

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

No. 15-40966

United States Court of Appeals
Fifth Circuit

FILED

September 23, 2016

Lyle W. Cayce
Clerk

ROCCO FUNARI,

Plaintiff-Appellant

v.

JASON SMITH, Correctional Officer at Telford Unit; BRIAN NICHOLS, Correctional Officer at Telford Unit; BILLY TAYLOR, Correctional Officer at Telford Unit; RICHARD SMITH, Correctional Officer at Telford; STEPHANIE COPPEDGE, Correctional Officer at Telford; KEN PAXTON, Attorney General, State of Texas,

Defendants-Appellees

Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 5:13-CV-8

Before CLEMENT, PRADO, and HIGGINSON, Circuit Judges.

PER CURIAM:*

Rocco Funari, Texas prisoner # 1027893, moves this court for authorization to proceed in forma pauperis (IFP) in an appeal from the dismissal of his 42 U.S.C. § 1983 complaint following a jury verdict in favor of the defendants. The magistrate judge (MJ) denied Funari's motion for leave

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

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to proceed IFP on appeal and certified that the appeal was not taken in good faith.

By moving to proceed IFP, Funari is challenging the MJ's certification that his appeal is not taken in good faith. *See Baugh v. Taylor*, 117 F.3d 197, 202 (5th Cir. 1997). Our 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)." *Howard v. King*, 707 F.2d 215, 220 (5th Cir. 1983) (internal quotation marks and citation omitted).

Funari argues that the jury verdict should be overturned because the jury relied on the defendants' testimony to deny his claims instead of relying on his testimony, which fully supported his claims. Funari's challenge to the weight and credibility of the evidence is not a proper issue for appellate review. *See Martin v. Thomas*, 973 F.2d 449, 453 (5th Cir. 1992). Funari's argument that the verdict should be overturned because his attorneys were ineffective will not be considered by this court. *See Sanchez v. United States Postal Serv.*, 785 F.2d 1236, 1237 (5th Cir. 1986).

Funari's appeal is without arguable merit and is thus frivolous. *See Howard*, 707 F.2d at 219-20. His IFP motion is therefore denied, and his appeal is dismissed as frivolous. *See Baugh*, 117 F.3d at 202 & n.24; 5TH CIR. R. 42.2.

This court's dismissal of Funari's appeal as frivolous counts as a strike under 28 U.S.C. § 1915(g). *See Adepegba v. Hammons*, 103 F.3d 383, 388 (5th Cir. 1996). Funari is cautioned that if he accumulates three strikes, he will not be able 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).

MOTION DENIED; APPEAL DISMISSED AS FRIVOLOUS;
SANCTION WARNING ISSUED.