

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-40218

United States Court of Appeals
Fifth Circuit
FILED
February 18, 2019

ANTHONY L. PIERCE,

Lyle W. Cayce
Clerk

Plaintiff-Appellant

v.

LISA GARRETT; SUSAN CUNNINGHAM,

Defendants-Appellees

Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 6:17-CV-518

Before JONES, ELROD, and ENGELHARDT, Circuit Judges.

PER CURIAM:*

Anthony L. Pierce, Texas prisoner # 1813502, moves for leave to proceed in forma pauperis (IFP). He wishes to appeal the dismissal of his 42 U.S.C. § 1983 lawsuit as frivolous and for failure to state a claim upon which relief may be granted. By moving to proceed IFP, Pierce is challenging the district court's certification that his appeal is not taken in good faith. *See Baugh v. Taylor*, 117 F.3d 197, 202 (5th Cir. 1997). Our inquiry into an appellant's good faith "is limited to whether the appeal involves legal points arguable on their

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

RECEIVED
JUN 3 - 2019
OFFICE OF THE CLERK
SUPREME COURT, U.S.

merits (and therefore not frivolous).” *Howard v. King*, 707 F.2d 215, 220 (5th Cir. 1983). We may dismiss the appeal if it is frivolous. *See Baugh*, 117 F.3d at 202 n.24; 5TH CIR. R. 42.2. Our review of the district court’s dismissal of Pierce’s complaint as frivolous and for failure to state a claim is de novo. *Geiger v. Jowers*, 404 F.3d 371, 373 (5th Cir. 2005).

In his filings to this court, Pierce renews his claims for declaratory and injunctive relief and the return of his personal property, asserting that the confiscation by correctional officers was in contravention of prison policy and violated due process. However, the district court correctly dismissed his complaint under the *Parratt/Hudson* doctrine because Pierce had an adequate post-deprivation remedy, to wit: a state court lawsuit for conversion. *See Allen v. Thomas*, 388 F.3d 147, 149 (5th Cir. 2004); *Murphy v. Collins*, 26 F.3d 541, 543-44 (5th Cir. 1984). Thus, Pierce has failed to show that his appeal involves any arguably meritorious issue. *See Howard*, 707 F.2d at 220. Accordingly, his motion for leave to proceed IFP on appeal is denied, and his appeal is dismissed as frivolous. *See Baugh*, 117 F.3d at 202; 5TH CIR. R. 42.2.

The dismissal of this appeal as frivolous and the district court’s dismissal of Pierce’s § 1983 complaint as frivolous count as two strikes under 28 U.S.C. § 1915(g). *See Coleman v. Tollefson*, 135 S. Ct. 1759, 1761-64 (2015); *Adepegba v. Hammons*, 103 F.3d 383, 388 (5th Cir. 1996). In addition, Pierce has received a strike as a result of the district court’s dismissal as frivolous of his civil rights complaint in *Pierce v. Livingston*, No. 6:16-cv-1105 (E.D. Tex. Apr. 16, 2017). Pierce is informed that he is now barred from proceeding 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.” § 1915(g).

IFP MOTION DENIED; APPEAL DISMISSED; SANCTION IMPOSED.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

ANTHONY PIERCE #01813502

§

v.

§ CIVIL ACTION NO. 6:17cv518

LISA GARRETT, ET AL.

§

ORDER DENYING APPELLANT'S MOTION TO PROCEED
IN FORMA PAUPERIS ON APPEAL

The Appellant Anthony Pierce has filed a motion for leave to proceed *in forma pauperis* on appeal. Title 28 U.S.C. §1915(a)(3) provides that leave to proceed *in forma pauperis* on appeal shall be denied if the district court determines that the appeal is not taken in good faith - in other words, if the appeal fails to present a non-frivolous issue. *Coppedge v. U.S.*, 369 U.S. 438, 445, 82 S. Ct. 917, 8 L. Ed. 2d 21 (1962); *United States v. Benitez*, 405 Fed. Appx. 930, 930, 2010 U.S. App. LEXIS 26255, 2010 WL 5298173 (5th Cir. 2010) (*per curiam*). An action is frivolous where there is no arguable legal or factual basis for the claim. *Neitzke v. Williams*, 490 U.S. 319, 325, 109 S. Ct. 1827, 104 L. Ed. 2d 338 (1989); *United States v. Pineda-Arellano*, 492 F.3d 624, 630 (5th Cir. 2007), *cert. denied*, 552 U.S. 1103, 128 S.Ct. 872, 169 L. Ed. 2d 737 (2008).

Similarly, under Fed. R. App. P. 24(a)(3)(A), the Appellant is ineligible for *in forma pauperis* status if the Court certifies that the appeal is not taken in "good faith." If the district court finds no "legal points arguable on the merits," then an appeal is not taken in "good faith." *Howard v. King*, 707 F.2d 215, 220 (5th Cir. 1983), *reh'g denied*, 719 F.2d 787 5th Cir. 1983); *see also Wai Leung Chu v. United States*, 353 Fed. Appx. 952, 953, 2009 U.S. App. LEXIS 26032, 2009 WL 4250642 (5th Cir. 2009) (*per curiam*); *Groden v. Kizzia*, 354 Fed. Appx. 36, 36, 2009 U.S. App. LEXIS 24744, 2009 WL 3762401 (5th Cir. 2009) (*per curiam*); *Walton v. Valdez*, 340 Fed. Appx. 954, 955, 2009 U.S. App. LEXIS 18123, 2009 WL 2477254 (5th Cir. 2009) (*per curiam*).

For the reasons stated in the Memorandum Opinion (docket no. 20) and the Report of the Magistrate Judge which was adopted as the opinion of the Court (docket no. 16), the Court certifies that the Appellant's appeal is not taken in good faith. 28 U.S.C. § 1915(a)(3); Fed. R. App. P. 24(a)(3)(A); *Baugh v. Taylor*, 117 F.3d 197, 202 n.21 (5th Cir. 1997) (to comply with Rule 24 and to inform the Court of Appeals of the reasons for its certification, a district court may incorporate by reference its order dismissing an appellant's claims). In his notice of appeal, Appellant states that he could not resolve his property claim through the prison grievance procedure and the Magistrate Judge was biased against him. The Court has examined these allegations in light of the record and has determined that neither sets out a non-frivolous basis for appeal. It is accordingly

ORDERED that the Appellant's motion for leave to proceed *in forma pauperis* on appeal (docket no. 23) is **DENIED**.

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)(A), the Appellant may challenge this finding pursuant to *Baugh v. Taylor*, by filing a separate motion to proceed *in forma pauperis* on appeal with the Clerk of Court, U.S. Court of Appeals for the Fifth Circuit, within 30 days of this order. *Baugh*, 117 F.3d at 202. 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 *in forma pauperis*, the jail authorities will be directed to collect the fees as calculated in this order.

The Appellant Anthony Pierce, TDCJ-CID No. 01813502, is assessed an initial partial appellate fee of \$14.00. The total appellate filing fee due is \$505.00. The agency having custody of the prisoner shall collect the initial partial appellate fee of \$14.00 from the trust fund account or institutional equivalent, when funds are available, and forward it to the clerk of the district court.

Thereafter, Appellant shall pay \$491.00, the balance of the filing fees, in periodic installments. 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 fee of \$505.00. The agency having custody of the prisoner 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 clerk of the district court.

If Appellant moves to proceed on appeal *in forma pauperis*, 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.

So Ordered and Signed

May 31, 2018



Ron Clark, United States District Judge