

August 7, 2006

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Charles R. Fulbruge III
Clerk

No. 05-40781
Summary Calendar

DOUGLAS ALAN BURDEN,

Plaintiff-Appellant,

versus

UNIDENTIFIED PARTY, Head Supervisor/Director of ATAR
Spindletop Life Resources; DENA JOHNSON, Johnston's Head
Counselor; MIKE FAIRLEY, Head Coordinator of Substance
Abuse; JAMES TABORWSKI, Probation Officer; ROSALYN COBBALD,
Director, ATAR Spindletop Life Resources,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 1:03-CV-582

Before JONES, Chief Judge, and JOLLY and DAVIS, Circuit Judges.

PER CURIAM:*

Douglas Alan Burden, Texas prisoner # 1160823, appeals from the dismissal of his 42 U.S.C. § 1983 complaint pursuant to 28 U.S.C. § 1915(e)(2)(b)(i), (ii) as frivolous and for failure to state a claim and moves for appointment of counsel. He argues that the district court erred in holding that he failed to state a claim under the Equal Protection Clause. Burden's motion to file a supplemental reply brief is granted.

Affording the dismissal the requisite de novo review, Geiger

*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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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. Jowers, 404 F.3d 371, 373 (5th Cir. 2005), we hold that Burden has failed to allege facts that would tend to show that he was intentionally treated differently from similarly situated clients of the treatment program without a rational basis for the distinction. See Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000). He has therefore indeed failed to state an equal protection claim.

Burden's appeal presents no "exceptional circumstances," and his motion for appointment of counsel is therefore denied. Ulmer v. Chancellor, 691 F.2d 209, 212 (5th Cir. 1982). Because his appeal is without arguable merit, it is dismissed. See 5TH CIR. R. 42.2; Howard v. King, 707 F.2d 215, 219-20 (5th Cir. 1983).

Burden is cautioned that the dismissal of this appeal as frivolous counts as a strike for purposes of 28 U.S.C. § 1915(g), in addition to the strike for the district court's dismissal. See Adepegba v. Hammons, 103 F.3d 383, 388 (5th Cir. 1996). He is further cautioned that if he accumulates three strikes under § 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; MOTION FOR APPOINTMENT OF COUNSEL DENIED; MOTION TO FILE SUPPLEMENTAL REPLY BRIEF GRANTED; SANCTION WARNING ISSUED.