

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF TEXAS

STEVEN DWAYNE GILBERT,

Plaintiff,

versus

SHERIFF MITCH NEWMAN, *et al.*,

Defendants.

CIVIL ACTION NO. 1:23-CV-11

**MEMORANDUM ORDER OVERRULING PLAINTIFF'S OBJECTIONS AND
ADOPTING THE MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION**

Plaintiff Steven Dwayne Gilbert, an inmate formerly confined at the Jasper County Correctional Center, proceeding *pro se*, brought this lawsuit pursuant to 42 U.S.C. § 1983.

The court referred this matter to the Honorable Zack Hawthorn, United States Magistrate Judge, at Beaumont, Texas, for consideration pursuant to applicable laws and orders of this court. The magistrate judge recommends dismissing this action without prejudice pursuant to 28 U.S.C. § 1915(g).

The court has received and considered the Report and Recommendation of United States Magistrate Judge filed pursuant to such referral, along with the record, pleadings and all available evidence. Plaintiff filed objections to the magistrate judge's Report and Recommendation. This requires a *de novo* review of the objections in relation to the pleadings and the applicable law. *See* FED. R. CIV. P. 72(b). After careful consideration, the court concludes plaintiff's objections are without merit, as set forth below.

Plaintiff argues that two of his previous cases should not be counted against him for the purpose of proceeding *in forma pauperis* in this action. A review of the dockets in the relevant cases, however, reveals that plaintiff is incorrect in his assertions.

Plaintiff first contends the lawsuit styled *Gilbert v. Stacks*, No. 9:05cv24 (E.D. Tex. 2005), proceeded to a trial by jury. A review of the judgment entered in the case reveals that

plaintiff's statement is patently false. *See Gilbert*, No. 9:05cv24 (#7). As the magistrate judge stated in the report, the case was dismissed as frivolous.

Next, plaintiff contends the lawsuit styled *Gilbert v. Livingston*, No. 4:15cv370 (S.D. Tex. Feb. 17, 2015) should not count as a strike because it was dismissed as barred by *Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994). The action, however, was dismissed under 28 U.S.C. § 1915(e)(2)(B). *See Gilbert*, No. 4:15cv370 (#5 at *7). *Heck*-barred lawsuits are frivolous and fail to state a claim.¹ As a result, both actions count as "strikes" under 28 U.S.C. § 1915(g). Therefore, the above-styled action should be dismissed without prejudice, as recommended.

ORDER

Accordingly, plaintiff's objections are **OVERRULED**. The findings of fact and conclusions of law of the magistrate judge are correct, and the report of the magistrate judge is **ADOPTED**. A final judgment will be entered in this case in accordance with the magistrate judge's recommendation.

SIGNED at Beaumont, Texas, this 6th day of July, 2023.



MARCIA A. CRONE
UNITED STATES DISTRICT JUDGE

¹ *See Randell v. Johnson*, 227 F.3d 300, 301 (5th Cir. 2000) (finding *Heck*-barred claims fail to state a claim upon which relief may be granted); *Hamilton v. Lyons*, 74 F.3d 99, 102 (5th Cir. 1999) (finding *Heck*-barred claims are "legally frivolous").