

June 21, 2006

Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 05-10550
Conference Calendar

DANIEL GAUDETTE,

Plaintiff-Appellant,

versus

K. J. WENDT; GORDON TRUEBLOOD; KAREN FERNANDERS;
SCOTT CROWE; JOSEPH CAPPS,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:05-CV-245

Before STEWART, DENNIS, and OWEN, Circuit Judges.

PER CURIAM:*

Daniel Gaudette, federal prisoner # 04208-180, moves this court for leave to proceed in forma pauperis (IFP) on appeal following the district court's dismissal of his pro se and IFP complaint brought pursuant to Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971). The district court dismissed the complaint as frivolous under 28 U.S.C. § 1915(e)(2). We construe Gaudette's motion as a challenge to the district court's

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

determination that the appeal is not taken in good faith. See Baugh v. Taylor, 117 F.3d 197, 202 (5th Cir. 1997).

Gaudette argues that his appeal should proceed because he "made an honest mistake" by failing to provide all of his evidence to the district court. Gaudette does not, however, give any indication what evidence he failed to submit, nor does he allege that he was precluded from presenting such evidence. He argues only that because he was proceeding pro se, he thought that the district court would give him "some leniency."

Gaudette was allowed to develop his claims through his responses to the magistrate judge's questionnaire. See Eason v. Thaler, 14 F.3d 8, 9-10 (5th Cir. 1994). Gaudette was provided with ample opportunity to provide evidence, and the record shows that he made use of that opportunity. His suggestion that the district court failed to afford his pro se pleadings liberal construction is without merit. See Haines v. Kerner, 404 U.S. 519, 520 (1972).

Gaudette has failed to establish that he seeks to present a nonfrivolous issue for appeal. Accordingly, his motion for IFP is denied, and the appeal dismissed as frivolous. See Baugh, 117 F.3d at 202 n.24; 5TH CIR. R. 42.2. The motion for appointment of counsel is denied. We caution Gaudette that he has accumulated two strikes under 28 U.S.C. § 1915(g). See Adepegba v. Hammons, 103 F.3d 383, 387 (5th Cir. 1996). If he accumulates a total of three strikes, Gaudette may no longer

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 § 1915(g); Carson v. Johnson, 112 F.3d 818, 819 (5th Cir. 1997).

MOTION FOR IFP DENIED; MOTION FOR APPOINTMENT OF COUNSEL DENIED; APPEAL DISMISSED AS FRIVOLOUS; SANCTION WARNING ISSUED.