

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

DEC 21 2004

PATRICK FISHER
Clerk

ANDREW SEAN LEAHY,

Plaintiff - Appellant,

v.

DOCTOR McCALLON, Medical
Doctor at B.V.C.F.,

Defendant - Appellee.

No. 04-1216
(Colorado)
(D.Ct. No. 03-Z-2521)

ORDER AND JUDGMENT*

Before **SEYMOUR, LUCERO, and O'BRIEN**, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1.9(G). The case is therefore ordered submitted without oral argument.

Andrew Sean Leahy, a state prisoner at the Sterling Correctional Facility in

*This order and judgment is not binding precedent except under the doctrines of law of the case, *res judicata* and collateral estoppel. The court generally disfavors the citation of orders; nevertheless, an order may be cited under the terms and conditions of 10th Cir. R. 36.3.

Sterling, Colorado, filed a §1983 action¹ on December 11, 2003, alleging Dr. McCallon of the Buena Vista Correctional Facility violated his Eighth Amendment rights by acting with deliberate indifference toward his medical needs while he was in Dr. McCallon's care in September, 2001. On February 24, 2004, the magistrate judge, to whom the matter had been referred, ordered Leahy to file an amended complaint in order to (1) clearly and concisely set forth his claims and (2) demonstrate he exhausted his administrative remedies for each claim asserted. On March 25, 2004, Leahy filed his amended complaint. On April 16, 2004, the district court dismissed Leahy's complaint for failure to exhaust administrative remedies pursuant to 42 U.S.C. § 1997e(a). Specifically, the court concluded Leahy waited more than two years before filing a grievance against Dr. McCallon, well beyond the thirty days allotted for filing a grievance with corrections officials.

Leahy then filed a notice of appeal from the decision dismissing his complaint and an application to take his appeal in forma pauperis. *See* 28 U.S.C. § 1915; FED. R. APP. P. 24. On July 6, 2004, the district court certified the appeal was not taken in good faith because Leahy had "not shown the existence of a reasoned, non-frivolous argument on the law and facts in support of the issues raised on appeal." (R. Doc. 16.) Therefore, it denied the application to proceed

¹42 U.S.C. § 1983 (civil rights action against state actor).

in forma pauperis. *See* 28 U.S.C. § 1915(a)(3) (“An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith.”). Leahy renews his application for leave to proceed in forma pauperis in this court and also seeks appointment of counsel. Reviewing de novo a district court's finding of failure to exhaust administrative remedies under 42 U.S.C. § 1997e(a), *Jernigan v. Stuchell*, 304 F.3d 1030, 1032 (10th Cir. 2002), and exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

Having reviewed Leahy's opening brief, we, like the district court, cannot discern a reasoned, non-frivolous argument on the law and facts in support of the issues he raises on appeal. We are at a loss as to why we should excuse Leahy's complete lack of diligence in filing a grievance against Dr. McCallon (or any other corrections official) given his allegation he suffered a serious injury requiring surgery.

Accordingly, we **AFFIRM** the order of the district court dismissing Leahy's complaint. We **DENY** Leahy's application to proceed in forma pauperis and motion for appointment of counsel. Leahy is ordered to pay the full appellate filing fee within twenty (20) days of this order.

Entered by the Court:

Terrence L. O'Brien
United States Circuit Judge