

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 20-14219-F

DARRELL DEMETRIUS CROSS,

Plaintiff - Appellant,

versus

KECIA DAVIDSON,
Dodge County Jail Detention Officer,
COUNSELOR GORDON,
CORRECTIONS OFFICER BURKE,
VIRGINIA SMITH,
CPT. SID ANDREWS, et al.,

Defendants - Appellees.

Appeal from the United States District Court
for the Southern District of Georgia

ENTRY OF DISMISSAL: Pursuant to the 11th Cir.R.42-1(b), this appeal is DISMISSED for want of prosecution because the appellant Darrell Demetrius Cross has failed to pay the filing and docketing fees to the district court within the time fixed by the rules; Motion entitled: "Emergency Motion for Venue" is MOOT due to the clerk's order being entered; Motion for leave to proceed based on imminent danger is MOOT due to the clerk's order being entered, effective February 22, 2021.

DAVID J. SMITH
Clerk of Court of the United States Court
of Appeals for the Eleventh Circuit

by: Dionne S. Young, F, Deputy Clerk

FOR THE COURT - BY DIRECTION

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
DUBLIN DIVISION

W.D. GA.
U.S. DISTRICT COURT
AUGUSTA DIV.

2020 OCT 29 P 1:41

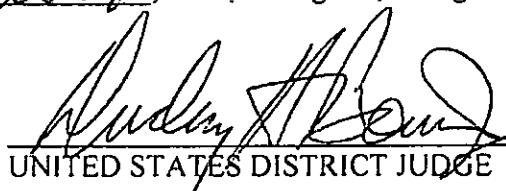
CLERK SO. U.S.T. W. GA.

DARRELL D. CROSS,)
Plaintiff,)
v.) CV 320-058
KECIA DAVIDSON; COUNSELOR)
GORDON; CORRECTIONS OFFICER)
BURKE; VIRGINIA SMITH; CPT. SID)
ANDREWS; and SERGEANT LOCKETTE,)
Defendants.)

ORDER

After a careful, *de novo* review of the file, the Court concurs with the Magistrate Judge's Report and Recommendation, to which no objections have been filed. Accordingly, the Court **ADOPTS** the Report and Recommendation of the Magistrate Judge as its opinion, **DENIES** Plaintiff's request to proceed *in forma pauperis*, (doc. no. 2), **DENIES AS MOOT** Plaintiff's motion for appointment of counsel, (doc. no. 3), and motion to stay, (doc. no. 8), and **DISMISSES** this action without prejudice. If Plaintiff wishes to proceed with the claims raised in this lawsuit, he must initiate a new lawsuit, which would require submission of a new complaint. See Dupree v. Palmer, 284 F.3d 1234, 1236 (11th Cir. 2002) (per curiam).

SO ORDERED this 29th day of October, 2020, at Augusta, Georgia.


UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
DUBLIN DIVISION

| | | |
|---------------------------------|---|------------|
| DARRELL D. CROSS, |) | |
| |) | |
| Plaintiff, |) | |
| |) | |
| v. |) | CV 320-058 |
| KECIA DAVIDSON; COUNSELOR |) | |
| GORDON; CORRECTIONS OFFICER |) | |
| BURKE; VIRGINIA SMITH; CPT. SID |) | |
| ANDREWS; and SERGEANT LOCKETTE, |) | |
| |) | |
| Defendants. |) | |

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

Plaintiff, an inmate at Dodge County Jail in Eastman, Georgia, seeks to proceed *in forma pauperis* ("IFP") in this action filed pursuant to 42 U.S.C. § 1983. (Doc. no. 1.) For the reasons set forth below, the Court **REPORTS** and **RECOMMENDS** Plaintiff's request to proceed IFP be **DENIED**, (doc. no. 2), motion for appointment of counsel be **DENIED AS MOOT**, (doc. no. 3), motion to stay be **DENIED AS MOOT**, (doc. no. 8), and this action be **DISMISSED** without prejudice.

I. BACKGROUND

A prisoner attempting to proceed IFP in a civil action in federal court must comply with the mandates of the Prison Litigation Reform Act ("PLRA"), Pub. L. No. 104-134, §§ 801-810, 110 Stat. 1321 (1996). 28 U.S.C. § 1915(g) of the PLRA provides:

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.

