

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Bryan Cole v. Darrel Vannoy

No. 18-30246, United States Court of Appeals for the Fifth Circuit (October 29, 2018)

SUMMARY

Bryan Cole, a Louisiana prisoner, appealed the dismissal of his 42 U.S.C. § 1983 action alleging Eighth Amendment deliberate indifference to serious medical needs. The Fifth Circuit denied his motion to proceed in forma pauperis (IFP) and dismissed the appeal as frivolous, holding that a disagreement with medical treatment—including a doctor’s decision not to follow an outside consultant’s recommendation—does not establish deliberate indifference. Because Cole failed to challenge any legal aspect of the district court’s dismissal or its certification that the appeal was not taken in good faith, he abandoned the critical issues. The court also warned Cole that this dismissal counts as a strike under 28 U.S.C. § 1915(g).

CASE DETAILS

COURT	United States Court of Appeals for the Fifth Circuit
WRITING FOR THE COURT	Owen; Willett; Oldham
JURISDICTION	Federal
DECIDED	October 29, 2018
DOCKET	18-30246
DISPOSITION	dismissed
PROCEDURAL POSTURE	Appeal from district court's dismissal of complaint and denial of IFP on appeal.
STANDARD OF REVIEW	Our inquiry into an appellant's good faith 'is limited to whether the appeal involves legal points arguable on their merits (and therefore not frivolous).' <i>Howard v. King</i> , 707 F.2d 215, 220 (5th Cir. 1983).
PRECEDENTIAL VALUE	unpublished
PARTIES	Bryan Cole v. Darrel Vannoy; Tracy Falgout; Doctor Randy Lavespere

TOPICS

appellate procedure civil procedure standard of review eleventh amendment immunity section 1983
prisoners rights civil rights motions to dismiss sovereign immunity

PRACTICE AREAS

Civil Rights

Prisoner Litigation

QUESTIONS PRESENTED

1. Whether Cole's appeal is taken in good faith, i.e., whether the appeal involves legal points arguable on their merits.
2. Whether Cole has shown that the district court erred in dismissing his complaint for failure to state a claim of deliberate indifference.

HOLDINGS

1. The appeal is not taken in good faith and is frivolous because Cole failed to challenge the district court's analysis and thus abandoned the critical issues of his appeal.
2. A doctor's decision not to follow the recommendation of an outside consulting physician does not establish deliberate indifference; it is merely a difference in medical opinion.

KEY QUOTATIONS

"Our inquiry into an appellant's good faith 'is limited to whether the appeal involves legal points arguable on their merits (and therefore not frivolous).'" (at 2)

"when an appellant fails to identify any error in the district court's analysis, it is as if the appellant had not appealed that issue." (at 3)

FACTUAL BACKGROUND

Bryan Cole, a Louisiana prisoner, filed a 42 U.S.C. § 1983 action against prison officials, alleging deliberate indifference to his serious medical needs in violation of the Eighth Amendment. He claimed that the defendants intentionally refused his medical treatment and supplies. The district court dismissed the complaint under Rule 12(b)(1) and (b)(6).

PROCEDURAL HISTORY

The district court granted defendants' motion to dismiss under Rule 12(b)(1) and (b)(6), dismissing official capacity claims under Eleventh Amendment and concluding Cole failed to state a deliberate indifference claim. The district court denied IFP on appeal, certifying appeal not taken in good faith.

DISPOSITION

dismissed

CASES CITED

- *Baugh v. Taylor*, 117 F.3d 197 (5th Cir. 1997)
- *Howard v. King*, 707 F.2d 215 (5th Cir. 1983)

- Stewart v. Murphy, 174 F.3d 530 (5th Cir. 1999)
- Yohey v. Collins, 985 F.2d 222 (5th Cir. 1993)
- Brinkmann v. Dallas County Deputy Sheriff Abner, 813 F.2d 744 (5th Cir. 1987)
- Coleman v. Tollefson, 135 S. Ct. 1759 (2015)
- Adepegba v. Hammons, 103 F.3d 383 (5th Cir. 1996)

OPINION

PER CURIAM.

Case: 18-30246 Document: 00514701445 Page: 1 Date Filed: 10/29/2018 IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT United States Court of Appeals Fifth Circuit No. 18-30246 FILED October 29, 2018 Lyle W. Cayce BRYAN COLE, Clerk Plaintiff-Appellant v. DARREL VANNOY; TRACY FALGOUT; DOCTOR RANDY LAVESPERE, Defendants-Appellees Appeal from the United States District Court for the Middle District of Louisiana USDC No. 3:17-CV-338 Before OWEN, WILLETT, and OLDHAM, Circuit Judges.

