

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

United States Court of Appeals  
Fifth Circuit

**FILED**

June 1, 2012

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No. 11-30581  
c/w No. 11-30873  
Summary Calendar

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Lyle W. Cayce  
Clerk

DAVID SCOTT JOHNSON,

Plaintiff-Appellant

v.

BURL CAIN, WARDEN, LOUISIANA STATE PENITENTIARY; JOE LAMARTINIARA, Assistant Warden; TROY PORET, Warden; ANTONIO WHITAKER, Captain; UNKNOWN CALLAHAN, Captain,,

Defendants-Appellees

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Appeals from the United States District Court  
for the Middle District of Louisiana  
USDC No. 3:09-CV-454

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Before HIGGINBOTHAM, DAVIS, and ELROD, Circuit Judges.

PER CURIAM:\*

David Scott Johnson, Louisiana prisoner # 84970, seeks leave to proceed *informa pauperis* (IFP) in this interlocutory appeal of the 2009 denial of his motion for appointment of counsel and the June 17, 2011, denial of his motion for reconsideration of the denial of the motion for appointment of counsel. Johnson's IFP motion is a challenge to the district court's certification that this

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

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

An appeal is taken in good faith if it involves legal points that are arguable on their merits and not frivolous. *Id.* Johnson's appeal from the 2009 denial of his motion for appointment of counsel is untimely. See FED. R. APP. P. 4(a)(1)(A); *Bowles v. Russell*, 551 U.S. 205, 214 (2007). His attempt to appeal from the magistrate judge's June 17, 2011 denial of his motion for reconsideration is ineffective because he filed this motion two days prior to the magistrate judge's decision and three days prior to entry of the decision on the docket. Cf. FED. R. APP. P. 4(a)(2) (stating that a filing made after the district court issues an order but prior to the entry of judgment is effective) (emphasis added).

Johnson's notice of appeal refers to the district court's June 6, 2011, denial of his motion for reconsideration. However, the June 6th decision related to the denial of Johnson's motion to strike the defendants' motions. Although the notice of appeal is timely as to this order, we lack jurisdiction to address this issue in an interlocutory appeal. See 28 U.S.C. §§ 1291 & 1292; *Will v. Hallock*, 546 U.S. 345, 349 (2006). Because we lack jurisdiction, Johnson has not shown that he will present a nonfrivolous issue on appeal. See *Howard v. King*, 707 F.2d 215, 220 (5th Cir. 1983). The motion for leave to proceed IFP is DENIED, and the appeal is DISMISSED as frivolous. See *Baugh*, 117 F.3d at 202 n. 24; 5TH CIR. R. 42.2.