

United States Court of Appeals
for the Fifth Circuit

No. 22-50304

United States Court of Appeals
Fifth Circuit

FILED

February 10, 2023

Lyle W. Cayce
Clerk

JOHN DESMARAIS,

Plaintiff—Appellant,

versus

BELL COUNTY SHERIFF'S OFFICE; CITY OF BELTON POLICE
DEPARTMENT; CITY OF TEMPLE POLICE DEPARTMENT; CITY OF
SALADO POLICE DEPARTMENT; BELL COUNTY DISTRICT
ATTORNEY'S OFFICE; ET AL.,

Defendants—Appellees.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 6:22-CV-92

Before HIGGINBOTHAM, DUNCAN, and WILSON, *Circuit Judges.*

PER CURIAM:*

John Desmarais, Texas prisoner # 2314327, has applied for leave to proceed in forma pauperis (IFP) in this appeal from the dismissal of his civil rights action as frivolous pursuant to 28 U.S.C. § 1915(e). The motion is construed as a challenge to the district court's certification that the appeal

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

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was not taken in good faith. *See Baugh v. Taylor*, 117 F.3d 197, 202 (5th Cir. 1997). Our inquiry “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 citations omitted).

The district court determined that the claims raised by Desmarais are time-barred because the complaint was filed more than two years after Desmarais knew of or had reason to know of his alleged injuries. *See Burrell v. Newsome*, 883 F.2d 416, 418 (5th Cir. 1989). Desmarais has not shown that his contentions that the limitation period began at a later date and was tolled while he was receiving psychiatric treatment are arguable on their merits. *See Howard*, 707 F.2d at 220. The district court determined also that Desmarais’s claims are barred under the rule in *Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994). Desmarais has raised no issue with respect to this holding. The motion for leave to proceed IFP is DENIED. Because the appeal is frivolous, it is DISMISSED. *See Baugh*, 117 F.3d at 202 & n.24.

The district court’s dismissal of Desmarais’s complaint as frivolous and this court’s dismissal of Desmarais’s appeal count as two strikes under 28 U.S.C. § 1915(g). *See Adepegba v. Hammons*, 103 F.3d 383, 387 (5th Cir. 1996), *abrogated in part on other grounds, Coleman v. Tollefson*, 575 U.S. 532, 537 (2015). Desmarais has at least one other civil action that was dismissed as frivolous. *See Desmarais v. State of Tex. Med. Bd.*, No. 6:21-CV-1283-ADA (dismissed as frivolous Feb. 7, 2022). That decision also counts as a strike under § 1915(g). Because Desmarais has at least three strikes, Desmarais is now subject to the § 1915(g) filing bar and, accordingly, IT IS ORDERED that Desmarais may not 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).