UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

APR 10 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

LEROY LAMONT WELLS,

Plaintiff - Appellant,

v.

COLLETTE PETERS; et al.,

Defendants - Appellees.

No. 17-35696

D.C. No. 2:16-cv-01930-JE
U.S. District of Oregon, Pendleton

ORDER

A review of the docket demonstrates that appellant has failed to pay the docketing/filing fees in this case.

Pursuant to Ninth Circuit Rule 42-1, this appeal is dismissed for failure to prosecute.

This order served on the district court shall, 21 days after the date of the order, act as the mandate of this court.

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

By: Marc Eshoo
Deputy Clerk
Ninth Circuit Rule 27-7

APPENDIX A

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PENDLETON DIVISION

LEROY LAMONT WELLS,

Plaintiff,

v.

COLLETTE PETERS et al.,

Defendants.

No. 2:16-cv-01930-JE

OPINION AND ORDER

MOSMAN, J.,

On March 6, 2017, Magistrate Judge John Jelderks issued his Findings and Recommendation ("F&R") [49], recommending that Plaintiff's *in forma pauperis* ("IFP") status should be revoked. Plaintiff objected [58], and Defendants responded [62].

LEGAL STANDARD

The magistrate judge makes only recommendations to the court, to which any party may file written objections. The court is not bound by the recommendations of the magistrate judge, but retains responsibility for making the final determination. The court is generally required to make a de novo determination regarding those portions of the report or specified findings or recommendations as to which an objection is made. 28 U.S.C. § 636(b)(1)(C). However, the court is not required to review, de novo or under any other standard, the factual or legal conclusions of the magistrate judge as to those portions of the F&R to which no objections are

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addressed. *See Thomas v. Arn*, 474 U.S. 140, 149 (1985); *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003). While the level of scrutiny with which I am required to review the F&R depends on whether or not objections have been filed, in either case, I am free to accept, reject, or modify any part of the F&R. 28 U.S.C. § 636(b)(1)(C).

ANALYSIS

Under what is commonly referred to as the "three-strikes rule" of the Prison Litigation Reform Act ("PLRA"), IFP status is "unavailable to prisoners who have on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal . . . that was dismissed" because it was "frivolous, malicious, or fails to state a claim upon which relief may be granted." *Andrews v. Cervantes*, 493 F.3d 1047, 1049 (9th Cir. 2007) (as amended) (quoting 28 U.S.C. § 1915(g) (internal quotation marks omitted)). But the PLRA provides an imminent danger exception to the three-strikes rule. Specifically, if "the prisoner is under imminent danger of serious physical injury," he may file without paying the filing fee. *Id.* at 1050 (quoting 28 U.S.C. § 1915(g)).

Here, Judge Jelderks found that Mr. Wells was ineligible for IFP status because of the three strikes rule. Specifically, Judge Jelderks found that Mr. Wells has more than three prior "strikes" for the purposes of the PLRA. Mr. Wells did not object to this finding, and I agree that Mr. Wells is ineligible for IFP status under the PLRA. He has filed at least three cases that have been dismissed as frivolous or malicious, or because they failed to state a claim upon which relief could be granted.

Judge Jelderks also found, based in part on information provided by Defendants, that Mr. Wells was not under imminent danger of serious physical injury, and thus, he was not eligible to proceed without paying the filing fee under the imminent danger exception. Mr. Wells objects to

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this finding and recommendation. Defendants argue that Judge Jelderks is correct in finding that Mr. Wells has not shown he is under imminent danger of serious physical injury but that his reasoning is faulty. Specifically, they argue that Judge Jelderks's finding must be based only on the allegations in the Complaint. Instead, he based his findings, in part, on information provided by Defendants, who explained that Mr. Wells is incarcerated under normal conditions with the Oregon Department of Corrections.

As an initial matter, I agree that a court may incorporate information from Defendants in determining whether Mr. Wells met the imminent danger exception. While the Ninth Circuit in *Andrews* held that the plaintiff had sufficiently shown in his complaint a likelihood of serious injury to invoke the imminent danger exception, it did not hold that district courts may only look to the allegations in the complaint in making this determination. *See Andrews*, 493 F.3d at 1050. In addition, there is nothing in the text of the statute that requires a court to only consider the allegations in the complaint to determine whether a plaintiff qualifies for the exception. *See* 28 U.S.C. § 1915. Therefore, I do not find that Judge Jelderks erred in considering information outside the Complaint in determining whether Mr. Wells qualified for the imminent danger exception.

