

October 9, 2003

Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-51356
Summary Calendar

RAMON ALBERTO GARCIA,

Plaintiff-Appellant,

versus

TIMOTHY KEITH; ERNESTO GUTIERREZ,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Texas
(SA-02-CV-311)

Before JOLLY, JONES, and WIENER, Circuit Judges.

PER CURIAM:*

Following the district court's dismissal of his 42 U.S.C. § 1983 complaint and denial of leave to proceed in forma pauperis (IFP) on appeal, Plaintiff-Appellant Ramon Alberto Garcia, TDCJ-ID # 792815, filed a notice of appeal in this court, which we have construed as a motion to proceed IFP. Garcia is challenging the district court's certification that his appeal is not taken in good faith. See *Baugh v. Taylor*, 117 F.3d 197, 202 (5th Cir. 1997); 28 U.S.C. § 1915(c)(3); FED. R. APP. P. 24(a). The district court

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

dismissed Garcia's 42 U.S.C. § 1983 complaint as frivolous pursuant to 28 U.S.C. § 1915(e)(2)(B)(i)-(ii).

Garcia asserts that the district court mistakenly assumed that the prison was on "lock-down" status or that the dining hall was full, erred in finding his assertions of the defendants' involvement to be "conclusory" and "unsupported," erred in addressing his claim of "severe" living conditions, and erred in finding his claim of denial of access to the law library unlikely. He also asserts that the district court was biased.

Based upon our review of the record, we conclude that Garcia has not shown a non-frivolous issue for appeal. See Howard v. King, 707 F.2d 215, 220 (5th Cir. 1983). We uphold the district court's order certifying that the appeal was not taken in good faith. We also conclude that the instant appeal is without arguable merit and is frivolous. Garcia's motion to proceed IFP is DENIED, and his appeal is DISMISSED AS FRIVOLOUS. See Baugh, 117 F.3d at 202 and n.24; 5TH CIR. R. 42.2.

The dismissal of Garcia's complaint in the district court and the dismissal of this appeal as frivolous each count as a "strike" for the purposes of 28 U.S.C. § 1915(g). See Adepegba v. Hammons, 103 F.3d 383, 387 (5th Cir. 1996). We caution Garcia that once he accumulates three strikes, he may not proceed IFP 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).