“This provision of the PLRA, commonly known as the three strikes provision, requires frequent filer prisoners to prepay the entire filing fee before federal courts may consider their lawsuits and appeals.” Rivera v. Allin, 144 F.3d 719, 723 (11th Cir. 1998) (internal citations omitted), *abrogated on other grounds by Jones v. Bock*, 549 U.S. 199 (2007). The Eleventh Circuit has upheld the constitutionality of § 1915(g) because it does not violate an inmate’s right to access the courts, the doctrine of separation of powers, an inmate’s right to due process of law, or an inmate’s right to equal protection. Id. at 721-27.

II. DISCUSSION

A. Dismissal Is Warranted Because Plaintiff Has Three Strikes Under § 1915(g)

A review of Plaintiff’s history of filings reveals he has brought at least three cases that were dismissed as frivolous or for failure to state a claim and count as strikes: (1) Cross v. GDOC Central Banking Inc. of Atl, Ga, 1:19-cv-1382-CAP-LTW (N.D. Ga. Apr. 24, 2019) (dismissing for failure to state a claim); Cross v. State Bd. of Pardons and Paroles, 1:00-cv-02010-CAP (N.D. Ga. June 13, 2001) (dismissing for failure to state a claim); Cross v. Santos, 1:01-cv-02779-CAP (N.D. Ga. Jan. 2, 2002) (dismissing for failure to state a claim). Because Plaintiff has at least three strikes, he cannot proceed IFP unless he can demonstrate he qualifies for the “imminent danger of serious physical injury” exception to § 1915(g). Mitchell v. Nobles, 873 F.3d 869, 873 (11th Cir. 2017).

B. Plaintiff Does Not Qualify for the Imminent Danger Exception

In order to come within the imminent danger exception, a prisoner must be in imminent danger at the time he files suit in district court, not at the time of the alleged incident that serves

as the basis for the complaint. Medberry v. Butler, 185 F.3d 1189, 1193 (11th Cir. 1999). The majority of Plaintiff's complaint is illegible, however from what the Court can discern, Plaintiff is requesting a criminal warrant for felony battery and assault be issued for the arrest of Defendants. (Doc. no. 1, p. 6.) Further, it appears Plaintiff is attempting to bring suit on behalf of another inmate, Steven Gates, whom Plaintiff alleges was physically abused by Defendants. (Id. at 6-9, 11.)

Plaintiff may not force prosecutors to bring criminal charges against Defendants. See Leeke v. Timmerman, 454 U.S. 83, 86-87 (1981) ("a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another"); Otero v. United States Att'y Gen., 832 F.2d 141, 141 (11th Cir. 1987) (same) (quoting Linda R. S. v. Richard D., 410 U.S. 614, 619 (1973)); see also Capogrosso v. Supreme Ct. of N.J., 588 F.3d 180, 184 (3d Cir. 2009) ("[I]ndividual citizens do not have a constitutional right to the prosecution of alleged criminals."); Sattler v. Johnson, 857 F.2d 224, 227 (4th Cir. 1988) (holding that there is no constitutional right for a member of the public, as a victim, to have defendants, including state government officials, criminally prosecuted). Indeed, the decision whether to ultimately prosecute a criminal case is a matter entirely in the local prosecutor's discretion. See, e.g., Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978) ("In our system . . . the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in [the prosecutor's] discretion.").

Plaintiff has pled no facts to show he has suffered any injury, much less that he is in imminent danger. Therefore, Plaintiff fails to demonstrate he should be excused from paying the full filing fee under the "imminent danger" exception to § 1915(g)'s three strike rule.

C. The Complaint Should Also Be Dismissed Because Plaintiff Failed to Disclose His Prior Cases and His Acquiring Three Strikes under the PLRA

The standard form on which Plaintiff submitted his claims, “Questionnaire for the Prisoners Proceeding Pro Se Under 42 U.S.C. § 1983,” requires that prisoner plaintiffs disclose: (1) whether they have begun other lawsuits dealing with the same or similar facts or issues involved in the current action, (2) whether they have filed any lawsuits while incarcerated or detained, (3) whether they have had a case dismissed based on the three strike rule, and (4) the disposition of any such lawsuits. (Doc. no. 1, pp. 2-3.) Under the questions concerning whether a prisoner plaintiff has brought any lawsuits otherwise relating to the same or similar facts as the current claim or has brought any lawsuits while incarcerated or detained, the prisoner plaintiff who has brought any such lawsuits is specifically instructed to describe each lawsuit, including the court hearing the case, and the date of filing and disposition. (*Id.* at 2.) If there is more than one such lawsuit, the additional lawsuits must be described on another piece of paper. (*Id.*)

Plaintiff did not state he had any cases dismissed under the three strikes rule, which as discussed above is untrue. (Doc. no. 1, p. 3.) Moreover, under the questions concerning filing prior lawsuits, Plaintiff stated he only filed Cross v. GDOC Central Banking Inc. of Atl, Ga., 5:18-cv-00121-MTT-CHW (M.D. Ga. Apr. 1, 2019). He did not disclose the prior lawsuits listed above. (*Id.* at 2.)