That said, I also agree that the allegations in the Complaint fail to show that Mr. Wells qualifies for the imminent danger exception. In the Complaint, Mr. Wells is seeking habeas relief. In support of his relief, he alleges he was kidnapped and "forced into some type of concrete cage, . . . sprayed with some type of liquid fire," and hit in the head, which caused him to slip in and out of consciousness. He also alleges he cannot leave the cage. These facts do not show that he is "under imminent danger of serious physical injury," as required to qualify for the imminent danger exception. At best, they show he was previously "kidnapped" and hit on the

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head. While Mr. Wells claims that the confinement continues, there is no ongoing danger of imminent serious physical injury alleged.

CONCLUSION

Upon careful review and with the above explanation, I agree with Judge Jelderks's findings and recommendations and ADOPT the F&R [49] as my own opinion. Mr. Wells's IFP status is revoked. In order to proceed with this case, he must pay the Court's filing fee within 30 days of the date of this Order.

IT IS SO ORDERED.

DATED this 30th day of June, 2017.

/s/ Michael W. Mosman
MICHAEL W. MOSMAN
Chief United States District Judge

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

MAY 25 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

LEROY LAMONT WELLS, Plaintiff-Appellant, v. COLLETTE PETERS; et al., Defendants-Appellees.	No. 17-35696 D.C. No. 2:16-cv-01930-JE District of Oregon, Pendleton ORDER

Before: PAEZ and BEA, Circuit Judges.

On January 24, 2018, the court denied appellant's motion to proceed in forma pauperis and ordered appellant within 21 days to pay $505.00 to the district court as the docketing and filing fees for this appeal.

On April 10, 2018, the court dismissed this appeal for appellant's failure to pay the docketing and filing fees in this case. *See* 9th Cir. R. 42-1.

Appellant now moves to reinstate the appeal (Docket Entry Nos. 62, 65), moves for reconsideration of the dismissal of his appeal (Docket Entry No. 63), and moves for a stay of the mandate (Docket Entry No. 64).

Appellant, however, does not include proof that the filing and docketing fees have been paid. The court therefore denies the pending motions to reinstate, to reconsider, and for a stay of mandate.

This case remains closed.

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sz/MOATT

Appellant's motion for judicial notice (Docket Entry No. 61) is denied as moot.

The mandate shall issue forthwith.

No further filings will be entertained in this closed case.

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JAN 24 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

LEROY LAMONT WELLS, Plaintiff-Appellant, v. COLLETTE PETERS; et al., Defendants-Appellees.	No. 17-35696 D.C. No. 2:16-cv-01930-JE District of Oregon, Pendleton ORDER

Before: PAEZ and BEA, Circuit Judges.

Appellant's motion to proceed in forma pauperis (Docket Entry Nos. 5, 7) is denied because appellant has had three or more prior actions or appeals dismissed as frivolous, malicious, or for failure to state a claim upon which relief may be granted, and appellant has not alleged imminent danger of serious physical injury. *See* 28 U.S.C. § 1915(g).

Within 21 days after the date of this order, appellant shall pay $505.00 to the district court as the docketing and filing fees for this appeal and file proof of payment with this court. Failure to pay the fees will result in the automatic dismissal of the appeal by the Clerk for failure to prosecute, regardless of further filings. *See* 9th Cir. R. 42-1.

No motions for reconsideration, clarification, or modification of the denial of appellant's in forma pauperis status shall be entertained.

sz/MOATT

APPENDIX D

If the appeal is dismissed for failure to comply with this order, the court will not entertain any motion to reinstate the appeal that is not accompanied by proof of payment of the docketing and filing fees.

All other motions will be addressed by separate order.

Briefing is suspended pending further order of this court.

VIOLATION
FRAP
Rule 32 (d)
SIGNATURE.
Every Brief, motion, or other Paper filed with the Court must be signed by the party filing the Paper or, if the party is represented, by one of the party's attorneys.

APPENDIX D

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

LEROY LAMONT WELLS,

Plaintiff,

Case No. 2:16-cv-01930-JE

JUDGMENT

v.

COLLETTE PETERS, et al.,

Defendants.

MOSMAN, District Judge.

Where plaintiff has not paid the civil filing fee as required by the court's Order dated June 30, 2017, IT IS ORDERED AND ADJUDGED that this Action is DISMISSED, without prejudice. All pending motions are DENIED AS MOOT.

DATED this 10th day of August, 2017.

Michael W. Mosman
United States District Judge

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Additional material from this filing is available in the Clerk's Office.