

United States Court of Appeals
for the Fifth Circuit

No. 22-50547
Summary Calendar

United States Court of Appeals
Fifth Circuit
FILED
December 15, 2022

Lyle W. Cayce
Clerk

DARNELL DELK,

Plaintiff—Appellant,

versus

ROBERT PERKINS, *Retired Judge*; JOHN DOE, *Retired D.A.*;
CHANTAL ELDRIDGE, *Judge*; MARGARET MOORE, *District Attorney*;
COURT OF CRIMINAL APPEALS, COURT JUDGES,

Defendants—Appellees.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 1:21-CV-861

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

PER CURIAM:*

Darnell Delk, former Texas prisoner # 399832, appeals the district court's dismissal of his 42 U.S.C. § 1983 complaint as frivolous pursuant to

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

No. 22-50547

28 U.S.C. § 1915A. He argues the district court erred in construing his complaint as a petition for writ of mandamus and dismissing it on the ground that he asked for the wrong relief, without giving him an opportunity to amend. According to Delk, his complaint stated a claim under § 1983 because he alleged the defendants were persons acting under color of state law who violated his constitutional rights. In addition, he argues the district court erred in denying his motion for an evidentiary hearing.

The district court determined that it did not have the authority to grant the mandamus relief against state officials that Delk requested in his complaint and his more definite statement. *See Moye v. Clerk, DeKalb Cnty. Super. Ct.*, 474 F.2d 1275, 1276 (5th Cir. 1973). Delk has not identified any error in the district court's determination. Therefore, he has effectively abandoned any challenge to that ruling. *See Yohey v. Collins*, 985 F.2d 222, 224-25 (5th Cir. 1993); *Brinkmann v. Dallas Cnty. Deputy Sheriff Abner*, 813 F.2d 744, 748 (5th Cir. 1987).

Delk also has not shown that the district court erred in dismissing his complaint without giving him the opportunity to amend to seek other relief or without conducting an evidentiary hearing. Because Delk filed his complaint against “a governmental entity or officer or employee of a governmental entity,” the district court properly complied with the Prison Litigation Reform Act's (PLRA) requirement that it review his complaint and dismiss it if the complaint “is frivolous, malicious, or fails to state a claim upon which relief may be granted.” § 1915A(a), (b)(1). Further, Delk does not state what other relief he would have requested if allowed to amend his complaint or show that the district court would have had authority to issue such relief. Therefore, he has not shown that the district court erred in dismissing his complaint without giving him an opportunity to amend it to seek other relief. *See Brewster v. Dretke*, 587 F.3d 764, 768 (5th Cir. 2009).

No. 22-50547

Delk has thus failed to show that the district court erred in dismissing his complaint as frivolous because it lacked an arguable basis in law. *See Taylor v. Johnson*, 257 F.3d 470, 472 (5th Cir. 2001). As Delk fails to raise any issues of arguable merit, his appeal is dismissed as frivolous. *See* 5TH CIR. R. 42.2; *Howard v. King*, 707 F.2d 215, 220 (5th Cir. 1983).

The dismissal of the complaint as frivolous and the dismissal of this appeal as frivolous each count as a strike under the PLRA. *See* 28 U.S.C. § 1915(g); *Coleman v. Tollefson*, 575 U.S. 532, 535-37 (2015). Delk is advised that if he accumulates three strikes under § 1915(g), he will not be allowed to proceed in forma pauperis in any action or appeal unless he shows that he is in imminent danger of serious physical injury. *See* § 1915(g). Delk is also advised that frivolous, repetitive, or otherwise abusive filings may invite the imposition of other sanctions, which may include dismissal, monetary sanctions, and restrictions on his ability to file pleadings in this court and any court subject to this court's jurisdiction. *See Coghlan v. Starkey*, 852 F.2d 806, 817 n.21 (5th Cir. 1988). He is further advised to review any pending actions and appeals and move to dismiss any that are frivolous.

Accordingly, Delk's appeal is DISMISSED as frivolous. His motion for appointment of counsel is DENIED.