

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-11290
Conference Calendar

KIERON DEREK PENIGAR,

Plaintiff-Appellant,

versus

GARY L. JOHNSON, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,

Defendant-Appellee.

- - - - -
Appeal from the United States District Court
for the Northern District of Texas
USDC No. 1:01-CV-88
- - - - -
February 20, 2002

Before JOLLY, JONES, and BENAVIDES, Circuit Judges.

PER CURIAM:*

Kieron Derek Penigar, Texas prisoner # 721657, appeals the magistrate judge's dismissal as frivolous of his 42 U.S.C. § 1983 complaint. Penigar argues that he has been "involuntarily exposed to hordes of pornographic material and immoral sexual behavior" and that the policy of permitting inmates to receive and possess this material places him at risk of being sexually assaulted.

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

We review the magistrate judge's dismissal for an abuse of discretion. See Harper v. Showers, 174 F.3d 716, 718 (5th Cir. 1999). Penigar does not identify any constitutional right that has been allegedly violated, cites no legal authority, and offers only the conclusional and speculative assertion that he is at greater risk because of the presence of the pornography. Conclusional allegations are insufficient to state a claim under 42 U.S.C. § 1983. Baker v. Putnal, 75 F.3d 190, 195 (5th Cir. 1996). To the extent that Penigar is raising a failure-to-protect claim, he has failed to show that Johnson was both aware of facts from which the inference could be drawn that a substantial risk of serious harm exists and that he drew the inference. Farmer v. Brennan, 511 U.S. 825, 833, 837 (1994).

Penigar's appeal is without arguable merit and, thus, frivolous. See Howard v. King, 707 F.2d 215, 219-20 (5th Cir. 1983). Because the appeal is frivolous, it should be dismissed. 5TH CIR. R. 42.2.

The dismissal of this appeal as frivolous counts as a "strike" for purposes of 28 U.S.C. § 1915(g), as does the magistrate judge's dismissal of his complaint as frivolous. See Adepegba v. Hammons, 103 F.3d 383, 387 (5th Cir. 1996). Penigar is WARNED that if he accumulates three strikes, he may not proceed in forma pauperis in any civil action or appeal while he is incarcerated or detained in any facility unless he is in imminent danger of serious physical injury. See 28 U.S.C. § 1915(g).

APPEAL DISMISSED; SANCTIONS WARNING ISSUED.