FILED
United States Court of Appeals
Tenth Circuit

June 8, 2012

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

OLOYEA D. WALLIN,

Plaintiff-Appellant,

v.

RODNEY ACHEN; MASCARENAS; BELL; T. STENZEL; R. BASTIDOS; DAVE ALLEN; JAMES ABBOT, Warden of CTCF; MASSEY; HENRY WILLIAMS; TOOMEY; BENEVIDEZ; FAZZINO; MARY ANN ALDRICH; TOFOYA; CARLAND; JANTZ; LOPEZ-MARTINEZ; LOPEZ, JOHN and JANE Doe of CDOC; ARISTEDES ZAVARAS, Executive Director of CDOC,

Defendants-Appellees.

No. 11-1201
(D.C. No. 1:10-CV-01317-LTB)
(D. Colo.)

ORDER

Before **TYMKOVICH**, **BALDOCK**, and **GORSUCH**, Circuit Judges.

Plaintiff-appellant Oloyea D. Wallin, a state prisoner, seeks to appeal the district court's orders dismissing his civil rights action, denying his motion for reconsideration, and denying his motion to amend the complaint. He has not paid the filing fee for this appeal, but seeks to proceed in forma pauperis (IFP) under 28 U.S.C. § 1915.

AUTHENTICATED U.S. GOVERNMENT INFORMATION GPO

On April 16, 2012, we entered an order directing appellant to either pay the full amount of the filing fee forthwith or show cause why this appeal should not be dismissed because he had "struck out" under the Prison Litigation Reform Act ("PLRA"), *id.* § 1915(g), prior to filing this appeal on May 3, 2011. We granted his motion for an extension of time, allowing him until June 4 to respond and stating that no further extensions would be granted. Mr. Wallin failed to file a response by June 4, so we now proceed to rule on his IFP motion.

Under PLRA, prisoners initiating civil actions and appeals must pay the full amount of the filing fee, but they may pay the fee in monthly installments if they are granted leave to proceed IFP. *See id.* § 1915(b). PLRA further provides, however, that

> [i]n 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.

Id. § 1915(g).

Prior to filing the present appeal, appellant, while incarcerated or detained, had filed at least three civil actions or appeals that were dismissed as frivolous, malicious, or for failure to state a claim upon which relief may be granted. In *Wallin v. Arapahoe County Detention Facility*, 244 F. App'x 214, 221 (10th Cir. 2007), we considered three of appellant's appeals, holding that appeals

No. 06-1376 and No. 06-1416 were frivolous and declaring two strikes under § 1915(g). The Supreme Court allowed appellant an extension of time until February 21, 2008, in which to file a petition for writ of certiorari from our decision, but the Supreme Court's website indicates that appellant did not file one. Thus, the two strikes we assessed in *Wallin v. Arapahoe County Detention Facility* ripened to be counted against appellant's civil filings on February 21, 2008, when his time to file a petition for writ of certiorari expired. *See Hafed v. Fed. Bureau of Prisons*, 635 F.3d 1172, 1175 (10th Cir. 2011).

In addition, in the district court case underlying appeal No. 06-1376, the district court dismissed appellant's complaint without prejudice because his claims were premature under *Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994). *See Wallin v. McCabe*, No. 06-cv-01322, slip op. at 3 (D. Colo. July 20, 2006). We noted in *Smith v. Veterans Administration*, 636 F.3d 1306, 1312 (10th Cir. 2011), that "[o]ur precedent holds that the dismissal of a civil rights suit for damages based on prematurity under *Heck* is for failure to state a claim." Moreover, "[i]t is irrelevant under § 1915(g) whether the district court affirmatively stated in the order of dismissal that it was assessing a strike." *Id.* at 1313. "In fact, because a district court's order of dismissal cannot count as a strike in this circuit until the prisoner 'has exhausted or waived his appeals[,]' *Jennings*[*v. Natrona Cnty. Det. Ctr. Med. Facility*], 175 F.3d [775,] 780 [(10th Cir. 1999)], it will be more usual that a district court's order of dismissal

will not state that it is a strike." *Id.* As a result, the dismissal in *Wallin v. McCabe* is a strike under § 1915(g), and it ripened to be counted against appellant's civil filings on February 21, 2008, when the extension of time allowed by the Supreme Court for appellant's petition for writ of certiorari in appeal No. 06-1376 expired.

Thus, appellant accumulated three strikes and "struck out" on February 21, 2008. As a result, the prepayment requirement imposed by § 1915(g) applies to this appeal, which appellant filed in this court on May 3, 2011. But he has neither paid the filing fee nor shown why he is not required to pay. We decline to consider his untimely response to our show cause order.

Appellant's motion for leave to proceed IFP is denied. The appeal is DISMISSED.

Entered for the Court

ELISABETH A. SHUMAKER, Clerk