

June 25, 2007

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Charles R. Fulbruge III
Clerk

No. 06-20088
Summary Calendar

GORDON RAY SIMMONDS,

Plaintiff-Appellant,

versus

CLAVIN L. BLAKE, JR., Sergeant; MAJOR RICHARD GUNNELS;
JAMES L. JONES; CHARLES T. O'REILLY,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:05-CV-4254

Before JOLLY, DENNIS, and CLEMENT, Circuit Judges.

PER CURIAM:*

Gordon Ray Simmonds, Texas prisoner # 932489, has filed a motion to proceed in forma pauperis (IFP) in the appeal of the dismissal of his civil rights complaint he filed pursuant to 42 U.S.C. § 1983. The district court dismissed the complaint without prejudice after it determined that Simmonds had three "strikes" under 28 U.S.C. § 1915(g). The district court identified three lawsuits filed by Simmonds that were dismissed

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

as frivolous, malicious, or for failure to state a claim. Simmonds contends that one of the identified dismissals, specifically Simmonds v. United States Court of Appeals, No. 2:04-CV-3000 (E.D. La. Nov. 19, 2004), should not have been considered as a strike for purposes of § 1915(g) because it was in the nature of a "habeas petition." He also contends that the case should not have been counted as a strike because he is currently appealing to this court the district court's dismissal of that case.

In Simmonds v. United States Court of Appeals, No. 2:04-CV-3000 (E.D. La. Nov. 19, 2004), the district court dismissed Simmonds's complaint with prejudice for failure to state a claim on which relief may be granted, pursuant to § 1915(e)(2), and denied him leave to proceed IFP on appeal. In Simmonds v. United States Court of Appeals, No. 05-30018 (5th Cir. Apr. 28, 2006) (unpublished), this court denied Simmonds leave to proceed IFP and dismissed his appeal as frivolous. However, the appellate process in that case was not exhausted prior to Simmonds filing of his notice of appeal in the instant case. Accordingly, the district court erred in counting that case as a strike and in determining that Simmonds was barred under § 1915(g). See Adepegba v. Hammons, 103 F.3d 383, 387-88 (5th Cir. 1996).

Accordingly, IT IS ORDERED that Simmonds's motion to proceed IFP is GRANTED. IT IS FURTHER ORDERED that the district court's dismissal of his § 1983 complaint is VACATED and the case is

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REMANDED for further proceedings.