

FILED

August 21, 2007

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Charles R. Fulbruge III
Clerk

No. 06-50800
Conference Calendar

DENNIS SMITH

Plaintiff-Appellant

v.

JOHN TERRY

Defendant-Appellee

Appeal from the United States District Court
for the Western District of Texas
USDC No. 6:05-CV-154

Before HIGGINBOTHAM, SMITH, and CLEMENT, Circuit Judges.

PER CURIAM:*

Dennis Smith, Texas prisoner # 541423, appeals the district court's denial of his FED. R. CIV. P. 60(b) motion for relief from the judgment dismissing his 42 U.S.C. § 1983 action as frivolous. Smith has filed a motion to proceed in forma pauperis (IFP) on appeal, challenging the district court's certification that his appeal was not taken in good faith pursuant to *Baugh v. Taylor*, 117 F.3d 197, 199-202 (5th Cir. 1997).

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

Smith argues that the district court abused its discretion in denying his FED. R. CIV. P. 60(b) motion for relief from judgment. Smith contends that the district court should have granted his motion based on the loss of his mail, referring to the amended complaint he allegedly mailed on September 15, 2005.

Smith does not explain in his brief or IFP motion what was in his amended complaint that would have prevented the district court from dismissing his complaint as frivolous. The district court considered the additional allegations that Smith made in his objections to the magistrate judge's report, in effect considering them as an amended complaint. The district court determined that, given Smith's admission that he could not prove a physical injury, any attempt to amend the complaint would be futile. Smith's motion and brief do not mention this ruling by the district court. The district court did not abuse its discretion in denying Smith's Rule 60(b) motion. See *Travelers Ins. Co. v. Liljeberg Enterprises, Inc.*, 38 F.3d 1404, 1408 (5th Cir. 1994).

The district court's certification that Smith's appeal is not taken in good faith is upheld, Smith's motion for IFP is denied, and this appeal is dismissed as frivolous. See *Baugh*, 117 F.3d at 202 & n.24; 5TH CIR. R. 42.2.

Smith is hereby informed that the dismissal of this appeal as frivolous counts as a strike for purposes of 28 U.S.C. § 1915(g). See *Adepegba v. Hammons*, 103 F.3d 383, 387 (5th Cir. 1996). We caution Smith that once he accumulates three strikes, he may not 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).

IFP DENIED; APPEAL DISMISSED; SANCTION WARNING ISSUED.