

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

United States Court of Appeals
Fifth Circuit

FILED

May 3, 2016

Lyle W. Cayce
Clerk

No. 15-10177
Summary Calendar

CARLOS WAYNE TOOMBS, also known as Carlos Wayne Durham,

Plaintiff-Appellant

v.

DIANNA MASSINGILL, Assistant District Attorney; TIM CANTRELL, Trial Counsel; RICKY DEARMAN, Amarillo Police Officer; SERGEANT JIM MCKENNY, Amarillo Police Officer,

Defendants-Appellees

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 2:14-CV-262

Before JOLLY, DENNIS, and PRADO, Circuit Judges.

PER CURIAM:*

Carlos Wayne Toombs, Texas prisoner # 1109593, appeals the district court's dismissal of his 42 U.S.C. § 1983 complaint as frivolous and malicious. According to Toombs, the district court erred in determining that the claims in his complaint were barred under *Heck v. Humphrey*, 512 U.S. 477 (1994), and thus frivolous. We find no abuse of discretion in the determination because

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

No. 15-10177

the complaint seeks monetary damages from defense counsel, the prosecutor, and two police officers “for the unjustified deprivation of [Toombs’s] life, liberty and property” but does not allege that his conviction or sentence has been reversed, expunged, set aside, or otherwise undermined. *See Boyd v. Biggers*, 31 F.3d 279, 283 (5th Cir. 1994). Nor do we find an abuse of discretion in the district court’s determination that the complaint, which was duplicative of a prior § 1983 suit, was malicious. *See Bailey v. Johnson*, 846 F.2d 1019, 1021 (5th Cir. 1988). Further, Toombs fails to assert or demonstrate any error in the district court’s rejection of his DNA testing claim, which he raised in a postjudgment motion. *See Skinner v. Switzer*, 562 U.S. 521, 525 (2011); *Dist. Attorney’s Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 69 (2009).

The appeal is DISMISSED AS FRIVOLOUS. *See* 5TH CIR. R. 42.2. The motions for an evidentiary hearing and to compel the production of evidence are DENIED. We previously warned Toombs that he had two strikes under 28 U.S.C. § 1915(g). The district court’s dismissal of his complaint in this case, as well as our dismissal of this appeal, count as additional strikes. *See Coleman v. Tollefson*, 135 S. Ct. 1759, 1763-64 (2015); *Adepegba v. Hammons*, 103 F.3d 383, 387 (5th Cir. 1996). Because Toombs has accumulated more than three strikes, he is BARRED from proceeding IFP in any civil action while he is incarcerated unless he is under imminent danger of serious physical injury. *See* § 1915(g).