

FILED
United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

October 27, 2021

FOR THE TENTH CIRCUIT

Christopher M. Wolpert
Clerk of Court

ADRIAN CHAVEZ,

Plaintiff - Appellant,

v.

JARED POLIS; COLORADO
DEPARTMENT OF CORRECTIONS;
DEAN WILLIAMS; RANDOLPH MAUL;
MISTY ZADE; FREMONT MEDICAL
NURSE AND PROVIDER JOHN DOE
OR JANE DOE; DRDC MEDICAL
NURSE AND PROVIDER JOHN DOE
OR JANE DOE; LIMON MEDICAL
NURSE AND PROVIDER JOHN DOE
OR JANE DOE; CSP MEDICAL NURSE
AND PROVIDER JOHN DOE OR JANE
DOE,

Defendants - Appellees.

No. 21-1221
(D.C. No. 1:20-CV-03798-LTB-GPG)
(D. Colo.)

ORDER AND JUDGMENT*

Before **MATHESON, BRISCOE, and PHILLIPS**, Circuit Judges.

* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially help determine this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

Adrian Chavez is a Colorado state prisoner at Colorado Territorial Correctional Facility. Proceeding pro se,¹ he appeals the district court's dismissal of his 42 U.S.C. § 1983 claims against Colorado Governor Jared Polis, Colorado Department of Corrections Executive Director Dean Williams, Chief Medical Officer Randolph Maul, Health Service Administrator Misty Zade, and unnamed medical staff at four correctional facilities. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

BACKGROUND

The district court screened Chavez's complaint under 28 U.S.C. § 1915. Because of deficiencies in his complaint, the magistrate judge directed Chavez to amend his complaint. Chavez did so. But because the deficiencies persisted, the magistrate judge recommended dismissal and informed Chavez that he had fourteen days to file written objections. Chavez failed to object.

The district court adopted the magistrate judge's order and dismissed Chavez's complaint. It also denied Chavez's motion to proceed *in forma pauperis* on appeal. Chavez timely appealed.

¹ Because Chavez is proceeding pro se, we liberally construe his pleadings. *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (citation omitted). Though we can allow for his "failure to cite proper legal authority, his confusion of various legal theories, his poor syntax and sentence construction, or his unfamiliarity with pleading requirements," we cannot assume the role of advocate on his behalf. *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991).

We issued a show-cause order, requiring Chavez to address whether he waived his right to appellate review by failing to object to the magistrate judge's recommendation. In response, Chavez argued that we should review his denial of counsel "in the interest of justice."

DISCUSSION

Chavez does not challenge the district court's dismissal of his case—in fact, he concedes that the district court followed all relevant procedures. Rather, Chavez argues only that the magistrate judge erred by denying as premature Chavez's two motions for appointment of counsel.

Usually, we review a district court's denial of a motion for appointment of counsel in a civil case for abuse of discretion. *Hill v. SmithKline Beecham Corp.*, 393 F.3d 1111, 1115 (10th Cir. 2004). Here, however, a procedural hurdle precludes our review: Chavez did not object to the magistrate's orders denying him counsel. *See* Fed. R. Civ. P. 72(a) ("A party may serve and file objections to [a magistrate judge's] order [on a non-dispositive matter] within 14 days after being served with a copy."). Thus, even if Chavez had sought to appeal the magistrate's orders to this court—which he did not—his failure to appeal them first to the district court would strip us of jurisdiction. *See Sinclair Wyo. Ref. Co. v. A & B Builders, Ltd.*, 989 F.3d 747, 783 (10th Cir. 2021) (the firm waiver rule applies to a magistrate judge's non-dispositive ruling under Rule 72(a)). Only the district court's order dismissing Chavez's complaint is properly before us. And because Chavez does not challenge the merits of the district court's resolution of his claims, we affirm.

Chavez also moved for leave to proceed *in forma pauperis* on appeal. We grant his motion because we believe he has sufficiently demonstrated that he lacks money to prepay the filing fee and brings the appeal in good faith, even though his arguments on appeal are not “reasonably debatable.” *Hayes v. Bear*, 739 F. App’x 930, 931–32 (10th Cir. 2018). Still, we affirm the district court’s dismissal.² We also deny Chavez’s motion for limited appointment of counsel as moot.

Further, 28 U.S.C. § 1915(g) prohibits prisoners from bringing civil actions or appeals under *in forma pauperis* status if the prisoner has, on three or more occasions, brought an action or appeal that was dismissed because it was “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.” Because the district court dismissed Chavez’s complaint for failure to state a claim, Chavez was assessed his first strike under § 1915(g). *See Childs v. Miller*, 713 F.3d 1262, 1266 (10th Cir. 2013). Our dismissal of this appeal as frivolous also results in a strike. *See Hafed v. Fed. Bureau of Prisons*, 635 F.3d 1172, 1176 (10th Cir. 2011), *abrogated on other grounds by Coleman v. Tollefson*, 575 U.S. 532 (2015). We caution Chavez that a third strike will preclude him from bringing future lawsuits and appeals without prepaying the applicable filing fee absent an imminent danger of serious harm.

² We remind Chavez that “[t]he dismissal of his appeal does not relieve him of the responsibility to pay the appellate filing fee in full.” *Kinnell v. Graves*, 265 F.3d 1125, 1129 (10th Cir. 2001); *see* 18 U.S.C. § 1915(b)(1).

CONCLUSION

For these reasons, we affirm the district court's dismissal.

Entered for the Court

Gregory A. Phillips
Circuit Judge