

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit

FILED

October 21, 2008

No. 08-40001
Conference Calendar

Charles R. Fulbruge III
Clerk

CHARLES WESTERBY

Plaintiff-Appellant

v.

GREG ABBOTT, Attorney General; WARDEN SMITH, Mark Stiles Unit;
UNIDENTIFIED PITTMAN, Captain; STACY DAVIS; JACK BIVEN, Unknown
Inmate

Defendants-Appellees

Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 1:06-CV-248

Before KING, BARKSDALE, and OWEN, Circuit Judges.

PER CURIAM:*

Charles Westerby, Texas prisoner # 579967, appeals the 28 U.S.C. § 1915(e)(2)(B)(i), (ii) dismissal of his 42 U.S.C. § 1983 complaint. The district court held that Westerby's complaint was barred by the limitations period. Westerby has failed to brief the limitations issue on appeal, and, therefore, its

* 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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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.

review is waived. See *Brinkmann v. Dallas County Deputy Sheriff Abner*, 813 F.2d 744, 748 (5th Cir. 1987). Westerby's motion to remand the case is denied.

Westerby's appeal is without arguable merit and is, thus, frivolous. See *Howard v. King*, 707 F.2d 215, 219-20 (5th Cir. 1983). Accordingly, it is dismissed. See 5TH CIR. R. 42.2. The district court's dismissal of his complaint and this court's dismissal of his appeal both count as strikes for purposes of § 1915(g). See *Adepegba v. Hammons*, 103 F.3d 383, 387-88 (5th Cir. 1996). Westerby is warned that if he accumulates three strikes, he will no longer be allowed to proceed in forma pauperis 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).

APPEAL DISMISSED; SANCTION WARNING ISSUED; MOTION DENIED.