PER CURIAM: * Bryan Cole, Louisiana prisoner # 475537, moves for leave to proceed in forma pauperis (IFP) on appeal. He filed this 42 U.S.C. § 1983 action against Darrel Vannoy, Warden of the Louisiana State Penitentiary (LSP) at Angola, Tracy Falgout, Assistant Warden, and Dr. Randy Lavespere, medical director of LSP Angola Hospital, alleging that they intentionally refused his medical treatment and supplies with deliberate indifference to his serious medical needs in violation of the Eighth Amendment. * 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. Case: 18-30246 Document: 00514701445 Page: 2 Date Filed: 10/29/2018 No. 18-30246 The district court granted the defendants' motion to dismiss Cole's complaint pursuant to Federal Rule of Civil Procedure 12(b)(1) and (b)(6).

The district court dismissed the complaint in part under Rule 12(b)(1) against the defendants in their official capacities under the Eleventh Amendment. The district court also dismissed his complaint under Rule 12(b)(6), concluding that Cole had failed to state a claim of deliberate indifference under the Eighth Amendment and that Cole had failed to allege any personal acts or involvement by the defendants in his medical care.

The district court determined that Cole's allegations amounted to a mere disagreement with the determinations made by medical personnel regarding his treatment. The district court denied Cole's motion to proceed IFP on appeal, certifying that his appeal was not taken in good faith pursuant to 28 U.S.C. § 1915(a)(3) and FED. R. APP. P. 24(a)(3). By moving to proceed IFP, Cole 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 merits (and therefore not frivolous)." *Howard v. King*, 707 F.2d 215, 220 (5th Cir. 1983) (internal quotation marks and citation omitted).

We may dismiss the appeal under 5th Circuit Rule 42.2 if it is frivolous. See *Baugh*, 117 F.3d at 202 n.24; 5TH CIR. R. 42.2. To the extent that Cole briefed an argument relating to Dr. Lavespere, the fact that Dr. Lavespere may have not agreed with or followed the treatment recommended by an outside consulting physician does not establish deliberate indifference.

See *Stewart v. Murphy*, 174 F.3d 530, 535 (5th Cir. 1999) (holding that doctor's decision not to follow recommendation of an outside consulting 2 Case: 18-30246 Document: 00514701445 Page: 3 Date Filed: 10/29/2018 No. 18-30246 doctor was a difference in medical opinion as to the appropriate method of treatment but not deliberate indifference). Otherwise, Cole does not challenge the district court's reasons for dismissing his complaint or denying him leave to proceed IFP on appeal.

Pro se briefs are afforded liberal construction. *Yohey v. Collins*, 985 F.2d 222, 225 (5th Cir. 1993). Nevertheless, when an appellant fails to identify any error in the district court's analysis, it is as if the appellant had not appealed that issue. *Brinkmann v. Dallas County Deputy Sheriff Abner*, 813 F.2d 744, 748 (5th Cir. 1987).

Because Cole has failed to challenge any legal aspect of the district court's disposition of his complaint or the certification that his appeal is not taken in good faith, he has abandoned the critical issues of his appeal. *Id.* Thus, the appeal lacks arguable merit and is frivolous. See *Howard*, 707 F.2d at 220.

Accordingly, Cole's motion for leave to proceed IFP on appeal is DENIED, and his appeal is DISMISSED as frivolous. See *Baugh*, 117 F.3d at 202 n.24; 5TH CIR. R. 42.2. We hereby inform Cole that the dismissal of this appeal as frivolous counts as a strike for purposes of § 1915(g), in addition to the strike for the district court's dismissal. See *Coleman v. Tollefson*, 135 S. Ct.

1759, 1761-64 (2015) ("A prior dismissal on a statutorily enumerated ground counts as a strike even if the dismissal is the subject of an appeal."); *Adepegba v. Hammons*, 103 F.3d 383, 387 (5th Cir. 1996) ("[B]oth the frivolous appeal and a lower court's dismissal as frivolous count."), abrogated in part on other grounds by *Coleman*, 135 S. Ct. at 1762-63.

We caution Cole that once he accumulates three strikes, he may not proceed 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. See 28 U.S.C. § 1915(g). 3 Case: 18-30246 Document: 00514701445 Page: 4 Date Filed: 10/29/2018 No. 18-30246 IFP DENIED; APPEAL DISMISSED; SANCTION WARNING ISSUED; ALL OTHER MOTIONS DENIED.

