

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
TEXARKANA DIVISION

BILLY JOE DENHAM, JR.

PLAINTIFF

v.

Civil No. 4:09-cv-04094

DAVID STINSON, Narcotics
Investigator, Howard County,
Arkansas

DEFENDANT

REPORT AND RECOMMENDATION OF THE MAGISTRATE JUDGE

This civil rights action was filed by the Plaintiff, Billy Joe Denham, Jr., pursuant to 42 U.S.C. § 1983. Pursuant to the provisions of 28 U.S.C. § 636(b)(1) and (3)(2007), the Honorable Harry F. Barnes, United States District Judge, referred this case to the undersigned for the purpose of making a report and recommendation. Before the Court is Plaintiff's motion for leave to proceed *in forma pauperis* on appeal.

Discussion

Plaintiff filed this case on August 27, 2009. Plaintiff filed a motion to proceed *in forma pauperis*.

Plaintiff asserted the Defendant, David Stinson, a narcotics investigator, in Howard County, Arkansas, seized Plaintiff's cell phone during a traffic stop. Plaintiff was arrested and incarcerated at the Howard County Jail in Nashville, Arkansas. When Plaintiff was transferred to the Hempstead County Detention Facility, he maintains his cell phone was not transferred with him. On October 19, 2009, a report and recommendation (Doc. 5) was entered recommending denial of the request to proceed *in forma pauperis* and dismissal of the complaint on the grounds the claims asserted were frivolous and failed to state claims upon which relief may be granted. 28 U.S.C. § 1915A(b)(1). The report and recommendation was adopted (Doc. 7) on November 9, 2009, and the case dismissed.

On November 10, 2009, Plaintiff filed a notice of appeal (Doc. 8). Plaintiff failed to submit the appellate filing fee or an application to proceed *in forma pauperis* with his notice of appeal. Plaintiff was given until January 25, 2010, to either submit the *in forma pauperis* application or pay the filing fee. On January 21, 2010, Plaintiff filed a motion for leave to proceed *in forma pauperis* on appeal (Doc. 12).

Pursuant to 28 U.S.C. § 1915(a)(3) “[a]n appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith.” As all claims were clearly frivolous, any appeal would not be taken in good faith. *Neitzke v. Williams*, 490 U.S. 319, 325 (1989).

Conclusion

I therefore recommend that the motion for leave to appeal (Doc. 12) be denied as the appeal is not taken in good faith, 28 U.S.C. § 1915(a)(3). I further recommend that the clerk be directed to collect the \$455 filing fee pursuant to the terms of the Prison Litigation Reform Act. Plaintiff may, of course, renew his motion for leave to appeal IFP with the Court of Appeals for the Eighth Circuit. Fed. R. App. P. 24(a).

Plaintiff has fourteen (14) days from receipt of this report and recommendation in which to file written objections pursuant to 28 U.S.C. § 636(b)(1). The failure to file timely objections may result in waiver of the right to appeal questions of fact. Plaintiff is reminded that objections must be both timely and specific to trigger de novo review by the district court.

DATED this 22nd day of February 2010.

/s/ Barry A. Bryant

HON. BARRY A. BRYANT
UNITED STATES MAGISTRATE JUDGE