

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

FEB 7 2019

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

WAYNE A. HUSSAR II, AKA Rusty
Hussar, AKA Wayne August Hussar,

Plaintiff-Appellant,

v.

JAMES C. REYNOLDS; et al.,

Defendants-Appellees.

No. 18-35914

D.C. No. 6:18-cv-00078-BMM
District of Montana, Helena

ORDER

On December 19, 2018, this court ordered appellant, within 21 days, to pay the filing fees for this appeal. The order warned appellant that failure to comply would result in the automatic dismissal of the appeal by the Clerk of the Court. To date, appellant has not complied with the court's order. Accordingly, this appeal is dismissed for failure to prosecute. *See* 9th Cir. R. 42-1.

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

All pending motions are denied as moot.

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

By: Aaron Leiderman
Deputy Clerk
Ninth Circuit Rule 27-7

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ORDER

Before: LEAVY and HURWITZ, Circuit Judges.

Appellant's motion for appointment of counsel (Docket Entry No. 2) is denied. No motions for reconsideration, clarification, or modification of this denial shall be filed or entertained.

Appellant's motion requesting "new relief" (Docket Entry No. 3) is denied.

Appellant's emergency motion requesting "relief on a petition for a writ of certiorari" (Docket Entry No. 7) is denied.

Appellant's motion to proceed in forma pauperis (Docket Entry No. 4) 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.

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.

Briefing is complete.

UNITED STATES DISTRICT COURT
DISTRICT OF MONTANA
HELENA DIVISION

WAYNE A. HUSSAR, II,

JUDGMENT IN A CIVIL CASE

Plaintiff,

CV-18-78-H-BMM

vs.

JAMES C. REYNOLDS, et al.,

Defendants.

Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

X **Decision by Court.** This action came before the Court for bench trial, hearing, or determination on the record. A decision has been rendered.

IT IS ORDERED AND ADJUDGED that this action is DISMISSED.

Dated this 24th day of July, 2018.

TYLER P. GILMAN, CLERK

By: /s/ T. Gesh
T. Gesh, Deputy Clerk

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION**

WAYNE A. HUSSAR, II and
SANDRA HUSSAR,

Plaintiffs,

v.

JUDGE JAMES C. REYNOLDS, et al.,

Defendants.

CV-18-78-GF-BMM-JTJ

**ORDER ADOPTING MAGISTRATE
JUDGE'S FINDINGS AND
RECOMMENDATION**

United States Magistrate Judge John Johnston entered Findings and Recommendation in this matter on July 6, 2018. (Doc. 3.) Judge Johnston recommended that the Court deny Plaintiff Wayne A. Hussar II's ("Hussar") motion to proceed in forma pauperis in this matter due to Hussar's filing history and failure to show imminent danger of serious physical injury as required by the Prison Litigation Reform Act. *Id.* at 2-3. Judge Johnston further observed that Sandar Hussar has not signed the pleadings in this case. Because a non-lawyer may not represent the rights of another pro-se litigant, Judge Johnston recommended that the Court terminate Sandra Hussar as a plaintiff in this case.

Hussar is not entitled to object to the Findings and Recommendation. *Minetti v. Port of Seattle*, 152 F.3d 1113, 1114 (9th Cir. 1998). The Court has reviewed

Judge Johnston's Findings and Recommendation for clear error. *McDonnell Douglas Corp. v. Commodore Bus. Mach., Inc.*, 656 F.2d 1309, 1313 (9th Cir. 1981). The Court finds no error in Judge Johnston's Findings and Recommendation, and adopts them in full.

I. ORDER

Accordingly, **IT IS ORDERED** that Magistrate Judge Johnston's Findings and Recommendation3 (Doc. 3) is **ADOPTED IN FULL**.

Sandra Hussar is terminated as a plaintiff in this action.

Hussar's Motion to Proceed in Forma Pauperis (Doc. 1) is **DENIED** pursuant to 28 U.S.C. § 1915(g).

The Clerk of Court is directed to close this case and enter judgment pursuant to Rule 58 of the Federal Rules of Civil Procedure.

No motions for reconsideration or rehearing will be entertained and the Clerk of Court is directed to disregard such motions.

DATED this 24th day of July, 2018.



Brian Morris
United States District Court Judge

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

WAYNE A. HUSSAR, II and
SANDRA HUSSAR,

Plaintiff,

vs.

JUDGE JAMES C. REYNOLDS,
MONTANA ATTORNEY GENERAL,
STATE OF MONTANA, MONTANA
DEPARTMENT OF JUSTICE, and
PUBLIC DEFENDER NICOLE
KLEIN,

Defendants.

