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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

KASEY F. HOFFMAN,
Plaintiff,
v.
CUNNINGHAM, et al.,
Defendants.

No. 2:16-cv-0983-EFB P

ORDER GRANTING IFP AND DISMISSING
COMPLAINT PURSUANT TO 28 U.S.C. §
1915A

Plaintiff is a state prisoner proceeding without counsel in an action brought under § 1983.¹
He has filed an application for leave to proceed in forma pauperis.

I. Request to Proceed In Forma Pauperis

Plaintiff’s application makes the showing required by 28 U.S.C. § 1915(a)(1) and (2).
Accordingly, by separate order, the court directs the agency having custody of plaintiff to collect
and forward the appropriate monthly payments for the filing fee as set forth in 28 U.S.C.
§ 1915(b)(1) and (2).

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¹ This proceeding was referred to this court by Local Rule 302 pursuant to 28 U.S.C. § 636(b)(1) and is before the undersigned pursuant to plaintiff’s consent. See E.D. Cal. Local Rules, Appx. A, at (k)(4).

1 **II. Screening Requirement and Standards**

2 Federal courts must engage in a preliminary screening of cases in which prisoners seek
3 redress from a governmental entity or officer or employee of a governmental entity. 28 U.S.C.
4 § 1915A(a). The court must identify cognizable claims or dismiss the complaint, or any portion
5 of the complaint, if the complaint “is frivolous, malicious, or fails to state a claim upon which
6 relief may be granted,” or “seeks monetary relief from a defendant who is immune from such
7 relief.” *Id.* § 1915A(b).

8 A pro se plaintiff, like other litigants, must satisfy the pleading requirements of Rule 8(a)
9 of the Federal Rules of Civil Procedure. Rule 8(a)(2) “requires a complaint to include a short and
10 plain statement of the claim showing that the pleader is entitled to relief, in order to give the
11 defendant fair notice of what the claim is and the grounds upon which it rests.” *Bell Atl. Corp. v.*
12 *Twombly*, 550 U.S. 544, 554, 562-563 (2007) (citing *Conley v. Gibson*, 355 U.S. 41 (1957)).
13 While the complaint must comply with the “short and plain statement” requirements of Rule 8,
14 its allegations must also include the specificity required by *Twombly* and *Ashcroft v. Iqbal*, 556
15 U.S. 662, 679 (2009).

16 To avoid dismissal for failure to state a claim a complaint must contain more than “naked
17 assertions,” “labels and conclusions” or “a formulaic recitation of the elements of a cause of
18 action.” *Twombly*, 550 U.S. at 555-557. In other words, “[t]hreadbare recitals of the elements of
19 a cause of action, supported by mere conclusory statements do not suffice.” *Iqbal*, 556 U.S. at
20 678.

21 Furthermore, a claim upon which the court can grant relief must have facial plausibility.
22 *Twombly*, 550 U.S. at 570. “A claim has facial plausibility when the plaintiff pleads factual
23 content that allows the court to draw the reasonable inference that the defendant is liable for the
24 misconduct alleged.” *Iqbal*, 556 U.S. at 678. When considering whether a complaint states a
25 claim upon which relief can be granted, the court must accept the allegations as true, *Erickson v.*
26 *Pardus*, 551 U.S. 89 (2007), and construe the complaint in the light most favorable to the
27 plaintiff, *see Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).

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1 **III. Screening Order**

2 The court has reviewed plaintiff’s complaint (ECF No. 1) pursuant to § 1915A and finds
3 that it must be dismissed. The complaint alleges that while plaintiff was shopping in Shopko, he
4 noticed that the emergency exits were locked, which induced an anxiety attack and light-
5 headedness. He alleges that to ensure that he did not fall over or have a seizure he had to exit the
6 store immediately and pushed a shopping cart out the front door. Several store employees then
7 allegedly assaulted plaintiff and the district attorney ultimately charged him with second degree
8 robbery. Plaintiff claims that defendant Shopko, a private corporation, and several store
9 employees, violated his constitutional rights, assaulted him, and falsely imprisoned him. He also
10 claims the defendant district attorney maliciously prosecuted him and as a result, he “has suffered
11 a confinement of thirteen plus years.” ECF No. 5 at 4. Plaintiff seeks damages as relief. ECF
12 No. 1, § V.

13 As a general rule, a challenge in federal court to the fact of conviction or the length of
14 confinement must be raised in a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.
15 *See Preiser v. Rodriguez*, 411 U.S. 475 (1973). Where success in a section 1983 action would
16 implicitly question the validity of confinement or its duration, the plaintiff must first show that
17 the underlying conviction was reversed on direct appeal, expunged by executive order, declared
18 invalid by a state tribunal, or questioned by the grant of a writ of habeas corpus. *Heck v.*
19 *Humphrey*, 512 U.S. 477, 486-87 (1994); *Muhammad v. Close*, 540 U.S. 749, 751 (2004).
20 Plaintiff is claiming that his federal constitutional rights were violated and as a result he was
21 convicted and incarcerated. By the terms of *Heck*, plaintiff is barred from collaterally challenging
22 this underlying criminal conviction in this civil rights action.

