IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit

FILED
February 5, 2020

Lyle W. Cayce
Clerk

No. 18-11409

ELMO FORTENBERRY,

Plaintiff-Appellant

v.

BOARD OF PARDON AND PAROLE; PAROLE OFFICER JENNIFER S. BROWN; DAVID GUTIERREZ; TEXAS DEPARTMENT OF CRIMINAL JUSTICE; WILLIAM STEPHENS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION; TEXAS DEPARTMENT OF PUBLIC SAFETY; GREG ABBOTT, GOVERNOR OF THE STATE OF TEXAS; LIEUTENANT GOVERNOR DAN PATRICK; LYNNE SHARP,

Defendants-Appellees

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 7:15-CV-167

Before JONES, HIGGINSON, and OLDHAM, Circuit Judges.

PER CURIAM:*

Elmo Fortenberry, Texas prisoner # 1949652, moves for leave to proceed in forma pauperis (IFP) on appeal from the dismissal of his 42 U.S.C. § 1983 suit. The district court denied Fortenberry leave to proceed IFP on appeal,

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

certifying that this appeal was not taken in good faith. *See* 28 U.S.C. § 1915(a)(3). By moving to proceed IFP here, Fortenberry is challenging the district court's certification decision. *See Baugh v. Taylor*, 117 F.3d 197, 202 (5th Cir. 1997). Fortenberry also moves for default judgment and the appointment of counsel.

Our inquiry into an appellant's good faith "is limited to whether the appeal involves legal points arguable on their merits (and therefore not frivolous)." *Howard v. King*, 707 F.2d 215, 220 (5th Cir. 1983) (internal quotation marks and citation omitted). Fortenberry's contention that immunity is not a defense against violations of law or constitutional rights does not establish a nonfrivolous issue for appeal with respect to the district court's decisions on Eleventh Amendment immunity, absolute immunity, and qualified immunity. *See Toney v. Owens*, 779 F.3d 330, 336 (5th Cir. 2015) (qualified immunity); *Moore v. La. Bd. of Elementary and Secondary Educ.*, 743 F.3d 959, 963 (5th Cir. 2014) (Eleventh Amendment immunity); *Hulsey v. Owens*, 63 F.3d 354, 356-57 (5th Cir. 1995) (absolute immunity). His reliance on *Monell v. Dep't of Social Servs.*, 436 U.S. 658 (1978), is unavailing, as *Monell* concerns local government units and does not set forth an exception to a state agency's Eleventh Amendment immunity. *See Monell*, 436 U.S. at 690 & n.54; *Johnson v. Kegans*, 870 F.2d 992, 998 n.5 (5th Cir. 1989).

Fortenberry also has not demonstrated a nonfrivolous issue regarding the district court's determinations that respondeat superior liability is not a basis for relief under § 1983, *see Brown v. Taylor*, 911 F.3d 235, 245 (5th Cir. 2018), and that his claim that he was unlawfully required to register as a sex offender was time barred because the claim accrued in 2010 when Fortenberry knew or had reason to know of the alleged unlawful registration, *see Moon v.*

City of El Paso, 906 F.3d 352, 358 (5th Cir. 2018), *cert. denied*, 139 S. Ct. 2616 (2019).

Lastly, even when the litigant is pro se, "conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to state a claim for relief" under § 1983. *Coleman v. Lincoln Par. Det. Ctr.*, 858 F.3d 307, 309 (5th Cir. 2017) (internal quotation marks and citation omitted). Fortenberry does not raise a nonfrivolous issue regarding the district court's determination under § 1915(e)(2)(B)(ii) that his conclusory allegations were insufficient to state a claim on which relief may be granted. *See id.*; *Yohey v. Collins*, 985 F.2d 222, 225 (5th Cir. 1993).

The instant appeal is without arguable merit and is dismissed as frivolous. *See Baugh*, 117 F.3d at 202 n.24; *Howard v. King*, 707 F.2d 215, 220 (5th Cir. 1983); 5TH CIR. R. 42.2. The district court's dismissal of Fortenberry's § 1983 suit and our dismissal of this appeal as frivolous both count as strikes for purposes of § 1915(g). *See Coleman v. Tollefson*, 135 S. Ct. 1759, 1763-64 (2015); *Adepegba v. Hammons*, 103 F.3d 383, 388 (5th Cir. 1996). Fortenberry is warned that if he accumulates three strikes, he will not be able 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).

MOTIONS FOR LEAVE TO PROCEED IFP, DEFAULT JUDGMENT, AND APPOINTMENT OF COUNSEL DENIED; APPEAL DISMISSED; SANCTION WARNING ISSUED.