The Eleventh Circuit has approved of dismissing a case based on dishonesty in a complaint. In Rivera, the Court of Appeals reviewed a prisoner plaintiff’s filing history for the purpose of determining whether prior cases counted as “strikes” under the PLRA and stated:

The district court's dismissal without prejudice in Parker is equally, if not more, strike-worthy. In that case, the court found that Rivera had lied under penalty of perjury about the existence of a prior lawsuit, Arocho. As a sanction, the court dismissed the action without prejudice, finding that Rivera "abuse[d] the judicial process[.]"

Rivera, 144 F.3d at 731; see also Sears v. Haas, 509 F. App'x 935, 936 (11th Cir. 2013) (*per curiam*) (affirming dismissal of complaint where prisoner plaintiff failed to accurately disclose previous litigation); Redmon v. Lake Cty. Sheriff's Office, 414 F. App'x 221, 223, 226 (11th Cir. 2011) (*per curiam*) (affirming dismissal, after directing service of process, of amended complaint raising claims that included denial of proper medical care and cruel and unusual punishment for placement in a "restraint chair" and thirty-seven days of solitary confinement upon discovering prisoner plaintiff failed to disclose one prior federal lawsuit); Young v. Sec'y Fla. for Dep't of Corr., 380 F. App'x 939, 940-41 (11th Cir. 2010) (*per curiam*) (affirming dismissal of third amended complaint based on a plaintiff's failure to disclose prior cases on the court's complaint form); Alexander v. Salvador, No. 5:12cv15, 2012 WL 1538368 (N.D. Fla. Mar. 21, 2012) (dismissing case alleging deliberate indifference to serious medical needs where plaintiff failed to disclose new case commenced in interim between filing original complaint and second amended complaint), *adopted by* Alexander v. Salvador, No. 5:12cv15, 2012 WL 1538336 (N.D. Fla. May 2, 2012).

The practice of dismissing a case as a sanction for providing false information about prior filing history is also well established in the Southern District of Georgia. See, e.g., Brown v. Wright, CV 111-044 (S.D. Ga. June 17, 2011); Hood v. Tompkins, CV 605-094 (S.D. Ga. Oct. 31, 2005), *aff'd*, 197 F. App'x 818 (11th Cir. 2006).

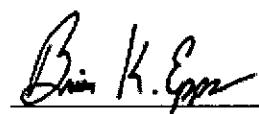
Plaintiff's answers about his filing history were blatantly dishonest, and therefore, even if Plaintiff were permitted to proceed IFP, the case should be dismissed without prejudice as a

sanction for the dishonesty.

III. CONCLUSION

In sum, Plaintiff has accumulated at least three strikes against him and cannot satisfy the dictates of the “imminent danger” exception of § 1915(g). Thus, he fails to demonstrate that he should be excused from paying the full filing fee. Furthermore, even if Plaintiff were allowed to proceed IFP, the case should be dismissed because he has abused the judicial process by providing dishonest information about his filing history. Therefore, the Court **REPORTS** and **RECOMMENDS** Plaintiff’s request to proceed IFP be **DENIED**, (doc. no. 2), and this action be **DISMISSED** without prejudice. Because Plaintiff is not entitled to proceed with this case, the Court also **REPORTS** and **RECOMMENDS** his motion for appointment of counsel and motion to stay be **DENIED AS MOOT**. (Doc. nos. 3, 8.) If Plaintiff wishes to proceed with the claims raised in this case, he should be required to initiate a new lawsuit, which would require submission of a new complaint. Dupree v. Palmer, 284 F.3d 1234, 1236 (11th Cir. 2002).

SO REPORTED and RECOMMENDED this 2nd day of October, 2020, at Augusta, Georgia.



BRIAN K. EPPS
UNITED STATES MAGISTRATE JUDGE
SOUTHERN DISTRICT OF GEORGIA

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