

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-20804
Conference Calendar

DONALD RAY MIKE,

Plaintiff-Appellant,

versus

BRADLE BACHMAN; FRANCIS CHERIAN;
GLENDA ADAMS; MS. KENT, Health Administrator,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. H-01-CV-163

April 10, 2002

Before SMITH, DeMOSS, and PARKER, Circuit Judges.

PER CURIAM:*

Donald Ray Mike, a Texas prisoner (# 423926), has filed a notice of appeal from the district court's denial of his "Motion to Alter Judgment," which was filed following the dismissal of his 42 U.S.C. § 1983 lawsuit for failure to state a claim, pursuant to 28 U.S.C. § 1915(e)(2)(B). Because it was filed more than 10 days after the entry of the judgment, the "Motion to Alter Judgment" was essentially a FED. R. CIV. P. 60(b) motion for

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

relief from judgment. See Harcon Barge Co. v. D & G Boat Rentals, Inc., 784 F.2d 665, 667 (5th Cir. 1986) (en banc).

An appeal from the denial of a Rule 60(b) motion is not an appeal from the merits of the underlying judgment, In re Ta Chi Navigation (Panama) Corp. S.A., 728 F.2d 699, 703 (5th Cir. 1984), and review of such a denial is for abuse of discretion only. Travelers Ins. Co. v. Liljeberg Enter., Inc., 38 F.3d 1404, 1408 (5th Cir. 1994). Under this standard, "[i]t is not enough that the granting of relief might have been permissible, or even warranted--denial must have been so *unwarranted* as to constitute an abuse of discretion." Seven Elves, Inc. v. Eskenazi, 635 F.2d 396, 402 (5th Cir. 1981).

Mike has not remotely made such a showing in his appellate brief. His appeal is wholly without merit and is thus frivolous. See Howard v. King, 707 F.2d 215, 219-20 (5th Cir. 1983); 5TH CIR. R. 42.2. Accordingly, his appeal is DISMISSED. The dismissal of the instant appeal as frivolous and the district court's dismissal of his complaint for failure to state a claim each count as a "strike" under the three-strikes provision of 28 U.S.C. § 1915(g). See Adepegba v. Hammons, 103 F.3d 383, 387 (5th Cir. 1996). Mike is thus 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 28 U.S.C. § 1915(g).

DISMISSED; SANCTION WARNING ISSUED.