United States Court of Appeals for the Fifth Circuit

No. 23-10654
Summary Calendar

United States Court of Appeals
Fifth Circuit
FILED
March 7, 2024
Lyle W. Cayce
Clerk

GENTRY STEPHEN LEONARD,

Plaintiff—Appellant,

versus

PARKLAND MEMORIAL HOSPITAL; PARKLAND HOSPITAL TRAUMA TEAM; JOHN DOE #3; JOHN DOE #2; JOHN DOE #1,

Defendants—Appellees.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:22-CV-2658

Before STEWART, GRAVES, and OLDHAM, *Circuit Judges*.

PER CURIAM:[*]

Gentry Stephen Leonard, Texas prisoner # 647348, seeks to proceed in forma pauperis (IFP) on appeal from the dismissal of his pro se 42 U.S.C. § 1983 suit alleging that the defendants violated his Eighth Amendment rights by failing to provide him necessary, post-surgical physical therapy. He asserts that the district court erred by dismissing his suit for failure to state a

[*] This opinion is not designated for publication. *See* 5TH CIR. R. 47.5.

claim without providing him sufficient opportunities to object to the magistrate judge's recommendation or to amend his complaint.

To proceed IFP, a litigant must demonstrate both financial eligibility and a nonfrivolous issue for appeal. *See Carson v. Polley*, 689 F.2d 562, 586 (5th Cir. 1982). Because Leonard presents a nonfrivolous argument for appeal, we GRANT his motion to proceed IFP. *See* 28 U.S.C. § 1915(a)(1); *Howard v. King*, 707 F.2d 215, 220 (5th Cir. 1983). However, we dispense with further briefing and AFFIRM because, for the following reasons, the record and Leonard's pleadings indicate that he has pleaded his best case and the district court did not reversibly err. *See Baugh v. Taylor*, 117 F.3d 197, 202 (5th Cir. 1997).

Leonard cites no evidence in support of his assertion that he did not receive the magistrate judge's recommendation until two weeks after it was mailed. *See* FED. R. APP. P. 28(a)(8)(A); *Yohey v. Collins*, 985 F.2d 222, 224-25 (5th Cir. 1993). Further, despite that a week passed between Leonard's avowed receipt of the recommendation and the dismissal of his suit, he did not file objections or seek leave to amend his complaint, nor did he inform the district court of the alleged mail delay. *See Theriot v. Par. of Jefferson*, 185 F.3d 477, 491 n.26 (5th Cir. 1999) ("An appellate court may not consider . . . facts which were not before the district court at the time of the challenged ruling.").

In any event, even if the district court erred by failing to afford Leonard a full 14 days to object to the magistrate judge's recommendation in accordance with 28 U.S.C. § 636(b)(1) and Federal Rule of Civil Procedure 72(b)(2), the error was harmless. *See McGill v. Goff*, 17 F.3d 729, 731-32 (5th Cir. 1994), *overruled on other grounds by Kansa Reinsurance Co. v. Cong. Mortg. Corp. of Tex.*, 20 F.3d 1362, 1373-74 (5th Cir. 1994). The district court dismissed the suit on its face based purely on the legal determination that the

complaint failed to state a claim for relief, and Leonard does not identify any objections that he would have made had he been afforded the opportunity. *See McGill*, 17 F.3d at 731-32; *Braxton v. Estelle*, 641 F.2d 392, 397 (5th Cir. 1981).

Leonard is correct that a district court generally errs by dismissing a pro se complaint without allowing the plaintiff an opportunity to amend. *See Mendoza-Tarango v. Flores*, 982 F.3d 395, 402 (5th Cir. 2020). However, he fails either to identify any material facts that he would have added had he been allowed to amend his complaint or to indicate that he has not pleaded his best case. *See id.*; *Yohey*, 985 F.2d at 224-25.

Leonard's § 1983 complaint consists of undetailed factual allegations that the defendants failed to provide him necessary physical therapy followed by bald assertions that such failure constitutes a violation of his constitutional rights. Such conclusory pleadings are not sufficient to state an Eighth Amendment claim. *See Ashcroft v. Iqbal* 556 U.S. 662, 678 (2009); *Domino v. Tex. Dep't of Crim. Just.*, 239 F.3d 752, 756 (5th Cir. 2001).

The district court's dismissal of the suit for failure to state a claim counts as a strike under 28 U.S.C. § 1915(g). *See Brown v. Megg*, 857 F.3d 287, 291 (5th Cir. 2017); *Adepegba v. Hammons*, 103 F.3d 383, 388 (5th Cir. 1996), *abrogated in part on other grounds by Coleman v. Tollefson*, 575 U.S. 532, 537 (2015). Leonard is WARNED that if he accumulates three strikes, he will not be permitted to 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).