

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

SEP 16 2004

PATRICK FISHER
Clerk

ROY DON ROBERTSON,

Plaintiff - Appellant,

v.

ADULT PROBATION AND PAROLE
DEPARTMENT; MIKE MAYOR;
ROSS WILLIAMS; SCOTT HENRIE,

Defendants - Appellees.

No. 04-4135
(D.C. No. 03-CV-841-JTG)
(D. Utah)

ORDER AND JUDGMENT*

Before **KELLY, HENRY**, and **TYMKOVICH**, Circuit Judges.**

Plaintiff-Appellant Roy Don Robertson, a state inmate appearing pro se, appeals from the district court's dismissal of his civil rights complaint, 42 U.S.C. § 1983. Mr. Robertson's complaint was dismissed without prejudice by order entered January 15, 2004, for failure to pay an initial partial filing fee and failure

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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 case is therefore ordered submitted without oral argument.

to consent to have the remaining fee collected in increments from his inmate account. R. Doc. 18. Thereafter, on May 11, 2004, Mr. Robertson filed motions for appointment of counsel and a request for service of process. R. Docs. 20 & 21. The district court denied those motions in an order entered June 8, 2004, noting that the motions were improper given that the case had been dismissed in January. R. Doc. 22. On June 15, 2004, Mr. Robertson filed his notice of appeal with the district court. R. Doc. 26.

In his opening brief on appeal, Mr. Robertson argues that the district court improperly dismissed his complaint. He also attempts to argue the merits of his complaint. Fed. R. App. P. 4(a)(1)(A) states that a “notice of appeal must be filed with the district clerk within 30 days after the judgment or order appealed from is entered.” Mr. Robertson’s notice of appeal was filed nearly five months after the order dismissing his claim.¹ The record does not reflect a request by Mr. Robertson for an extension of time to file a notice of appeal, nor does it reflect any circumstances warranting such an extension. See Jenkins v. Burtzloff, 69 F.3d 460, 462 (10th Cir. 1995); Fed. R. App. P. 4(a)(5) & (6). “[S]ince the taking of an appeal within the prescribed time is mandatory and jurisdictional,” we are without jurisdiction to review the decision on the merits. Budinich v. Becton

¹ Mr. Robertson’s filing of a motion for appointment of counsel or a request for service of process did not toll the time in which to take an appeal. See Fed. R. App. P. 4(a)(4)(A).

Dickinson & Co., 486 U.S. 196, 203 (1988); see 28 U.S.C. § 2107(a).

APPEAL DISMISSED. We DENY Mr. Robertson's motion to pay the filing fee in partial installments; Mr. Robertson shall pay the unpaid balance due.

All other pending motions are DENIED.

Entered for the Court

Paul J. Kelly, Jr.
Circuit Judge