

August 26, 2003

Charles R. Fulbruge III  
Clerk

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 03-20256  
Summary Calendar

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CHRISTOPHER NEAL KINGERY,

Plaintiff-Appellant,

versus

JEFFREY KARL HALE,

Defendant-Appellee.

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Appeal from the United States District Court  
for the Southern District of Texas  
USDC No. H-02-CV-3856  
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Before SMITH, DeMOSS and STEWART, Circuit Judges.

PER CURIAM:\*

Christopher Neal Kingery, Texas prisoner # 1066564, appeals the dismissal of his 42 U.S.C. § 1983 suit as frivolous. Kingery filed suit against the attorney who represented him in his criminal case and alleged that his attorney was friends with the prosecutor and provided ineffective assistance.

We review for an abuse of discretion the district court's determination that Kingery's complaint was frivolous. See Siglar

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

v. Hightower, 112 F.3d 191, 193 (5th Cir. 1997). A complaint is frivolous if it lacks an arguable basis either in law or in fact. Denton v. Hernandez, 504 U.S. 25, 31-33 (1992).

Kingery's claims that his attorney conspired with the prosecutor and provided ineffective assistance of counsel challenge the constitutionality of Kingery's conviction, which has not been reversed or called into question on direct appeal or in a habeas proceeding. The claim is barred by Heck v. Humphrey, 512 U.S. 477, 486-87 (1994).

The district court's dismissal was not an abuse of discretion. Kingery's appeal lacks arguable merit and is also DISMISSED AS FRIVOLOUS. See Howard v. King, 707 F.2d 215, 219-20 (5th Cir. 1983); 5TH CIR. 42.2. The district court's dismissal and the dismissal of his appeal both count as strikes for the purposes of 28 U.S.C. § 1915(g). Adepegba v. Hammons, 103 F.3d 383, 385-87 (5th Cir. 1996). Kingery is warned that, if he accumulates a third strike pursuant to 28 U.S.C. § 1915(g), 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).

APPEAL DISMISSED AS FRIVOLOUS; SANCTION WARNING ISSUED.