

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

JUN 23 1997

PATRICK FISHER
Clerk

RICHARD C. WHITE,

Petitioner - Appellant,

v.

MARC McKINNA, Warden; THE
SUPREME COURT OF COLORADO,

Respondents - Appellees.

No. 97-1014

(D. Colorado)

(D.C. No. 96-S-2331)

ORDER AND JUDGMENT*

Before **ANDERSON, HENRY**, and **BRISCOE**, 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); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

Petitioner Richard C. White is currently incarcerated in the Colorado Territorial Correctional Facility. He filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, challenging the validity of his state conviction on numerous grounds. The

*This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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

district court ordered Mr. White to show cause why his petition should not be dismissed pursuant to 28 U.S.C. § 1915(g) because he has, on three or more prior occasions, while incarcerated, brought an action which was dismissed as frivolous or for failure to state a claim and because Mr. White failed to allege that he was under imminent danger of serious physical injury. The court also ordered him to cure certain deficiencies in his petition and in his in forma pauperis motion.

Mr. White subsequently cured the deficiencies and filed two responses to the order to show cause, alleging “imminent danger of serious physical injury,” R., Docs. 7, 15, and referencing two other civil actions he had filed. The district court then denied him leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915, and dismissed his petition because he has previously filed, while incarcerated, three or more actions which were dismissed as frivolous or for failure to state a claim. The district court also held that Mr. White had failed to demonstrate that he is in imminent danger of serious physical injury in this case. The court subsequently denied Mr. White’s motion for reconsideration, and, finally, entered an order denying him leave to appeal in forma pauperis and denied his application for a certificate of appealability. The district court’s reasons for so ruling were the same as in its initial order -- Mr. White had brought three or more frivolous or meritless actions while incarcerated, and failed to show that he was in imminent danger of serious physical injury. The court denied the certificate of appealability because it concluded Mr. White had “not made a substantial showing of the

denial of a constitutional right regarding his ability to proceed *in forma pauperis*.” R., Doc. 21 at 2 (District Court Order).

The in forma pauperis statute, 28 U.S.C. § 1915, as amended by the Prison Litigation Reform Act of 1995 (“PLRA”), Pub. L. No. 104-134, 110 Stat. 1321 (April 26, 1996) provides:

In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

28 U.S.C. § 1915(g).

We have recently held, however, that habeas corpus petitions are not “civil action[s]” for purposes of the “three strikes” provision. United States v. Simmonds, 111 F.3d 737 (10th Cir. 1997). The district court therefore erred when it dismissed Mr. White’s habeas petition under § 1915(g).

We accordingly GRANT the certificate of appealability and GRANT Mr. White’s motion to proceed in forma pauperis. We REVERSE the district court’s dismissal of his petition and we REMAND for further proceedings.

ENTERED FOR THE COURT

Stephen H. Anderson
Circuit Judge