No. 20-6005

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RICKEY BENSON,

Plaintiff-Appellant,

v.

STATE OF TENNESSEE; JAMES M. LAMMEY, Judge of Division 5 of the Criminal Court of Shelby County, TN,

Defendants-Appellees.

AMENDED ORDER

Before: BUSH, Circuit Judge.

Rickey Benson, a pro se inmate at the Shelby County Correctional Center and frequent litigant, moves to proceed in forma pauperis in his appeal from the district court's dismissal of his civil rights complaint pursuant to the "three-strikes" provision, 28 U.S.C. § 1915(g). Benson has also filed a "petition for initial en banc hearing" and a "motion to enjoin crossclaim to petition for en banc hearing."

In July 2020, Benson filed a complaint, pursuant to 42 U.S.C. § 1983, against the State of Tennessee and Judge James M. Lammey, Jr., raising claims related to the sentence imposed by Judge Lammey upon his plea of guilty to burglary charges in a Shelby County criminal court in early 2019. He argued that, because of his history of mental illness, Judge Lammey should have sentenced him to probation and ordered him to participate in a mental health treatment program rather than to a six-year prison term. He alleged that Judge Lammey "neglect[ed] his official duties to certify to the State that [Benson was] a mental patient who was consuming prescribed drugs," discriminated against him on the basis of his race and mental illness, and deprived him of due process "by issuing an order for [him] to be transferred to a mental hospital . . . where [he] was

forced to consume prescribed drugs without [his] consent." He asserted that Judge Lammey and the State conspired to violate his constitutional rights. Benson also requested that the court "relieve [him] from the [three-strikes] provision" because it had been more than ten years since such restrictions had been imposed. Along with his complaint, Benson filed a motion to proceed in forma pauperis.

Finding that Benson had filed more than three prior civil rights actions that were dismissed for failure to state a claim or as frivolous and that his complaint did not demonstrate that he was in imminent danger at the time he filed suit, *see* 28 U.S.C. § 1915(g), the district court denied Benson's motion to proceed in forma pauperis and dismissed his complaint without prejudice. The court advised Benson that, within thirty days of its order, he could reopen the case by filing a motion to reopen, accompanied by full payment of the civil filing fee. Benson filed a notice of appeal from that order and a motion for reconsideration. The district court denied the motion for reconsideration. Benson now moves this court to proceed in forma pauperis on appeal.

An indigent litigant may proceed in forma pauperis on appeal if the appeal has an arguable basis in law and fact. Fed. R. App. P. 24(a)(5); *Neitzke v. Williams*, 490 U.S. 319, 325 (1989); *Owens v. Keeling*, 461 F.3d 763, 774-76 (6th Cir. 2006). However, § 1915(g) provides that a prisoner who has previously had three or more actions or appeals dismissed as frivolous, as malicious, or for failure to state a claim is barred from proceeding in forma pauperis in the district court or on appeal "unless the prisoner is under imminent danger of serious physical injury." 28 U.S.C. § 1915(g). To satisfy the imminent-danger exception, a prisoner must allege "facts from which a court, informed by its judicial experience and common sense, could draw the reasonable inference that [he] was under an existing danger at the time he filed his complaint" or, on appeal to this court, at the time that he filed his appeal. *Vandiver v. Prison Health Servs., Inc.*, 727 F.3d 580, 585 (6th Cir. 2013) (alteration in original) (quoting *Taylor v. First Med. Mgmt.*, 508 F. App'x 488, 492 (6th Cir. 2012)); *see Martin v. Shelton*, 319 F.3d 1048, 1050 (8th Cir. 2003). Allegations of past danger, as well as wholly speculative or conclusory allegations of danger, are insufficient to satisfy the exception. *Vandiver*, 727 F.3d at 585. "The imminent danger exception is essentially

a pleading requirement subject to the ordinary principles of notice pleading." *Vandiver v. Vasbinder*, 416 F. App'x 560, 562 (6th Cir. 2011).

Benson's motion to proceed in forma pauperis is denied. First, Benson does not and, indeed, cannot successfully challenge on appeal the district court's finding that he has at least three prior strikes. He has been an active pro se litigant and has accrued at least three prior strikes in his proceedings filed with the district courts and with this court. *See, e.g.*, *Benson v. Luttrell*, No. 2:08-cv-02825, R.E. #6 (W.D. Tenn. Jan. 9, 2009); *Benson v. Luttrell*, No. 2:07-cv-02790, R.E. #22 (W.D. Tenn. Sept. 11, 2008); *Benson v. Luttrell*, No. 2:04-cv-02507, R.E. #7 (W.D. Tenn. Oct. 26, 2004).

