

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 11-6796

GARY B. WILLIAMS,

Plaintiff - Appellant,

v.

DAVID L. SIMMONS, Superintendent, Western Tidewater Regional Jail; MASKELONY, Mr., Captain, Director of Security, Western Tidewater Regional Jail; RUSSELL MOULTON, Mr., Sergeant, Jail Guard, Western Tidewater Regional Jail; BOONE, Mr., Detective, Franklin Police Department; BUTTS, Mr., Detective, Franklin Police Department; MICHAEL ROSENBERGER, Mr., State Appointed Attorney; CIRCUIT COURT FOR THE CITY OF FRANKLIN; EASON, Mr., Judge, Suffolk Circuit Court; REBECCA S. COLAW, Ms., State Appointed Attorney; E. PRESTON GRISSOM, Mr., Substitute Judge ?, Imposter ?, Suffolk Circuit Court; GREGORY MATTHEWS, Mr., State Appointed Counsel (Stand By); MILLER, Mr., Classification Officer, Jail Staff, Western Tidewater Regional Jail; E. C. HARRIS, Mr., Chief Investigator for the Suffolk Commonwealth Attorney's Office; ERIC MATTHEW HURT, U.S. Attorney for the Eastern District of Virginia; ROBERT BRADENHAM, U.S. Attorney for the Eastern District of Virginia; UNITED STATES MARSHALS SERVICE; DIRECTOR OF THE UNITED STATES MARSHALS SERVICE,

Defendants - Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. Henry E. Hudson, District Judge. (3:11-cv-00311-HEH)

Submitted: April 18, 2012

Decided: April 25, 2012

Before WILKINSON, MOTZ, and GREGORY, Circuit Judges.

Vacated and remanded by unpublished per curiam opinion.

Gary Buterra Williams, Appellant Pro Se.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Gary Buterra Williams appeals the district court's orders denying his request to proceed with his complaint, brought pursuant to 42 U.S.C. § 1983 (2006), without prepayment of fees and dismissing the action without prejudice. Because the district court erroneously classified Williams as a "three-striker" for purposes of the Prison Litigation Reform Act ("PLRA"), we vacate the orders and remand.

Under the PLRA, a prisoner who brings a civil action or an appeal who has had three or more actions or appeals dismissed as frivolous, malicious, or for failure to state a claim may not proceed without prepayment of fees unless he is under "imminent danger of serious physical injury." 28 U.S.C. § 1915(g) (2006). The dismissal of an action for failure to state a claim that is without prejudice, however, does not count as a strike under the PLRA. McLean v. United States, 566 F.3d 391, 395-98 (4th Cir. 2009).

Only two of the three cases the district court relied on to deny Williams's PLRA motion constituted strikes for purposes of the PLRA. See Williams v. Vliet, No. 3:05-cv-00621 (E.D. Va. June 8, 2006); Williams v. Cavedo, No. 3:05-cv-00842 (E.D. Va. Feb. 23, 2006). While the third case was dismissed based on the district court's conclusion that Williams failed to state a claim for relief as to each of his claims, the dismissal

was without prejudice. Williams v. City of Richmond, No. 3:04-cv-00747 (E.D. Va. Aug. 17, 2005). Accordingly, pursuant to McLean, we conclude that City of Richmond does not count as a qualifying strike for purposes of the PLRA.

We therefore vacate the district court's orders and remand for further consideration. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

VACATED AND REMANDED