

February 23, 2006

Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-21017
Conference Calendar

MARIO JOSEPH NIETO,

Plaintiff-Appellant,

versus

B. REEVES-GALLOWAY, Texas Department of Criminal Justice-Institutional Division Correctional Officer; J. KARNES, Texas Department of Criminal Justice-Institutional Division Correctional Officer; M. BRIGHT, Texas Department of Criminal Justice-Institutional Division Correctional Officer; B. GRAHAM, Texas Department of Criminal Justice-Institutional Division Correctional Officer; M. HYDE, Texas Department of Criminal Justice-Institutional Division Correctional Officer; J. RAGAN, Texas Department of Criminal Justice-Institutional Division Correctional Officer, Inmate Property Officer; T. SMITH, Texas Department of Criminal Justice-Institutional Division Correctional Officer; J. ROSSER, Texas Department of Criminal Justice-Institutional Division Correctional Officer; R. NEWLON, Texas Department of Criminal Justice-Institutional Division Correctional Officer; G. GRIFFIN, Texas Department of Criminal Justice-Institutional Division Correctional Officer,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:04-CV-1662

Before GARZA, DENNIS, and PRADO, Circuit Judges.

PER CURIAM:*

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

Mario Nieto, Texas inmate # 591239, appeals the dismissal of his 42 U.S.C. § 1983 complaint as frivolous under 28 U.S.C. § 1915(e)(2)(B). Nieto's arguments that the defendants subjected him to cruel and unusual punishment in violation of the Eighth Amendment because they failed to protect him from another inmate and used excessive force lack legal bases. See Jones v. Greninger, 188 F.3d 322, 326 (5th Cir. 1999); 42 U.S.C. § 1997e(e); Glenn v. City of Tyler, 242 F.3d 307, 314 (5th Cir. 2001). Nieto's claim that the defendants denied him access to the courts is likewise without a legal basis. See Walker v. Navarro County Jail, 4 F.3d 410, 413 (5th Cir. 1993).

Nieto's appeal is without arguable merit and is frivolous. See Howard v. King, 707 F.2d 215, 219-20 (5th Cir. 1983). Accordingly, the appeal is dismissed. See 5TH CIR. R. 42.2.

The dismissal of Nieto's complaint as frivolous and of this appeal as frivolous each count as "strikes" for purposes of the three-strikes provision, 28 U.S.C. § 1915(g). See Adepegba v. Hammons, 103 F.3d 383, 388 (5th Cir. 1996). Nieto is warned that if he accumulates three strikes, he will not be permitted 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).

IFP DENIED; APPEAL DISMISSED AS FRIVOLOUS; SANCTION WARNING ISSUED.