Second, the district court properly held that Benson failed to overcome § 1915(g)'s filing restrictions because his complaint did not contain sufficient allegations of imminent danger. All of Benson's allegations concern his criminal proceedings in 2018 and 2019. He made no allegation that he was in imminent danger at the time he filed his complaint. In his motion for reconsideration, Benson argued that his allegation that Judge Lammey ordered him to be transferred to a mental institution where he was forced to take medication without his consent satisfied the imminent-danger exception. But according to the complaint, that transfer happened in July 2018, nearly two years before he filed his complaint. Although Benson alleged in his motion for reconsideration that the danger did not end until he stopped taking the medication while at the Shelby County Correctional Center, where he is currently incarcerated, he gave no indication that anyone at that facility was forcing him to take the medication against his will. Indeed, he suggests that he simply stopped taking the medication. What is more, in his complaint, Benson stated that "[t]hese civil rights violations ha[ve] nothing to do with [his current] institution."

Accordingly, Benson's motion to proceed in forma pauperis is **DENIED**. Unless Benson pays the $505 appellate filing fee to the district court within thirty days of the entry of this order, this appeal will be dismissed for want of prosecution. Benson's petition for initial en banc hearing and his motion to enjoin crossclaim to petition for en banc hearing will not be considered unless and until the filing fee is paid.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

RICKEY BENSON,

Plaintiff,

v. No. 20-2481-MSN-tmp

STATE OF TENNESSEE, et al.,

Defendants.

ORDER DENYING LEAVE TO PROCEED IN FORMA PAUPERIS, DISMISSING THE COMPLAINT PURSUANT TO 28 U.S.C. § 1915(g), DENYING REQUEST FOR APPOINTMENT OF COUNSEL, CERTIFYING THAT AN APPEAL WOULD NOT BE TAKEN IN GOOD FAITH, AND DENYING LEAVE TO APPEAL IN FORMA PAUPERIS

On July 1, 2020, Plaintiff Rickey Benson, who is incarcerated at the Shelby County Correctional Center in Memphis, Tennessee, filed a *pro se* complaint pursuant to 42 U.S.C. § 1983 and a motion to proceed *in forma pauperis*. (ECF Nos. 1, 2.) He names the State of Tennessee and State Court Judge James M. Lammey, Jr. as Defendants. (*Id.* at PageID 2.) Benson's complaint addresses his contention that, based on Benson's mental health issues, Judge Lammey should have sentenced him to a shorter term and assigned him to a mental health program for supervised release. Benson argues that Defendants are liable for conspiracy, negligence, discrimination, due process violation, cruel and unusual punishment, emotional distress, and pain and suffering. (ECF No. 1 at PageID 3 ("Claim One").) The complaint also "challeng[es] the three-strike provision that keep[s] me from proceeding *in forma pauperis*" in this case. (*Id.* at PageID 4 ("Claim Two").) Benson also asks the Court to appoint counsel for him and seeks "compensation for the Defendants violating my civil rights." (*Id.* at PageID 5.)

I. DENIAL OF LEAVE TO PROCEED *IN FORMA PAUPERIS*, AND DISMISSAL OF COMPLAINT PURSUANT TO 28 U.S.C. § 1915(g)

Under the Prison Litigation Reform Act, §§ 1915(a)-(b), a prisoner bringing a civil action must pay the full civil filing fee. The PLRA merely provides the prisoner the opportunity to make a "downpayment" of a partial filing fee and pay the remainder in installments. *See McGore v. Wrigglesworth*, 114 F.3d 601, 604 (6th Cir. 1997) ("[w]hen an inmate seeks pauper status, the only issue is whether the inmate pays the entire fee at the initiation of the proceeding or over a period of time under an installment plan. Prisoners are no longer entitled to a waiver of fees and costs."), partially overruled on other grounds by *LaFountain v. Harry*, 716 F.3d 944, 951 (6th Cir. 2013).

However, not all indigent prisoners are entitled to take advantage of the installment payment provisions of § 1915(b). Section 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.

Thus, "[s]uch a litigant cannot use the period payment benefits of § 1915(b). Instead, he must make full payment of the filing fee before his action may proceed." *In re Alea*, 286 F.3d 378, 380 (6th Cir. 2002). The Sixth Circuit has upheld the constitutionality of this provision. *Wilson v. Yaklich*, 148 F.3d 596, 602–06 (6th Cir. 1998).

