

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

MAR 20 2017

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

RODNEY T. KRALOVETZ,

Plaintiff-Appellant,

v.

MARION SPEARMAN; et al.,

Defendants-Appellees.

No. 16-15615

D.C. No. 3:16-cv-00299-WHA

MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
William Alsup, District Judge, Presiding

Submitted March 8, 2017**

Before: LEAVY, W. FLETCHER, and OWENS, Circuit Judges.

Rodney T. Kralovetz, a California state prisoner, appeals pro se from the district court's judgment dismissing his 42 U.S.C. § 1983 action alleging claims arising out of the investigation of allegedly false allegations that he sexually assaulted another inmate. We have jurisdiction under 28 U.S.C. § 1291. We

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

review de novo a dismissal for failure to state a claim under 28 U.S.C. § 1915A. *Belanus v. Clark*, 796 F.3d 1021, 1024 (9th Cir. 2015). We vacate and remand.

The district court dismissed Kralovetz’s action for failure to state a due process claim after considering the allegations in the complaint but not the attachments to the complaint, and denied leave to amend as futile. However, we conclude it is not absolutely clear that amendment would be futile. *See Lucas v. Dep’t of Corr.*, 66 F.3d 245, 248 (9th Cir. 1995) (“Unless it is absolutely clear that no amendment can cure the defect . . . a pro se litigant is entitled to notice of the complaint’s deficiencies and an opportunity to amend prior to dismissal of the action.”). For instance, Kralovetz alleges, including in his motion for reconsideration, that he was held near naked in a booth near an open window in 30 to 40 degree weather for close to three hours, after having been taken from a medical triage unit where he was registering a lower than normal body temperature. We vacate the judgment and remand for the district court to provide Kralovetz with leave to amend his complaint.

VACATED and REMANDED.