

APR 20 2005

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

PATRICK FISHER
Clerk

WAYNE THOMAS JOHNSON,

Plaintiff - Appellant,

v.

SMIRNOFF DISTILLERY; ATF,

Defendants - Appellees.

No. 04-6263
(D.C. No. 04-CV-647-C)
(W.D. Okla.)

ORDER AND JUDGMENT*

Before **KELLY, O'BRIEN, and TYMKOVICH**, Circuit Judges.**

Wayne Thomas Johnson, a state inmate appearing pro se, seeks to appeal from the dismissal of his civil rights complaint, 42 U.S.C. § 1983, which sought to hold Defendants Smirnoff Distillery and the Bureau of Alcohol, Tobacco and Firearms liable for Mr. Johnson's various alcohol related problems based upon a

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. This 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.

** After examining the briefs and the appellate record, this three-judge panel has determined unanimously that oral argument would not be of material assistance in the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1(G). The cause is therefore ordered submitted without oral argument.

failure to warn theory (in the guise of constitutional claims). Performing its screening function pursuant to 28 U.S.C. § 1915A(b), the district court, upon recommendation of the magistrate judge, dismissed the action for failure to state a claim, 28 U.S.C. § 1915(e)(2)(B)(ii), and concluded that the dismissal should count as a “strike” pursuant to 28 U.S.C. § 1915(g). For substantially the reasons given by the magistrate judge, we affirm as Mr. Johnson has not addressed any of the defects identified below. Thus, the district court’s dismissal counts as a strike, as will this dismissal. Jennings v. Natrona County Det. Ctr. Med. Facility, 175 F.3d 775, 780 (10th Cir. 1999).

AFFIRMED. Mr. Johnson’s motion to proceed IFP is DENIED, and he is responsible for immediate payment of any unpaid filing fee.

Entered for the Court

Paul J. Kelly, Jr.
Circuit Judge