

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-30366
Conference Calendar

PERCY HAWTHORNE,

Plaintiff-Appellant,

versus

BURL CAIN,

Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Louisiana
USDC No. 02-CV-132-C

December 12, 2002

Before JOLLY, JONES, and WIENER, Circuit Judges.

PER CURIAM:*

Percy Hawthorne, Louisiana inmate # 348602, appeals from the dismissal, pursuant to 28 U.S.C. §§ 1915(e) and 1915A, of his civil action. Hawthorne, the plaintiff in a state court civil action, filed a "Writ of Removal," seeking to remove the action to the district court.

Hawthorne argues that he was entitled to effect removal under 28 U.S.C. § 1443. However, as the district court explained, the right of removal provided by statute is available

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

only to defendants. See 28 U.S.C. § 1443. Hawthorne has failed to show error on the part of the district court.

This appeal is without arguable merit and is thus 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 pursuant to 28 U.S.C. §§ 1915(e) and 1915A, based on the legal impossibility of removal by a plaintiff, was a dismissal for frivolousness or failure to state a claim upon which relief may be granted. The district court's dismissal thus necessitates the imposition of a "strike" for purposes of the three-strikes provision of 28 U.S.C. § 1915(g), and this court's dismissal as frivolous counts as a second strike. See 28 U.S.C. § 1915(g); see Adepegba v. Hammons, 103 F.3d 383, 388 (5th Cir. 1996). Hawthorne is WARNED that should he accumulate three strikes he will be unable to bring a civil action or appeal a judgment or proceeding under the provisions of 28 U.S.C. § 1915 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.