

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-50884
Conference Calendar

BENTON G. MILEY, III,

Plaintiff-Appellant,

versus

CAROLE KEETON RYLANDER,
Comptroller of Public Accounts,
State of Texas, in Her Official Capacity,

Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Texas
USDC No. A-99-CV-452-JN

February 16, 2000

Before EMILIO M. GARZA, BENAVIDES, and DENNIS, Circuit Judges.

PER CURIAM:*

Benton G. Miley III, TDCJ #775702, filed a 42 U.S.C. § 1983 action, seeking a declaratory judgment that the Texas drug tax was a punishment for purposes of the Double Jeopardy Clause. The claim is not cognizable in a § 1983 action unless the challenged conviction has been invalidated because the action necessarily implies the invalidity of the conviction. See Edwards v.

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

Balisok, 540 U.S. 641, 648 (1997); Heck v. Humphrey, 512 U.S. 477, 486-87 (1994); Clarke v. Stalder, 154 F.3d 186, 190 (5th Cir. 1998), cert. denied, 119 S. Ct. 1052 (1999). Miley's appeal is frivolous and is DISMISSED as such. See 5TH CIR. R. 42.2.

Miley is warned that the dismissals of his claim by the district court for failure to state a claim and of his appeal by this court as frivolous count as two strikes for purposes of 28 U.S.C. § 1915(g). See Adepegba v. Hammons, 103 F.3d 383, 387 (5th Cir. 1996)("[D]ismissals as frivolous in the district courts or the court of appeals count [as strikes] for the purposes of [§ 1915(g)]."). We caution Miley that once he accumulates three strikes, he may not proceed in forma pauperis 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 28 U.S.C. § 1915(g).

APPEAL DISMISSED. SANCTIONS WARNING ISSUED.