

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Sossamon v. Cook

No. 07-10429 (5th Cir. Feb. 20, 2008) (per curiam) (unpublished) · No. No. 07-10429 · Decided February 20, 2008

SUMMARY

The Fifth Circuit denied Harvey Leroy Sossamon's motion to proceed in forma pauperis and dismissed his appeal as frivolous. The court held that the disciplinary punishments imposed did not create a constitutionally protected liberty interest, rejected his discovery argument, deemed his Religious Land Use and Institutionalized Persons Act claim waived, and counted the district court and appellate dismissals as strikes under 28 U.S.C. § 1915(g).

CASE DETAILS

COURT	United States Court of Appeals for the Fifth Circuit
WRITING FOR THE COURT	Per curiam; King; Wiener; Elrod
JURISDICTION	Federal
DECIDED	February 20, 2008
DOCKET	No. 07-10429
DISPOSITION	dismissed
PROCEDURAL POSTURE	Appeal from dismissal as frivolous of a prisoner civil-rights complaint; appellant sought leave to proceed in forma pauperis on appeal.
STANDARD OF REVIEW	The good-faith inquiry for appellate IFP status is limited to whether the appeal involves legal points arguable on their merits and therefore is not frivolous.
PRECEDENTIAL VALUE	unpublished, nonprecedential
PARTIES	Harvey Leroy Sossamon, III v. Assistant Warden Cary J. Cook, Thomas P. Driver, T. Roddy

TOPICS

[appellate procedure](#) [civil procedure](#) [prisoners rights](#) [due process](#) [fourteenth amendment](#)

PRACTICE AREAS

QUESTIONS PRESENTED

1. Whether Sossamon's appeal presented legal points arguable on their merits so that he could proceed in forma pauperis.
2. Whether the disciplinary punishment imposed a constitutionally protected liberty interest requiring the procedural protections recognized in *Wolff v. McDonnell*.
3. Whether dismissal as frivolous was improper because Sossamon had not been allowed discovery.
4. Whether Sossamon waived his RLUIPA claim by failing to provide legal or factual analysis in his IFP motion.

HOLDINGS

1. Sossamon's appeal lacked arguable merit and was frivolous; therefore, leave to proceed in forma pauperis on appeal was denied and the appeal was dismissed.
2. A punishment limited to 15 days of commissary and cell restrictions does not give rise to a constitutionally protected liberty interest.
3. Dismissal as frivolous was proper without allowing discovery because no facts that could have been developed through discovery would overcome the absence of a constitutionally protected liberty interest.
4. Sossamon waived the issue whether the defendants violated his rights under RLUIPA by failing to provide legal or factual analysis of that issue in his IFP motion.
5. The district court's dismissal as frivolous and the Fifth Circuit's dismissal of the appeal counted as strikes for purposes of 28 U.S.C. § 1915(g).

KEY QUOTATIONS

“The court’s inquiry into whether the appeal is taken in good faith “is limited to whether the appeal involves legal points arguable on their merits (and therefore not frivolous).”” (at 2)

“No facts could have been developed through discovery that could have overcome this fatal flaw in Sossamon’s due process claim.” (at 2)

“IFP DENIED; APPEAL DISMISSED; SANCTION WARNING ISSUED.” (at 3)

FACTUAL BACKGROUND

Sossamon, a Texas prisoner, was disciplined for being out of place and received 15 days of commissary and cell restrictions. He alleged that prison officials violated his First and Fourteenth Amendment rights and asserted a claim under the Religious Land Use and Institutionalized Persons Act. The district court dismissed the complaint as frivolous.

PROCEDURAL HISTORY

The Northern District of Texas dismissed Sossamon's civil-rights complaint as frivolous and certified that an appeal could not be taken in forma pauperis. The Fifth Circuit construed Sossamon's IFP motion as a challenge to that certification, denied leave to proceed IFP, dismissed the appeal as frivolous, and assessed strikes under 28 U.S.C. § 1915(g).

