

February 13, 2007

Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 06-50643
Conference Calendar

EARL HENRY SHELTON, JR.,

Plaintiff-Appellant,

versus

CITY OF MIDLAND,

Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 7:05-CV-124

Before BARKSDALE, GARZA, and CLEMENT, Circuit Judges.

PER CURIAM:*

Earl Henry Shelton, Jr., Texas prisoner # 629604, moves for leave to proceed in forma pauperis (IFP) on appeal. The district court denied Shelton's IFP motion and certified that the appeal was not taken in good faith. By moving for IFP, Shelton is challenging the district court's certification. See Baugh v. Taylor, 117 F.3d 197, 202 (5th Cir. 1997).

Shelton asserts that his due process rights were violated because the defendant performed an autopsy on his deceased wife without his permission and did not return the body to Shelton for

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

burial although Shelton was the next of kin. He also asserts that he wrongly lost custody of his children. The district court concluded that Shelton's claims, which accrued at the latest in 1992, were untimely. See *Piotrowski v. City of Houston*, 51 F.3d 512, 516 (5th Cir. 1995); TEX. CIV. PRAC. AND REM. CODE ANN. § 16.003(a). Shelton has not presented a nonfrivolous appellate issue concerning the dismissal on limitations grounds.

Shelton has not shown that the district court's conclusion that his appeal would be frivolous was incorrect. The instant appeal is without arguable merit and is thus frivolous. Accordingly, Shelton's request for IFP status is denied, and his appeal is dismissed. See *Howard v. King*, 707 F.2d 215, 219-20 (5th Cir. 1983); 5TH CIR. R. 42.2.

The dismissal of Shelton's 42 U.S.C. § 1983 suit by the district court pursuant to 28 U.S.C. § 1915(e)(2)(B) and our dismissal of this appeal as frivolous both count as strikes under § 1915(g). See *Adepegba v. Hammons*, 103 F.3d 383, 385-87 (5th Cir. 1996). Shelton has two prior strikes. *Shelton v. Schorre*, No. 02-50216 (5th Cir. Aug. 21, 2002). Because Shelton has accumulated at least three strikes under § 1915(g), he is barred from proceeding 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 MOTION DENIED; APPEAL DISMISSED; 28 U.S.C. § 1915(g) BAR IMPOSED.