

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

United States Court of Appeals
Fifth Circuit

F I L E D
June 18, 2010

No. 09-20860
Summary Calendar

Lyle W. Cayce
Clerk

JAMES SCOT THOMAS, also known as James Scott Thomas,

Plaintiff - Appellant

v.

BRAD LIVINGSTON, Individually and in Their Official Capacities; VICKY BARROW, Individually and In Their Official Capacities; ALFONSO CASTILLO, Individually and in Their Official Capacities; ELIZABETH C. STAMBAUGH, Individually and in Their Official Capacities; LISA HARRISON, Individually and in Their Official Capacities; DEMETRIE M. PHIPPS, Individually and in Their Official Capacities; REGINA KIZZEE, Individually and in Their Official Capacities; GREGORY G. WALL, Individually and in Their Official Capacities; ANY LAW LIBRARY STAFF UNKNOWN TO PLAINTIFF THAT OVERSEES DAILY OPERATIONS, Individually and in Their Official Capacities; ESTELLE HIGH SECURITY PRISON UNIT, Individually and in Their Official Capacities,

Defendants - Appellees

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:09-CV-1150

Before HIGGINBOTHAM, CLEMENT, and SOUTHWICK, Circuit Judges.

PER CURIAM:*

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

James Scot Thomas, Texas prisoner # 1157623, appeals the district court's dismissal of his complaint seeking relief under 42 U.S.C. § 1983. Thomas, proceeding pro se and in forma pauperis (IFP), alleges that prison library staff and officials denied him access to the courts. Specifically, he asserts that library staff provided unreadable or incomplete copies of legal materials and often mislabeled materials necessary for his legal research. As a result, he argues that he was unable to file a reply brief in an appeal of a prior lawsuit, *Thomas v. Owens*, No. 345 F. App'r 892 (5th Cir. 2009). The district court determined that this court had permitted Thomas to file two of three submitted pleadings in that appeal and had denied leave to file a third only because it was duplicative. The district court concluded that Thomas thus had shown no injury and it dismissed his complaint as frivolous. *See* 28 U.S.C. § 1915(e)(2)(B)(i).

Thomas does not challenge the district court's conclusion that he suffered no injury. Rather, he argues that the district court incorrectly described the pleadings filed in his prior appeal, that this court mischaracterized those pleadings, and that the district court erred in failing to review those pleadings itself. Because Thomas in fact filed the pleadings that formed the basis of his access claims, he has failed to show that the defendants' alleged unconstitutional conduct denied him access to the courts. *See Brewster v. Dretke*, 587 F.3d 764, 769 (5th Cir. 2009) (citing *Lewis v. Casey*, 518 U.S. 343, 351 (1996)); *Walker v. Navarro County Jail*, 4 F.3d 410, 413 (5th Cir. 1993). Thus, the district court did not abuse its discretion in dismissing Thomas's complaint as frivolous. *Berry v. Brady*, 192 F.3d 504, 507 (5th Cir. 1999).

Thomas moves for a change of venue, arguing that this court demonstrated bias against him in its characterization of his pleadings in the prior appeal. There is no provision for a change of appellate venue and the motion is denied.

Because Thomas has not raised an issue of arguable merit, his appeal is frivolous. *See Howard v. King*, 707 F.2d 215, 220 (5th Cir. 1983). As such, it is dismissed. 5TH CIR. R. 42.2. The district court's dismissal of Thomas's action as

frivolous and the dismissal of this appeal as frivolous each count as a strike for purposes of § 1915(g). *See Adepegba v. Hammons*, 103 F.3d 383, 387 (5th Cir. 1996). Thomas is warned that if he accumulates three strikes pursuant to § 1915(g), 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.

**MOTION FOR CHANGE OF VENUE DENIED; APPEAL DISMISSED;
SANCTION WARNING ISSUED.**