23 Plaintiff also fails to plead facts sufficient to state a cognizable claim for relief. In order
24 to state a claim under § 1983, a plaintiff must allege: (1) the violation of a federal constitutional
25 or statutory right; and (2) that the violation was committed by a person acting under the color of
26 state law. *See West v. Atkins*, 487 U.S. 42, 48 (1988); *Jones v. Williams*, 297 F.3d 930, 934 (9th
27 Cir. 2002). An individual defendant is not liable on a civil rights claim unless the facts establish
28 the defendant’s personal involvement in the constitutional deprivation or a causal connection

1 between the defendant's wrongful conduct and the alleged constitutional deprivation. *See Hansen*
2 *v. Black*, 885 F.2d 642, 646 (9th Cir. 1989); *Johnson v. Duffy*, 588 F.2d 740, 743-44 (9th Cir.
3 1978).

4 Plaintiff's allegations against Shopko and its employees do not state a cognizable claim
5 for relief under 42 U.S.C. § 1983 because private individuals and entities do not act under color
6 of state law. *See Van Ort v. Estate of Stanewich*, 92 F.3d 831, 835 (9th Cir. 1996); *see also*
7 *Kirtley v. Rainey*, 326 F.3d 1088, 1092 (9th Cir. 2003) ("While generally not applicable to private
8 parties, a § 1983 action can lie against a private party" only if he is alleged to be "a willful
9 participant in joint action with the State or its agents.") (citation and quotation marks omitted).
10 Here, there are no allegations that Shopko or its employees acted "in concert with state agents to
11 deprive [plaintiff of his] constitutional rights." *Fonda v. Gray*, 707 F.2d 435, 437 (9th Cir. 1983).

12 Moreover, "a claim of malicious prosecution is not cognizable under 42 U.S.C. § 1983 if
13 process is available within the state judicial system to provide a remedy. However, an exception
14 exists to the general rule when a malicious prosecution is conducted with the intent to deprive a
15 person of equal protection of the laws or is otherwise intended to subject a person to a denial of
16 constitutional rights. In California, the elements of malicious prosecution are (1) the initiation of
17 criminal prosecution, (2) malicious motivation, and (3) lack of probable cause." *Usher v. Los*
18 *Angeles*, 828 F.2d 556 (9th Cir. Cal. 1987) (internal citations and quotations omitted). Plaintiff
19 fails to plead any facts to support this claim for relief.

20 In addition, state prosecutors are entitled to absolute prosecutorial immunity for acts taken
21 in their official capacity. *See Kalina v. Fletcher*, 522 U.S. 118, 123-24 (1997); *Buckley v.*
22 *Fitzsimmons*, 509 U.S. 259, 269-70 (1993); *Imbler v. Pachtman*, 424 U.S. 409, 427, 430-31
23 (1976) (holding that prosecutors are immune from civil suits for damages under § 1983 for
24 initiating prosecutions and presenting cases).

25 Plaintiff's remaining claims are brought under state law, which do not come within the
26 jurisdiction of the federal courts. Accordingly, plaintiff's complaint must be dismissed.

27 Plaintiff will be granted leave to file an amended complaint, if he can allege a cognizable
28 legal theory against a proper defendant and sufficient facts in support of that cognizable legal

1 theory. *Lopez v. Smith*, 203 F.3d 1122, 1126-27 (9th Cir. 2000) (*en banc*) (district courts must
2 afford pro se litigants an opportunity to amend to correct any deficiency in their complaints).
3 Should plaintiff choose to file an amended complaint, the amended complaint shall clearly set
4 forth the claims and allegations against each defendant. Any amended complaint must cure the
5 deficiencies identified above and also adhere to the following requirements:

6 Any amended complaint must identify as a defendant only persons who personally
7 participated in a substantial way in depriving him of a federal constitutional right. *Johnson v.*
8 *Duffy*, 588 F.2d 740, 743 (9th Cir. 1978) (a person subjects another to the deprivation of a
9 constitutional right if he does an act, participates in another's act or omits to perform an act he is
10 legally required to do that causes the alleged deprivation).

11 It must also contain a caption including the names of all defendants. Fed. R. Civ. P. 10(a).

12 Plaintiff may not change the nature of this suit by alleging new, unrelated claims. *George*
13 *v. Smith*, 507 F.3d 605, 607 (7th Cir. 2007).

14 Any amended complaint must be written or typed so that it so that it is complete in itself
15 without reference to any earlier filed complaint. E.D. Cal. L.R. 220. This is because an amended
16 complaint supersedes any earlier filed complaint, and once an amended complaint is filed, the
17 earlier filed complaint no longer serves any function in the case. *See Forsyth v. Humana*, 114
18 F.3d 1467, 1474 (9th Cir. 1997) (the ““amended complaint supersedes the original, the latter
19 being treated thereafter as non-existent.””) (quoting *Loux v. Rhay*, 375 F.2d 55, 57 (9th Cir.
20 1967)).

21 The court cautions plaintiff that failure to comply with the Federal Rules of Civil
22 Procedure, this court's Local Rules, or any court order may result in this action being dismissed.
23 *See* E.D. Cal. L.R. 110.

24 **IV. Summary of Order**

25 Accordingly, IT IS HEREBY ORDERED that:

- 26 1. Plaintiff's request to proceed in forma pauperis (ECF No. 2) is granted.


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2. Plaintiff shall pay the statutory filing fee of \$350. All payments shall be collected in accordance with the notice to the California Department of Corrections and Rehabilitation filed concurrently herewith.
3. The complaint is dismissed with leave to amend within 30 days. The complaint must bear the docket number assigned to this case and be titled "Amended Complaint." Failure to comply with this order will result in dismissal of this action for failure to prosecute. If plaintiff files an amended complaint stating a cognizable claim the court will proceed with service of process by the United States Marshal.

Dated: October 3, 2017.


EDMUND F. BRENNAN
UNITED STATES MAGISTRATE JUDGE