

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

FILED
United States Court of Appeals
Tenth Circuit

May 20, 2024

Christopher M. Wolpert
Clerk of Court

GREGORY D. COSBY, a/k/a Gregory D.
Cosmo Crosby,

Plaintiff - Appellant,

v.

A CIOLLI, Warden ADX; BILL TRUE,
Former Warden; AW(S) PROGRAMS
(COMPLEX); CMC COMPLEX;
FEDERAL BUREAU OF PRISONS,

Defendants - Appellees.

No. 24-1072
(D.C. No. 1:24-CV-00151-STV)
(D. Colo.)

ORDER

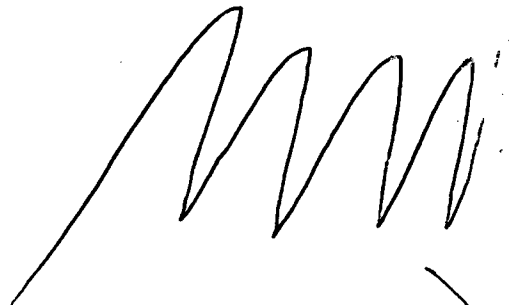
This appeal is dismissed for lack of prosecution pursuant to Tenth Circuit Rules
3.3(B) and 42.1. A copy of this order shall stand as and for the mandate of the court.

Entered for the Court



CHRISTOPHER M. WOLPERT, Clerk

Attach ment 2



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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 24-cv-00151-STV

GREGORY D. COSBY, a/k/a Gregory D. Cosmo Crosby,

Plaintiff,

v.

A. CIOLLI, Warden ADX,
BILL TRUE, Former Warden,
AW(S) PROGRAMS (COMPLEX),
CMC COMPLEX, and
FEDERAL BUREAU OF PRISONS (NCRO),

Defendants.

ORDER DENYING LEAVE TO PROCEED IN FORMA PAUPERIS

Plaintiff, Gregory D. Cosby (also known as Gregory D. Crosby), is in the custody of the Bureau of Prisons, currently incarcerated at the Florence ADMAX United States Penitentiary in Florence, Colorado. On January 16, 2024, he submitted *pro se* a Prisoner Complaint (ECF No. 1).

On January 25, 2024, Magistrate Judge Scott T. Varholak issued an order directing Plaintiff to cure certain designated filing deficiencies. (ECF No. 4). Specifically, Mr. Cosby was directed to either pay the \$405.00 filing and administrative fees or file a motion to proceed *in forma pauperis* on the court-approved form with the required accompanying information. (*Id.*). In addition, the Court reminded Mr. Cosby that he was

Attachment 13

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subject to 28 U.S.C. § 1915(g) filing restrictions. (*Id.*). Thus, if he wished to proceed *in forma pauperis*, the Court directed him to show cause why he should not be denied leave to proceed pursuant to 28 U.S.C. § 1915(g). (*Id.*).

In response, on February 5, 2024, Mr. Cosby filed a Prisoner's Motion and Affidavit for Leave to Proceed Pursuant to 28 U.S.C. § 1915 ("IFP Motion") (ECF No. 5). For the reasons discussed below, Mr. Cosby will be denied leave to proceed *in forma pauperis*.

Mr. Crosby is subject to the filing restriction in § 1915(g), which states 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.

28 U.S.C. § 1915(g).

The court may take judicial notice of its own records in determining whether Mr. Cosby has three or more prior dismissals that count as strikes under § 1915(g). *Green v. Nottingham*, 90 F.3d 415, 418 (10th Cir. 1996). Mr. Cosby, on three or more prior occasions, has brought an action while incarcerated that was dismissed on the grounds that it failed to state a claim upon which relief may be granted. See e.g., *Cosby v. Novetny*, No. 95-3150-RDR (D. Kan. Nov. 1, 1995) (ECF No. 28, attachment No. 3) (dismissed for failure to state a claim); *Cosby v. True*, No. 96-3002-GTV (D. Kan. Jan. 24, 1996) (ECF No. 28, attachment No. 5) (dismissed for failure to state a claim); *Cosby*

v. Dody, No. 93-3408-SAC (D. Kan. Sept. 11, 1996) (ECF No. 28, attachment Nos. 7, 8 at 2) (dismissed for failure to state a claim); and *Crosby v. Martin*, No. 09-3179-SAC (D. Kan. June 12, 2012) (dismissed for failure to state a claim) (ECF No. 28, attachment No. 12), *aff'd*, No. 12-3163 (10th Cir. Nov. 16, 2012) (ECF No. 28, attachment 11).