CV 18-00078-H-BMM-JTJ

FINDINGS AND RECOMMENDATION OF
UNITED STATES MAGISTRATE JUDGE
TO DENY MOTION TO PROCEED IN
FORMA PAUPERIS

Plaintiff Wayne Hussar, a state prisoner proceeding without counsel, filed a motion to proceed in forma pauperis (Doc. 1) and a proposed Complaint alleging Defendants illegally convicted and sentenced him. (Doc. 2.)¹ Mr. Hussar is subject to the three strikes provision of 28 U.S.C. § 1915(g) and therefore the Motion to Proceed in Forma Pauperis should be denied.

¹Mr. Hussar purports to bring this action on behalf of himself and his wife, Sandra Hussar. Sandra Hussar did not sign the pleadings. A non-lawyer may not file papers with the court or otherwise represent the rights of another pro se litigant. *See Storseth v. Spellman*, 654 F.2d 1349, 1355 (9th Cir. 1981); *C.E. Pope Equity Trust v. United States*, 818 F.2d 696 (9th Cir. 1987). Mr. Hussar is considered the sole plaintiff in this case.

Permission to proceed in forma pauperis is discretionary with the Court.

See 28 U.S.C. § 1915(a). 28 U.S.C. § 1915(g) provides as follows:

In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

Mr. Hussar has filed at least three civil actions which have been dismissed as frivolous or for failure to state a claim. *See Hussar v. Touchette*, CV-11-00011-H-DWM (D. Mont. May 6, 2011 Judgment of dismissal based upon *Heck v. Humphrey*, 512 U.S. 477 (1994) which was plain on the face of the complaint, designated as strike because frivolous, not appealed); *Hussar v. Abendroth, et al.*, CV-12-00076-M-DLC (D. Mont. October 30, 2012 Judgment of dismissal, designated as strike for failure to state a claim, not appealed); and *Hussar v. Nichals*, CV-12-00045-H-DLC (D. Mont. Judgment of dismissal filed January 29, 2013, designated as a strike for failure to state a claim, not appealed.)

Mr. Hussar has exceeded the three “strikes” allowed by the Prison Litigation Reform Act to a prisoner attempting to proceed in forma pauperis in a federal civil lawsuit. As such, he cannot proceed in forma pauperis in the instant case unless he can show that he qualifies for the “imminent danger of serious physical injury”

exception of 28 U.S.C. § 1915(g).

To meet the exception, Mr. Hussar must allege facts that demonstrate that he was “under imminent danger of serious physical injury” at the time of the filing of the complaint. *Andrews*, 493 F.3d at 1053 (“it is the circumstances at the time of the filing of the complaint that matters for the purposes of the ‘imminent danger’ exception under § 1915(g)”). Mr. Hussar is complaining of an illegal conviction and sentencing. His claims are barred by *Heck v. Humphrey*, 512 U.S. 477 (1994) and do not satisfy the imminent danger exception to section 1915(g). *Andrews v. Cervantes*, 493 F.3d 1047, 1055-56 (9th Cir. 2007). The motion to proceed in forma pauperis should be denied.

While ordinarily litigants are given a period of time to pay the full filing fee of \$400.00, Mr. Hussar should not be allowed to do so in this case. Mr. Hussar has been made aware that he is subject to the provisions of 28 U.S.C. § 1915(g) and cannot submit such filings without payment of the filing fee or demonstrating imminent danger of serious physical harm. *See Hussar v. Lewis and Clark County Detention Center*, Civil Action No. 17cv55-H-DLC-JTJ; *Hussar v. Almandinger, et al.*, Civil Action No. 18cv51-H-DMM-JTJ.

In addition, Mr. Hussar is not entitled to a fourteen-day period to object. *See Minetti v. Port of Seattle*, 152 F.3d 1113, 1114 (9th Cir. 1998) (per curiam).

No motion for reconsideration will be entertained.

Based upon the foregoing, the Court issues the following:

RECOMMENDATIONS

1. Sandra Hussar should be terminated as a plaintiff in this action.
2. Mr. Hussar's Motion to Proceed in Forma Pauperis (Doc. 1) should be denied pursuant to 28 U.S.C. § 1915(g).
3. The Clerk of Court should be directed to close the case and enter judgment pursuant to Rule 58 of the Federal Rules of Civil Procedure.
4. No motions for reconsideration or rehearing will be entertained and the Clerk of Court is directed to discard any such motions.

DATED this 6th day of July, 2018.

/s/ John Johnston

John Johnston
United States Magistrate Judge