

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

February 7, 2006

Elisabeth A. Shumaker
Clerk of Court

HECTOR HUGO MARTINEZ
JIMENEZ,

Plaintiff-Appellant,

v.

PAUL BACA, Sto.; TINA GURULE,
Lt.; BRENDA LARSON, Nurse;
GARY CARR, Lt.; PATSY PATE,
Nurse; MIGUEL ZAMUDIO, Officer;
IVEETT POPE, Nurse,

Defendants-Appellees.

No. 05-1181

(D.C. No. 02-F-1076 (MJW))

(D. Colo.)

ORDER AND JUDGMENT*

Before **HENRY, McKAY, and EBEL**, Circuit Judges.

After examining the briefs and the appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G).

The case is therefore ordered submitted without oral argument.

Appellant, a state court prisoner proceeding pro se, sought relief for two

*This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

claims arising under 42 U.S.C. § 1983 for violation of his Eighth Amendment rights. Specifically, he claims that employees of the Colorado Department of Corrections violated his rights by placing him in a cell with a dangerous prisoner without adequate protection and by denying his requests for treatment of his injuries and diabetes. The district court granted summary judgment to Appellees on both of Appellant's claims, because he failed to allege any evidence of physical injury that occurred as a result of Appellees' actions. Order, 3 (Mar. 23, 2005, D. Colo.). The district court then issued an order denying a motion to vacate the judgment on March 28, 2005.

In addition, the district court denied Appellant's leave to proceed on appeal, stating that "[p]ursuant to 28 U.S.C. § 1915(a)(3), the court finds that this appeal is not taken in good faith because plaintiff has not shown the existence of a reasoned, nonfrivolous argument on the law and facts in support of the issues raised on appeal." Order Denying Leave to Proceed on Appeal Pursuant to 28 U.S.C. § 1915 and Fed. R. App. P. 24 (May 3, 2005, D. Colo.). While we have not yet determined whether the standard of review of an order denying leave to appeal under § 1915 is de novo or abuse of discretion, we would reach the same decision under either standard in this case, and affirm the district court's denial of leave to appeal. *See Plunk v. Givens*, 234 F.3d 1128, 1130 (10th Cir. 2000).

Appellant's motion to proceed without prepayment of the appellate filing

fee is granted. We remind Appellant that he must continue making partial payments until the entire fee has been paid.

We have carefully reviewed the briefs of the Appellant and the Appellees, the district court's disposition, and the record on appeal. We have conducted a de novo review of the district court's grant of summary judgment to Appellees, and for substantially the same reasons set forth by the district court in its Order of March 23, 2005, we **AFFIRM** the district court's dismissal with prejudice of Appellant's § 1983 complaint.

Entered for the Court

Monroe G. McKay
Circuit Judge