DISPOSITION

dismissed

CASES CITED

- Baugh v. Taylor, 117 F.3d 197, 202 (5th Cir. 1997)
- Howard v. King, 707 F.2d 215, 219-20 (5th Cir. 1983)
- Wolff v. McDonnell, 418 U.S. 539 (1974)
- Sandin v. Conner, 515 U.S. 472, 483-84 (1995)
- Madison v. Parker, 104 F.3d 765, 767-68 (5th Cir. 1997)
- Cavallini v. State Farm Mut. Auto. Ins. Co., 44 F.3d 256, 260 n.9 (5th Cir. 1995)
- Adepegba v. Hammons, 103 F.3d 383, 387-88 (5th Cir. 1996)

OPINION

Sossamon v. Cook

PER CURIAM.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT United States Court of Appeals Fifth Circuit

FILED

February 20, 2008 No. 07-10429 Conference Calendar Charles R. Fulbruge III Clerk

HARVEY LEROY SOSSAMON, III

Plaintiff-Appellant v. ASSISTANT WARDEN CARY J COOK, Assistant Warden; THOMAS P DRIVER, Lieutenant Security; T RODDY, Administrative Assistant Defendants-Appellees Appeal from the United States District Court for the Northern District of Texas

USDC No. 1:05-CV-221

Before KING, WIENER, and ELROD, Circuit Judges.

PER CURIAM:*

Harvey Leroy Sossamon, III, Texas prisoner # 1120297, has applied for leave to proceed in forma pauperis (IFP) in this appeal from the dismissal as frivolous of his civil rights complaint, in which he asserted that the appellees violated his rights under the First and Fourteenth Amendments in connection with a disciplinary conviction of being out of place. * 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. No. 07-10429 Sossamon's IFP motion is construed as a challenge of the district court's certification decision. See Baugh v.

Taylor, 117 F.3d 197, 202 (5th Cir. 1997). “Under 28 U.S.C. § 1915(a), a federal court may refuse to certify an appeal for in forma pauperis status if it is not taken in good faith.” Howard v. King, 707 F.2d 215, 219-20 (5th Cir. 1983). The court’s inquiry into whether the appeal is taken in good faith “is limited to whether the appeal involves legal points arguable on their merits (and therefore not frivolous).” Id. at 220 (quotation marks omitted). Sossamon contends that he was entitled to receive the procedural protections of Wolff v. McDonnell, 418 U.S. 539 (1974), and that the magistrate judge erred in dismissing the complaint as frivolous without giving him an opportunity to conduct discovery. These contentions are without merit. A district court must dismiss a complaint that it determines to be frivolous. § 1915(e)(2)(B)(i). Sossamon’s punishment was limited to 15 days of commissary and cell restrictions. Such punishments do not give rise to a constitutionally protected liberty interest. See Sandin v. Conner, 515 U.S. 472, 483-84 (1995); Madison v. Parker, 104 F.3d 765, 767-68 (5th Cir. 1997). No facts could have been developed through discovery that could have overcome this fatal flaw in Sossamon’s due process claim. Sossamon has failed to provide in his IFP motion any legal or factual analysis of the question whether the defendants violated his rights under the Religious Land Use and Institutionalized Persons Act.¹ Accordingly, the issue is waived. See Cavallini v. State Farm Mut. Auto Ins. Co., 44 F.3d 256, 260 n.9 (5th Cir. 1995). The motion for leave to proceed IFP on appeal is denied. Sossamon’s appeal is without arguable merit and is dismissed as frivolous. See 5TH CIR. R. 42.2; Howard, 707 F.2d at 219-20. The district court’s dismissal of Sossamon’s 1 42 U.S.C. § 2000cc et seq. 2 No. 07-10429 complaint as frivolous and this court’s dismissal of Sossamon’s appeal both count as strikes for purposes of § 1915(g). See Adepegba v. Hammons, 103 F.3d 383, 387-88 (5th Cir. 1996). We caution Sossamon that if he accumulates three strikes, he will not be permitted to 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 § 1915(g). IFP DENIED; APPEAL DISMISSED; SANCTION WARNING ISSUED. 3