

FILED

April 15, 2003

Charles R. Fulbruge III
Clerk

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 02-11308
Summary Calendar

IRVING DEAN ELLIOT,
also known as Al Yasa Muhammad,

Plaintiff-Appellant,

versus

SHEILA WHATLEY,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Texas
(2:02-CV-105)

Before BARKSDALE, DEMOSS, and BENAVIDES, Circuit Judges.

PER CURIAM:*

Irving Dean Elliot, Texas prisoner #384725, appeals, *pro se* and *in forma pauperis*, the dismissal of his 42 U.S.C. § 1983 action as frivolous and for failure to exhaust administrative remedies. Elliot does not address the district court's finding of failure to exhaust administrative remedies except to contradict it in a conclusory statement. By failing to brief any argument challenging the reasons for the dismissal, Elliot has waived the sole ground

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

for appeal. See **Yohey v. Collins**, 985 F.2d 222, 224-25 (5th Cir. 1993). This appeal is therefore without arguable merit and is **DISMISSED** as frivolous. See **Howard v. King**, 707 F.2d 215, 219-20 (5th Cir. 1983); 5TH CIR. R. 42.2.

Elliot has previously had an appeal dismissed as frivolous. See **Elliot v. Geerds**, No. 01-20179 (5th Cir. 6 July 2001) (unpublished). Thus, Elliot already has two "strikes" for purposes of 28 U.S.C. § 1915(g). The dismissal of this appeal as frivolous and the district court's dismissal of the action as frivolous both count as strikes for purposes of 28 U.S.C. § 1915(g). See **Adepegba v. Hammons**, 103 F.3d 383, 388 (5th Cir. 1996). Because Elliot has accumulated more than three "strikes," he may not pursue a civil action or appeal *in forma pauperis* unless he is "under imminent danger of serious physical injury." 28 U.S.C. § 1915(g).

DISMISSED; SANCTION IMPOSED