Each dismissal in the above-referenced cases qualifies as a "strike" under 28 U.S.C. § 1915(g). See *Hafed v. Fed. Bureau of Prisons*, 635 F.3d 1172, 1176 (10th Cir. 2011). In addition, filing restrictions were imposed against Plaintiff in *Cosby v. Meador*, No. 00-cv-00267-REB-OES (D. Colo. Dec. 2, 2002) (Plaintiff is prohibited from filing any further non-habeas civil actions *in forma pauperis* in this court unless he is under imminent danger of serious physical injury, until he has demonstrated consistent and long-term (e.g., six months to a year) progress toward the payment of all his filing fee obligations in this court), *aff'd and assessed a "strike," Cosby v. Meadors*, 351 F.3d 1324, 1334 (10th Cir. 2003). As such, Mr. Cosby is subject to the filing restriction in § 1915(g).

"There is only one exception to the prepayment requirement in § 1915(g)" and a prisoner with three or more strikes who seeks to fall within that exception must "make specific, credible allegations of imminent danger of serious physical harm." *Hafed v. Fed. Bureau of Prisons*, 635 F.3d 1172, 1179 (10th Cir. 2011) (internal quotation marks omitted). The prisoner also must demonstrate a nexus between the imminent danger alleged and the legal claims asserted in the complaint. See *Lomax v. Ortiz-Marquez*, 754 F. App'x 756, 759 (10th Cir. 2018), *aff'd*, 140 S. Ct. 1721 (2020). Vague and

conclusory assertions of harm will not satisfy the imminent danger requirement of § 1915(g). See *White v. Colorado*, 157 F.3d 1226, 1231-32 (10th Cir. 1998).

Furthermore, allegations of past injury or harm are not sufficient. See *Fuller v. Wilcox*, 288 F. App'x 509, 511 (10th Cir. 2008). "Every circuit to have decided the issue so far has concluded that the statute's use of the present tense shows that a prisoner must have alleged an imminent danger at the time he filed his complaint." *Hafed*, 635 F.3d at 1179 (collecting cases).

In his Prisoner Complaint, Mr. Crosby fails to assert facts that he is under imminent danger of serious physical injury. (See ECF No. 1). Mr. Cosby was directed, that if he wished to proceed *in forma pauperis*, he must show cause why such request should not be denied. (See ECF No. 4). In his IFP Motion, Mr. Cosby states that he is in imminent danger of serious physical injury because: "Being confined and mentally incapacitated [sic] to longevity of confinement." (ECF No. 5 at 2).

Mr. Cosby does not meet his burden of making specific, credible allegations of imminent danger of serious physical injury under § 1915(g). None of Mr. Cosby's allegations in his Prisoner Complaint establish that he was under imminent danger of serious physical injury at the time he commenced this action. *Hafed*, 635 F.3d at 1179. Further, the vague assertions of "being confined" and "mentally incapacitated [sic]" are not specific and he fail to adequately allege he was under imminent danger of serious physical injury at the time he commenced this action. Thus, the IFP motion will be denied.

Accordingly, it is

ORDERED that the Prisoner's Motion and Affidavit for Leave to Proceed

Pursuant to 28 U.S.C. § 1915 (ECF No. 5) is DENIED. It is

FURTHER ORDERED that Mr. Cosby shall pay \$405.00 (\$350.00 filing fee, plus a \$55.00 administrative fee) within thirty (30) days from the date of this order if he wishes to pursue his claims in this action. It is

FURTHER ORDERED that, if Mr. Cosby fails to pay \$405.00 within the time allowed, the complaint and action will be dismissed without further notice.

DATED at Denver, Colorado, this 8th day of February, 2024.

BY THE COURT:

s/Lewis T. Babcock

LEWIS T. BABCOCK, Senior Judge
United States District Court