relief may be granted.

Washington's motion for appointment of counsel is DENIED.

Washington contends that the defendants were deliberately indifferent to his serious medical needs by failing to provide

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

him with a CPAP (continuous positive airway pressure) machine for his sleep apnea. Neither his complaint nor his Spears hearing testimony reflects that Washington suffered substantial harm as a result of not receiving CPAP treatment. Thus, whatever deficiencies there may have been in Williams's treatment, if any, certainly do not rise to the level of establishing deliberate indifference on the part of the defendants. See Mendoza v. Lynaugh, 989 F.2d 191, 195 (5th Cir. 1993). Accordingly, the district court did not err in dismissing his complaint for failure to state a claim.

Washington's appeal is without merit and therefore 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 district court's dismissal of the present case and our dismissal of this appeal count as two strikes against Washington for purposes of 28 U.S.C. § 1915(g). We caution Washington 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 28 U.S.C. § 1915(g).

APPEAL DISMISSED; SANCTION WARNING ISSUED.