Here, Benson has filed more than three previous civil actions in federal court that were dismissed for failure to state a claim or as frivolous.[1] Therefore, he may not file any further action

[1] *See Benson v. Luttrell, et al.*, No. 08-2825-JPM-dkv (W.D. Tenn. Jan. 9, 2009) (dismissed for failure to state a claim), *aff'd*, No. 09-5145 (6th Cir. Nov. 4, 2009); *Benson v. Luttrell, et al.*, No. 07-2790-SHM (W.D. Tenn. Sept. 11, 2008) (dismissed for failure to state a claim), *appeal dismissed*, No. 08-6277 (6th Cir. July 20, 2009), *cert. denied*, 130 S. Ct. 411 (2009);

in which he proceeds *in forma pauperis* unless he first demonstrates that he is under imminent danger of serious physical injury. The assessment of whether a prisoner is in imminent danger is made at the time of the filing of the complaint. *See, e.g., Vandiver v. Vasbinder*, 416 F. App'x 560, 561–62 (6th Cir. 2011); *Rittner v. Kinder*, 290 F. App'x 796, 797–98 (6th Cir. 2008); *Malik v. McGinnis*, 293 F.3d 559, 562–63 (2d Cir. 2002); *AbdulAkbar v. McKelvie*, 239 F.3d 307, 312–16 (3d Cir. 2001) (en banc). Section 1915(g)'s determinative consideration, as to whether three-strike filers may proceed *in forma pauperis*, is "imminent danger of serious physical injury," *see* 28 U.S.C. § 1915(g), and not—as Benson proposes—the passage of time. (*See* ECF No. 1 at PageID 4 ("I believe that the Judge should relieve me from the three-strike provision due to the fact that it has been over a decade since Judge Todd issued such order.").)

Benson's Count One addresses his motion to withdraw his guilty plea, his six-year sentence, and his motion to correct illegal sentence that he filed in Tennessee state court. Those state proceedings arose from burglary charges against him. (ECF No. 1 at PageID 3.) Benson argues that Judge Lammey violated his civil rights by refusing to certify that he is "a mental patient who was consuming prescribed drugs . . . and should have been sentenced to a lesser time on probation and assigned to a mental program to enjoy the privilege of supervised release into the community." (*Id.*) Benson states that Judge Lammey issued "an order for me to be transferred to

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Benson v. Luttrell, et al., No. 04-2507-JPM-tmp (W.D. Tenn. Oct. 26, 2004) (dismissed for failure to state a claim); *Benson v. State of Tennessee*, No. 16-2214-SHL-dkv (W.D. Tenn. Mar. 3, 2017) (noting that Benson filed at least three prior civil rights lawsuits before this Court while he was incarcerated, which were dismissed for failure to state a claim; finding that he failed to plead facts showing imminent danger under § 1915(g); and ordering him to remit the entire $400 filing fee within thirty days (ECF No. 10); and dismissing case for failure to comply with the Court's order directing payment of the civil filing fee (ECF No. 23)).

a mental health hospital where I was forced to consume prescribed drugs without my consent." (*Id.*)

Benson's Count Two "challeng[es] the three strikes provision" of 28 U.S.C. 1915(g). (*Id.* at PageID 4.) He asks to be "relieve[d] from" this statutory provision because "it has been over a decade" since this Court previously prevented him "from proceeding *in forma pauperis* unless I am in imminent danger of serious physical harm." (*Id.*)

None of Benson's allegations sufficiently allege that he was in imminent danger of serious physical injury when he filed his complaint on July 1, 2020. Count One's contentions—regarding the sentencing judge's consideration of Benson's mental health medication, the length of his sentence, the terms of his probation, and his eligibility for supervised release—do not involve any physical injury. Count Two's contentions—about whether § 1915(g)'s three-strikes provision applies so as to prevent him from proceeding *in forma pauperis*—are similarly unrelated to any physical injury. Accordingly, the complaint's allegations are insufficient to satisfy § 1915(g). *See Rittner v. Kinder*, 290 F. App'x 796, 797 (6th Cir. 2008) (explaining that, to meet the requirement of § 1915(g), "the threat or prison condition 'must be real and proximate' and the danger of serious physical injury must exist at the time the complaint is filed"). The complaint therefore does not come within the exception to 28 U.S.C. § 1915(g) and the Court cannot address its merits unless Benson first tenders the civil filing fee.

For these reasons, Benson's motion to proceed *in forma pauperis* (ECF No. 2) is **DENIED** pursuant to § 1915(g). This action is **DISMISSED** without prejudice. Benson may, within thirty

(30) days after the entry of judgment, re-open the case by filing a motion to re-open, accompanied by full payment of the $400 civil filing fee.[2]

II. PUTATIVE REQUEST FOR RECUSAL

In a prior case before this Court, Benson alleged judicial misconduct based on the Court's unfavorable rulings in his various cases. *See Benson v. State of Tennessee*, No. 16-2214-SHL-dkv (W.D. Tenn. Mar. 20, 2017) (ECF No. 50 at PageID 54–56). The Court found no valid basis for recusal. *Id.*

In his present complaint, Benson refers to his prior judicial misconduct allegation, but he does not expressly request recusal. (ECF No. 1 at PageID 4.) Nevertheless, even if he intended to seek such recourse, he does not offer any evidence that the Court has any personal bias against him arising out of the background or extrajudicial conduct of the undersigned judge. *See* 28 U.S.C. § 144 and 28 U.S.C. § 455; *Ullmo ex rel. Ullmo v. Gilmour Acad.*, 273 F.3d 671, 681 (6th Cir. 2001); *United States v. Sammons*, 918 F.2d 592, 599 (6th Cir. 1990); and *Browning v. Foltz*, 837 F.2d 276, 279 (6th Cir. 1988).

