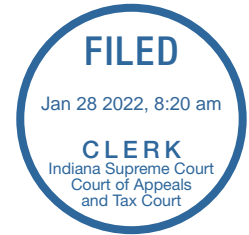


MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



APPELLANT PRO SE

Tracey Wheeler
Greencastle, Indiana

ATTORNEYS FOR APPELLEE

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Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Tracey Wheeler,
Appellant-Plaintiff,

v.

State of Indiana et al.,
Appellees-Defendants.

January 28, 2022

Court of Appeals Case No.
21A-MI-1438

Appeal from the Perry Circuit
Court

The Honorable Karen A. Werner,
Magistrate

Trial Court Cause No.
62C01-2105-MI-196

Weissmann, Judge.

- [1] To prevent a flood of frivolous civil lawsuits by prison inmates, Indiana codified a *Three Strikes Statute* (Indiana Code § 34-10-1-3) allowing a court to refuse to waive the filing fee after finding an inmate filed three prior unmeritorious lawsuits as defined by the statute. Tracey Wheeler, a prison inmate, claims in this appeal that the trial court improperly ruled him out under the *Three Strikes Statute* because he has less than three qualifying dismissals. In response, the State cites three dismissals, but at least one does not qualify as a strike.
- [2] Because we are not convinced that Wheeler has accumulated the required three dismissals, we reverse and remand for further proceedings.

Facts

- [3] Wheeler filed a complaint in the trial court primarily alleging the Branchville Correctional Facility negligently destroyed his mail. Seeking damages of \$7,840.80, including a \$50 per hour rate for his time spent litigating the case, Wheeler also asked the trial court to waive the filing fee because he was indigent. The State opposed his request, contending the trial court was precluded by statute from waiving Wheeler's fees because his complaints in at least three other civil actions had been dismissed and he did not meet the exception to the statute requiring immediate danger of serious bodily injury. The State requested the trial court stay the action until Wheeler paid the fees.
- [4] The trial court did as the State asked and dismissed the complaint following Wheeler's failure to pay the filing fee. In its dismissal order, the court also

banned Wheeler from filing future state civil actions as an indigent person. Wheeler appeals.

Discussion and Decision

- [5] Wheeler contends the trial court erroneously denied his motion to waive the filing fee and improperly applied the *Three Strikes Statute* limiting his ability to proceed as an indigent person in future lawsuits. We agree.
- [6] The *Three Strikes Statute* specifies that, “[i]f an offender has filed at least three (3) civil actions in which a state court has dismissed the action or a claim under [Indiana Code §] 34-58-1-2 [*Meritless Claims Statute*], the offender may not file a new complaint or petition as an indigent person under this chapter, unless a court determines the offender is in immediate danger of serious bodily injury.” Ind. Code § 34-10-1-3. The trial court did not identify the prior dismissals that it treated as strikes under the *Three Strikes Statute*. On appeal, the State offers three dismissals as possible “strikes.” State’s Br., pp. 7-8; State’s Supp. App. Vol. II, pp. 2-26. But one of those dismissals—lower court case number 62C01-2008-MI-339—was reversed on appeal. *Wheeler v. State*, No. 20A-MI-2034, *slip op.* at *2 (Ind. Ct. App. Oct.18, 2021) (Case 339); *see* Indiana Evidence Rule 201(b)-(c) (specifying that at any stage of the proceedings, a court, *sua sponte*, may take judicial notice of “records of a court of this state” and “the decisional . . . law”). In light of this, we cannot determine that Wheeler acquired the three required dismissals “under” Indiana Code § 34-58-1-2.

[7] Reversed and remanded for further proceedings.¹

[8] Najam, J., and Vaidik, J., concur.

¹ We note that if Wheeler, a prolific filer, has accumulated the necessary strikes under the *Three Strikes Statute* by the time the trial court reconsiders this case on remand, the trial court would be entitled to apply the *Three Strikes Statute* to him. But because we cannot discern on this record that Wheeler acquired the necessary strikes, reversal is required.