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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

ROBERT WREN,

Plaintiff,

No. 2:09-cv-0417 JFM (PC)

vs.

SOLANO STATE PRISON, et al.,

Defendants.

ORDER AND

FINDINGS & RECOMMENDATIONS

_____ /

Plaintiff is a state prisoner proceeding pro se with a civil rights action pursuant to 42 U.S.C. § 1983. Plaintiff seeks relief pursuant to 42 U.S.C. § 1983 and has requested leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915. This proceeding was referred to this court by Local Rule 72-302 pursuant to 28 U.S.C. § 636(b)(1).

Plaintiff has submitted a declaration that makes the showing required by 28 U.S.C. § 1915(a). Accordingly, the request to proceed in forma pauperis will be granted.

The court is required to screen complaints brought by prisoners seeking relief against a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The court must dismiss a complaint or portion thereof if the prisoner has raised claims that are legally “frivolous or malicious,” that fail to state a claim upon which relief may be granted, or that seek monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A(b)(1),(2).

1 A claim is legally frivolous when it lacks an arguable basis either in law or in fact.
2 Neitzke v. Williams, 490 U.S. 319, 325 (1989); Franklin v. Murphy, 745 F.2d 1221, 1227-28
3 (9th Cir. 1984). The court may, therefore, dismiss a claim as frivolous where it is based on an
4 indisputably meritless legal theory or where the factual contentions are clearly baseless. Neitzke,
5 490 U.S. at 327. The critical inquiry is whether a constitutional claim, however inartfully
6 pleaded, has an arguable legal and factual basis. See Jackson v. Arizona, 885 F.2d 639, 640 (9th
7 Cir. 1989); Franklin, 745 F.2d at 1227.

8 While not entirely clear, it appears plaintiff alleges defendants Rosario and
9 Williams used excessive force on plaintiff when they sprayed him with OC spray while he was
10 already handcuffed. However, plaintiff clearly states that he filed the instant complaint while his
11 second level administrative appeal was pending. (Id. at 2.)

12 “Section 1997e(a) of Title 42 of the United States Code provides:

13 No action shall be brought with respect to prison conditions under
14 [42 U.S.C. § 1983], or any other Federal law, by a prisoner
15 confined in any jail, prison, or other correctional facility until such
administrative remedies as are available are exhausted.

16 This exhaustion requirement is mandatory. Booth v. Churner, 532 U.S. 731, 741 (2001).”
17 McKinney v. Carey, 311 F.3d 1198, 1199 (9th Cir. Dec. 5, 2002). Exhaustion must precede the
18 filing of the complaint; compliance with the statute is not achieved by satisfying the exhaustion
19 requirement during the course of an action. Id. at 1200. Defendants have the burden of proving
20 that plaintiff failed to exhaust available administrative remedies. See Wyatt, 315 F.3d at 1120.

21 California’s Department of Corrections provides a four-step
22 grievance process for prisoners who seek review of an
23 administrative decision or perceived mistreatment. Within fifteen
24 working days of “the event or decision being appealed,” the inmate
25 must ordinarily file an “informal” appeal, through which “the
26 appellant and staff involved in the action or decision attempt to
resolve the grievance informally.” Cal.Code Regs., tit. 15, §§
3084.5(a), 3084.6(c). [Footnote omitted.] If the issue is not
resolved during the informal appeal, the grievant next proceeds to
the first formal appeal level, usually conducted by the prison’s
Appeals Coordinator. Id. §§ 3084.5(b), 3084.6(c). Next are the

1 second level, providing review by the institution's head or a
2 regional parole administrator, and the third level, in which review
3 is conducted by a designee of the Director of the Department of
4 Corrections. [Footnote omitted.] Id. § 3084.5(e)(1)-(2).

4 Brown v. Valoff, 422 F.3d 926, 929-30 (9th Cir. 2005.)

5 Plaintiff is required to pursue his administrative remedies through the Director's
6 level of review before he may file a complaint in federal court. Plaintiff has failed to exhaust his
7 administrative remedies so this action must be dismissed without prejudice.

8 In addition, plaintiff also alleges Correctional Officer Rosario stole his radio and
9 pictures of his daughter.

10 The United States Supreme Court has held that "an unauthorized intentional
11 deprivation of property by a state employee does not constitute a violation of the procedural
12 requirements of the Due Process Clause of the Fourteenth Amendment if a meaningful
13 postdeprivation remedy for the loss is available." Hudson v. Palmer, 468 U.S. 517, 533 (1984).
14 Thus, where the state provides a meaningful postdeprivation remedy, only authorized, intentional
15 deprivations constitute actionable violations of the Due Process Clause. An authorized
16 deprivation is one carried out pursuant to established state procedures, regulations, or statutes.
17 Piatt v. McDougall, 773 F.2d 1032, 1036 (9th Cir. 1985); see also Knudson v. City of
18 Ellensburg, 832 F.2d 1142, 1149 (9th Cir. 1987).

19 In the instant case, plaintiff has not alleged any facts which suggest that the
20 deprivation was authorized. The California Legislature has provided a remedy for tort claims
21 against public officials in the California Government Code, §§ 900, et seq. Since plaintiff has
22 not attempted to seek redress in the state system, he cannot sue in federal court on the claim that
23 the state deprived him of property without due process of the law. The court concludes that his
24 claims concerning stolen property must, therefore, be dismissed as frivolous. See 28 U.S.C.
25 § 1915(d).

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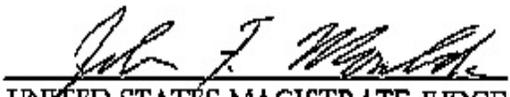
1 Accordingly, IT IS ORDERED that:

- 2 1. Plaintiff's request for leave to proceed in forma pauperis is granted.
3 2. The Clerk of the Court is directed to assign a district judge to this case; and

4 IT IS HEREBY RECOMMENDED that this action be dismissed without
5 prejudice.

6 These findings and recommendations are submitted to the United States District
7 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty
8 days after being served with these findings and recommendations, plaintiff may file written
9 objections with the court. The document should be captioned "Objections to Magistrate Judge's
10 Findings and Recommendations." Plaintiff is advised that failure to file objections within the
11 specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951
12 F.2d 1153 (9th Cir. 1991).

13 DATED: April 15, 2009.

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16 UNITED STATES MAGISTRATE JUDGE

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