Therefore, to the extent Benson requests the undersigned's recusal from this matter, such request is **DENIED**.

III. REQUEST FOR APPOINTMENT OF COUNSEL

Finally, Benson asks this Court to appoint him counsel because he has requested a jury trial. (ECF No. 1 at PageID 4.)

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[2] Title 28 U.S.C. § 1914(a) requires a civil filing fee of $350. However, pursuant to § 1914(b), "[t]he clerk shall collect from the parties such additional fees . . . as are prescribed by the Judicial Conference of the United States." The Judicial Conference has prescribed an additional administrative fee of $50 for filing any civil case, except for cases seeking habeas corpus and cases in which the plaintiff is granted leave to proceed *in forma pauperis* under 28 U.S.C. § 1915. Because the Court is denying leave to proceed *in forma pauperis* in this case, Plaintiff is liable for the entire $400 fee.

Pursuant to 28 U.S.C. § 1915(e)(1), "[t]he court may request an attorney to represent any person unable to afford counsel." However, "[t]here is no constitutional or . . . statutory right to counsel in federal civil cases." *Farmer v. Haas*, 990 F.2d 319, 323 (7th Cir. 1993). Rather, the appointment of counsel in a civil proceeding is a privilege justified only in exceptional circumstances. *Lavado v. Keohane*, 992 F.2d 601, 605–06 (6th Cir. 1993). The decision to appoint counsel for an indigent litigant in a civil case is a matter vested within the broad discretion of the Court. *Childs v. Pellegrin*, 822 F.2d 1384 (6th Cir. 1987). *See also Lavado*, 992 F.2d at 604–05. Generally, a court will only appoint counsel in "exceptional circumstances." *Id.* at 605–06. *Accord Willett v. Wells*, 469 F. Supp. 748, 751 (E.D. Tenn. 1977). To determine whether the case meets this standard, the Court examines the pleadings and documents to assess the merits of the claims, the complexity of the case, the *pro se* litigant's prior efforts to retain counsel, and his ability to present the claims. *Henry v. City of Detroit Manpower Dep't*, 763 F.2d 757, 760 (6th Cir. 1985). *See also Kilgo v. Ricks*, 983 F.2d 189, 193 (11th Cir. 1993) ("The key [to determining whether exceptional circumstances exist] is whether the pro se litigant needs help in presenting the essential merits of his or her position to the court. Where the facts and issues are simple, he or she usually will not need such help.").

Here, after consideration of Benson's request for counsel (ECF No. 1 at PageID 5), including the type and nature of the case, its complexity, and his ability to prosecute his claim, counsel is not necessary at this time to ensure his claims are fairly heard. *See Mira v. Marshall*, 806 F.2d 636 (6th Cir. 1986). The issues in this case are not complex, and the complaint's assertions do not demonstrate exceptional circumstances warranting appointment of counsel at this time. *See Kennedy v. Doyle*, 37 F. App'x 755, 757 (6th Cir. 2002). Benson's request for appointment of counsel is **DENIED**.

IV. CONCLUSION

In conclusion, the Court hereby **CERTIFIES**, pursuant to 28 U.S.C. § 1915(a)(3) and Federal Rule of Appellate Procedure 24(a), that an appeal by Benson in this case would not be taken in good faith. Leave to appeal *in forma pauperis* is **DENIED**.

The Clerk is directed to prepare a judgment.

IT IS SO ORDERED this 28th day of July, 2020.

s/ Mark Norris

MARK S. NORRIS
UNITED STATES DISTRICT JUDGE

No. 20-6005

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RICKEY BENSON,

Plaintiff-Appellant,

v.

STATE OF TENNESSEE; JAMES M. LAMMEY, Judge of Division 5 of the Criminal Court of Shelby County, TN,

Defendants-Appellees.

ORDER

Before: MOORE, GIBBONS, and MURPHY, Circuit Judges.

Rickey Benson, a pro se inmate at the Shelby County Correctional Center and frequent litigant, moves this court for reconsideration of its January 11, 2021, order denying his motion to proceed in forma pauperis on appeal. Benson's motion for reconsideration does not show that the court overlooked or misapprehended any point of law or fact in denying his motion to proceed in forma pauperis. *See* Fed. R. App. P. 40(a)(2).

Accordingly, Benson's motion for reconsideration is **DENIED**.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk