

A P P E N D I X

A

FIFTH CIRCUIT COURT OF APPEALS
15th November 2018

DENIAL OF IFP ON APPEAL,
AND DISMISSAL OF APPEAL AS FRIVOLOUS

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-50233

United States Court of Appeals
Fifth Circuit

FILED

November 15, 2018

Lyle W. Cayce
Clerk

SCOTT ASH JAMES ZIRUS,

Plaintiff - Appellant

v.

SHARON FAYE KELLER, in her official capacity; LAWRENCE E. MEYERS, in his official capacity; BERT RICHARDSON, in his official capacity; KEVIN P. YEARY, in his official capacity; CHERYL A. JOHNSON, in her official capacity; MICHAEL E. KEASLER, in his official capacity; BARBARA P. HERVEY, in her official capacity; ELSA ALCALA, in her official capacity; DAVID NEWELL, in his official capacity; M. REX EMERSON, in his official capacity; SCOTT MONROE, in his official capacity,

Defendants - Appellees

Appeal from the United States District Court
for the Western District of Texas
USDC No. 1:16-CV-428

Before SMITH, HIGGINSON, and DUNCAN, Circuit Judges.

PER CURIAM:*

Scott Ash James Zirus, Texas prisoner # 1640002, moves for leave to proceed in forma pauperis (IFP) on appeal from the district court's denial of his Federal Rule of Civil Procedure 60(b) motion, arguing that he should not have

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

to pay the balance of his filing fee under the Prison Litigation Reform Act (PLRA) because the district court construed his 42 U.S.C. § 1983 complaint as a request for a writ of mandamus. The district court denied the motion, stating that Zirus had induced any such error by seeking leave to proceed IFP in an action he filed pursuant to § 1983, and certified that an appeal would not be taken in good faith.

By moving to proceed IFP on appeal, Zirus challenges the district court's certification that the appeal is not taken in good faith. *See Baugh v. Taylor*, 117 F.3d 197, 202 (5th Cir. 1997). However, "[u]nder the doctrine of invited error, [plaintiff] may not complain of any error by the district court in applying the PLRA filing fee requirements because [plaintiff] induced any such error by seeking leave to proceed IFP in an action he filed as a 42 U.S.C. § 1983 action." *Nabelek v. Honorable Court of Criminal Appeals & All of Its Active Justices*, 112 F. App'x 948, 949 (5th Cir. 2004) (unpublished)¹ (citing *United States v. Baytank (Houston), Inc.*, 934 F.2d 599, 606-07 (5th Cir. 1991)). Because Zirus induced any error by the district court in applying the PLRA filing fee requirements, he has failed to raise a nonfrivolous argument that the district court abused its discretion by denying his Rule 60(b) motion. *See Howard*, 707 F.2d at 220.

Accordingly, Zirus's motion for leave to proceed IFP on appeal is DENIED, and his appeal is DISMISSED as frivolous. *See Baugh*, 117 F.3d at 202 n.24; 5TH CIR. R. 42.2. The dismissal of this appeal as frivolous does not count as a strike for purposes of 28 U.S.C. § 1915(g). *See Nabelek*, 112 F. App'x at 949.

¹ Although unpublished opinions issued on or after January 1, 1996, are not precedential, they may nevertheless be persuasive. *See Ballard v. Burton*, 444 F.3d 391, 401 & n.7 (5th Cir. 2006); 5TH CIR. R. 47.5.4.

A P P E N D I X

B

US DISTRICT COURT
18th April 2018

ORDER REGARDING MOTION TO PROCEED
IN FORMA PAUPERIS

FILED

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

18 APR 25 PM 12:53

CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY *[Signature]*
DEPUTY CLERK

SCOTT ASH JAMES Z. US #1640002,
Plaintiff,

V.

Case No. A-16-CV-428-LY

SHARON FAYE KELLER, et al.,
Defendants.

ORDER REGARDING MOTION TO PROCEED
IN FORMA PAUPERIS ON APPEAL

The Court has considered the appellant's application for leave to proceed in forma pauperis on appeal, the certified trust fund account statement or institutional equivalent, and all consents and other documents required by the agency having custody of the appellant to withdraw funds from the account.

[] The application for leave to proceed in forma pauperis on appeal pursuant to 28 U.S.C. § 1915 is GRANTED.

[] (Prisoner's name) is assessed an initial partial filing fee of (Amount). The agency having custody of the appellant shall collect this amount from the trust fund account or institutional equivalent, when funds are available, and forward to the clerk of the district court.

[] Thereafter, the appellant shall pay (Amount), the balance of the filing fees, in periodic installments. The appellant is required to make payments of 20% of the preceding month's income credited to the appellant's prison account until appellant has paid the total filing fees of \$455.00. The agency having custody of the appellant shall collect this amount from the trust fund account or institutional equivalent, when funds are available and when permitted by 28 U.S.C. § 1915(b)(2), and forward it to the district court clerk.

The clerk shall mail a copy of this order to the inmate accounting office or other person(s) or entity with responsibility for collecting and remitting to the district court interim filing payments on behalf of prisoners, as designated by the facility in which the appellant is currently or subsequently confined.

[X] The application for leave to proceed in forma pauperis on appeal pursuant to 28 U.S.C. §1915 is DENIED for the following reason(s):

The applicant is not a pauper.

The applicant has not complied with the requirements of 28 U.S.C. §1915(a)(1) or (a)(2) or has failed to supply the consent and authorization forms required by the institution having custody of the applicant, allowing collection of fees from the inmate trust fund account or institutional equivalent.

The applicant is barred from proceeding in forma pauperis on appeal because of the “three strikes” rule of 28 U.S.C. §1915(g).

Pursuant to 28 U.S.C. §1915(a)(3) and Fed.R.App.P. 24(a)(3), the court certifies that the appeal is not taken in good faith. As explained in the Court’s March 14, 2018 order, Plaintiff may not complain of any error by the district court in applying the PLRA filing fee requirements because Plaintiff induced any such error by seeking leave to proceed IFP in an action he filed pursuant to 42 U.S.C. § 1983.

IF PERMISSION TO APPEAL IN FORMA PAUPERIS IS DENIED BECAUSE THE COURT CERTIFIES THE APPEAL IS NOT TAKEN IN GOOD FAITH, COMPLETE THE SECTION BELOW.

Although this court has certified that the appeal is not taken in good faith under 28 U.S.C. §1915(a)(3) and Fed.R.App.P. 24(a)(3), the applicant may challenge this finding pursuant to *Baugh v. Taylor*, 117 F.3d 197 (5th Cir. 1997), by filing a separate motion to proceed IFP on appeal with the Clerk of Court, U.S. Court of Appeals for the Fifth Circuit, within 30 days of this order. The cost to file a motion to proceed on appeal with the Fifth Circuit is calculated below, and if the appellant moves to proceed on appeal IFP, the prison authorities will be directed to collect the fees as calculated in this order.

Scott Ash James Zirus #1640002 is assessed an initial partial filing fee of \$0. The agency having custody of the appellant shall collect this amount from the trust fund account or institutional equivalent, when funds are available, and forward to the clerk of the district court.

Thereafter, the appellant shall pay \$505.00, the balance of the filing fees, in periodic installments. The appellant is required to make payments of 20% of the preceding month’s income credited to the appellant’s prison account until appellant has paid the total filing fees of \$455.00. The agency having custody of the appellant shall collect this amount from the trust fund account or institutional equivalent, when funds are available and when permitted by 28 U.S.C. § 1915(b)(2), and forward it to the district court clerk.

If the appellant moves to proceed on appeal IFP, the clerk shall mail a copy of this order to the inmate accounting office or other person(s) or entity with responsibility for collecting and remitting to the district court interim filing payments on behalf of prisoners, as designated by the facility in which the prisoner is currently or subsequently confined.

SIGNED on this 25th day of April 2018.


LEE YEAKEL
UNITED STATES DISTRICT JUDGE

Filed IFP Application and Brief to 5th Cir. on 7th May 2018.

A P P E N D I X

C

US DISTRICT COURT
14th March 2018

ORDER DENYING RULE 60(b) MOTION

FILED

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

18 MAR 14 AM 8:29

CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS

BY

DENNIS CLERK

SCOTT ASH JAMES ZIRUS #1640002,
PLAINTIFF,

V.

Case No. A-16-CV-428-LY

SHARON FAYE KELLER, et al.,
DEFENDANTS.ORDER

Before the court is Plaintiff Scott Zirus's Rule 60(b) Motion. Zirus argues, because his civil-rights action was construed as a petition for writ of mandamus and dismissed, he should not be required to comply with the filing fee requirements of the Prison Litigation Reform Act ("PLRA"). After consideration of the motion, it is denied.

Under the doctrine of invited error, Zirus may not complain of any error by the district court in applying the PLRA filing fee requirements because Zirus induced any such error by seeking leave to proceed IFP in an action he filed pursuant to 42 U.S.C. § 1983. *See, e.g., United States v. Baytank (Houston), Inc.*, 934 F.2d 599, 606-07 (5th Cir. 1991); *Capella v. Zurich Gen. Acc. Liab. Ins. Co.*, 194 F.2d 558, 560 (5th Cir. 1952).

It is therefore **ORDERED** that the Rule 60(b) Motion, filed by Plaintiff Scott Zirus on March 5, 2018, is **DENIED**.

SIGNED this the 14th day of March 2018.


LEE YEAKEL
UNITED STATES DISTRICT JUDGE

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