

October 20, 2004

Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-20077
Conference Calendar

DENNIS E. POWELL,

Plaintiff-Appellant,

versus

DR. ERNESTINE JULYE,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:03-CV-3595

Before JOLLY, JONES, and WIENER, Circuit Judges.

PER CURIAM:*

Dennis E. Powell, Texas prisoner # 650087, appeals the district court's dismissal of his 42 U.S.C. § 1983 complaint as frivolous. He argues that the district court abused its discretion by: (1) amending an order related to the production of records in connection with the Spears** hearing; (2) not suspending the Spears hearing because the medical records were incomplete; (3) dismissing his complaint as frivolous; and

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

** Spears v. McCotter, 766 F.2d 179 (5th Cir. 1985).

(4) failing to rule on his motion for appointment of counsel prior to dismissing his case.

Powell has failed to show that the district court abused its discretion by amending the order concerning the production of records related to the Spears hearing or by failing to suspend the hearing. See Richardson v. Henry, 902 F.2d 414, 417 (5th Cir. 1990); Wesson v. Oglesby, 910 F.2d 278, 281 (5th Cir. 1990). Powell's factual allegations do not rise to the level of deliberate indifference to medical needs. At most, he has stated a claim for disagreement with medical treatment, which is not actionable in a 42 U.S.C. § 1983 suit. See Norton v. Dimazana, 122 F.3d 286, 292 (5th Cir. 1997). In light of the fact that Powell's motion for appointment of counsel was not filed until after his case was dismissed, his argument is without merit. See Howard v. King, 707 F.2d 215, 219-20 (5th Cir. 1983).

Powell's appeal is without arguable merit and is DISMISSED as frivolous. See 5TH CIR. R. 42.2; Howard, 707 F.2d at 219-20. The district court's dismissal of his complaint as frivolous and the dismissal of this appeal as frivolous each count as a "strike" for purposes of 28 U.S.C. § 1915(g). See Adepegba v. Hammons, 103 F.3d 383, 387 (5th Cir. 1996). Powell is cautioned that if he accumulates three "strikes" under 28 U.S.C. § 1915(g), he will not be able to 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; SANCTIONS WARNING ISSUED.