

United States Court of Appeals
for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

FILED

April 16, 2021

Lyle W. Cayce
Clerk

No. 20-20045
Summary Calendar

NELSON EDWARD DUSENBERY,

Plaintiff—Appellant,

versus

UNITED STATES OF AMERICA; DONALD TRUMP, *President of the United States*; JEFF SESSIONS, *Former U.S. Attorney General*; MATT WHITAKER; ROBERT BARR; CHRISTOPHER A. WRAY, *Director of the Federal Bureau of Investigation*; SEBASTIAN GONZALES, *Federal Bureau of Investigation Special Agent Austin, Texas*; GREG ABBOTT, *Governor of the State of Texas*; KEN PAXTON, *Attorney General of Texas*; STEVEN C. MCCRAW, *Director of Texas Department of Public Safety Public Integrity Unit*; DANNY BILEY; NIN HULETT; MATT MILLS; RALPH H. WALTON; ROBERT THOMAS CHRISTIAN; ROBERT YOUNG, *Hood County, Texas District Attorney Chief Investigator,*

Defendants—Appellees.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:19-CV-4267

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Before JONES, COSTA, and WILSON, *Circuit Judges*.

PER CURIAM:*

Nelson Edward Dusenbery, Texas prisoner # 02044126, moves for leave to proceed in forma pauperis (IFP) on appeal from the dismissal of his 42 U.S.C. § 1983 complaint and the denial of his Federal Rule of Civil Procedure 59(e) motion challenging that dismissal. He also seeks appointment of counsel on appeal and to supplement and re-file a motion for a preliminary injunction and supporting exhibits that were previously unfiled on the court's docket.

In the district court, Dusenbery argued that the defendants conspired to conceal crimes and to deny him due process, meaningful access to the courts, and equal protection of the laws because they did not furnish him with a complete copy of his record. The district court dismissed his complaint pursuant to 28 U.S.C. § 1915 and 28 U.S.C. § 1915A. After Dusenbery filed notice of his appeal, the district court certified that the appeal was not taken in good faith and denied his motion for leave to appeal IFP. *See* FED. R. APP. P. 24(a)(3)(A).

By moving to proceed IFP, Dusenbery is challenging the certification that his appeal is frivolous and is not taken in good faith. *See* *Baugh v. Taylor*, 117 F.3d 197, 202 (5th Cir. 1997). 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).

Dusenbery now argues that the district court provided insufficient reasons for its certification decision. However, in its order, the district court adequately explained that it certified that Dusenbery's appeal was not taken

* Pursuant to 5TH CIRCUIT RULE 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 CIRCUIT RULE 47.5.4.

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in good faith because did he not disclose any nonfrivolous issue for appeal in his IFP motion. *See* FED. R. APP. P. 24(a)(1)(C).

He also argues that his complaint and the pages of exhibits he filed were sufficient to state a viable claim that his constitutional rights were violated by the defendants' not providing him a complete record. However, indigent prisoners, like Dusenbery, do not have a federally-protected right to a free copy of court records to search for possible claims to raise on collateral review in the future. *Colbert v. Beto*, 439 F.2d 1130, 1131 (5th Cir. 1971). Further, Dusenbery's assertion that the defendants failed to provide him a complete copy of his record does not state a viable equal protection claim. *See United States v. MacCollom*, 426 U.S. 317, 324-25 (1976). Last, his factual assertion that the defendants conspired to deprive him of his record for a nefarious purpose "rise[s] to the level of the irrational or the wholly incredible," and is thus factually frivolous. *Denton v. Hernandez*, 504 U.S. 25, 33 (1992).

We agree with the district court. Dusenbery has not shown that his "appeal involves legal points arguable on their merits (and therefore not frivolous)." *Howard*, 707 F.2d at 219-20. Thus, he has not demonstrated that his appeal is taken in good faith. *Id.*

In light of the forgoing, we deny Dusenbery's IFP motion and dismiss his appeal as frivolous. *See Baugh*, 117 F.3d at 202 n.24; 5TH CIR. R. 42.2. Dusenbery's motion for appointment of counsel and his motion to supplement and re-file are also denied. *See Butts v. Aultman*, 953 F.3d 353, 361 (5th Cir. 2020); *Naranjo v. Thompson*, 809 F.3d 793, 799-800 (5th Cir. 2015).

Our dismissal and the district court's dismissal count as strikes for purposes of 28 U.S.C. § 1915(g). *See Adepegba v. Hammons*, 103 F.3d 383, 388 (5th Cir. 1996), *abrogated in part on other grounds by Coleman v. Tollefson*,

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135 S. Ct. 1759, 1762-63 (2015). Dusenbery is cautioned that if he accumulates three strikes, he may not proceed IFP in any civil action or appeal filed while he is detained or incarcerated in any facility unless he is in imminent danger of serious physical injury. *See* § 1915(g).

MOTIONS DENIED; APPEAL DISMISSED AS FRIVOLOUS; STRIKES WARNING ISSUED.