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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

SYLVESTER LUMPKIN,
Plaintiff,
v.
D. SHARPE, et al.,
Defendants.

No. 2:17-cv-1549 TLN CKD P

FINDINGS AND RECOMMENDATIONS

Plaintiff is a California prisoner proceeding pro se with claims arising under 42 U.S.C. §1983 and the Eighth Amendment for excessive force. Defendants Sharpe and Cooper are Correctional Officers employed at by the California Department of Corrections and Rehabilitation (CDCR) at High Desert State Prison. Their motion for summary judgment is before the court.

I. Plaintiff’s Allegations

In his complaint, which is signed under the penalty of perjury, plaintiff alleges as follows:

1. On the morning of August 9, 2016, plaintiff had an appointment with a nurse at High Desert. While walking to the meeting place, plaintiff was informed by defendant Sharpe that plaintiff had stepped “out of bounds.” Plaintiff responded that he was not aware he had stepped “out of bounds.” Sharpe then said, “next time, watch your fucking foot,” to which plaintiff responded, “I am not a dog, you don’t have to talk to me that way, I was not paying attention to the out of bounds line.”

1 2. At that point, Sharpe grabbed plaintiff by his shirt and “violently” pushed plaintiff
2 against a wall. Sharpe told plaintiff to put his hands behind his head and interlock his fingers.
3 Plaintiff complied. Sharpe then “violently” kicked plaintiff’s legs apart. Plaintiff told Sharpe this
4 was not necessary and that he would be filing a “citizen’s complaint.”

5 3. Then, defendant Sharpe cuffed plaintiff’s hands together behind plaintiff’s head and,
6 “violently” grabbed plaintiff by his shirt and spun him around. Sharpe told plaintiff he would
7 take him to a patio to discuss plaintiff filing a complaint. At some point, Sharpe bent plaintiff’s
8 body forward while plaintiff’s hands were cuffed behind his head.

9 4. Defendant Cooper approached and asked, “what’s up with this asshole.” Sharpe
10 responded, “we have an asshole who likes to file complaints on officers. We are going to the
11 patio.” At some point, Cooper and Sharpe bent plaintiff’s body forward a second time.

12 5. Plaintiff then asked to speak to a sergeant and informed the officers that he would file a
13 complaint if anything happened to him.

14 6. As plaintiff was led through the door to the patio, Sharpe grabbed one of plaintiff’s
15 legs, Cooper grabbed the other, they raised plaintiff in the air and then slammed him to the
16 concrete pavement below. Plaintiff was knocked unconscious.

17 7. Plaintiff asserts he suffered a fractured jaw, torn shoulder ligaments, and cuts and
18 scrapes to his face as a result of defendants’ actions.

19 II. Exhaustion of Administrative Remedies

20 Defendants argue that they are entitled to summary judgment because there is no genuine
21 issue of material fact as to whether plaintiff exhausted available administrative remedies prior to
22 filing suit with respect to his claims against defendants Sharpe and Cooper. Section 1997(e)(a) of
23 Title 42 of the United States Code provides that “[n]o action shall be brought with respect to
24 prison conditions under section 1983 of this title, . . . until such administrative remedies as are
25 available are exhausted.” Administrative procedures generally are exhausted with respect to the
26 California prisoner grievance process once the third level of review is complete. The third level
27 of review constitutes the decision of the Secretary of the California Department of Corrections
28 and Rehabilitation (CDCR). Cal. Code Regs. tit. 15, § 3084.7.

1 The exhaustion requirement demands “proper” exhaustion. Woodford v. Ngo, 548 U.S.
2 81, 90-91 (2006). In order to “properly exhaust” administrative remedies a prisoner generally
3 must comply with the prison’s procedural rules throughout the administrative process. Jones v.
4 Bock, 218 U.S. 199, 218 (2006).

5 If undisputed evidence viewed in the light most favorable to the prisoner / plaintiff shows
6 a failure to exhaust, a defendant is entitled to summary judgment under Rule 56 of the Federal
7 Rules of Civil Procedure. Albino v. Baca, 747 F.3d 1162, 1166 (9th Cir. 2014). If there is at
8 least a genuine issue of material fact as to whether there was exhaustion, the motion for summary
9 judgment must be denied. See Fed. R. Civ P. 56(a).

10 Defendants point to evidence indicating that on August 15, 2016, plaintiff submitted a
11 grievance including allegations which resemble the allegations in plaintiff’s complaint against
12 defendant Sharpe. ECF No. 24-7 at 8. The evidence also indicates plaintiff submitted the
13 grievance to the third level on November 6, 2016. Id. at 9. On January 3, 2017, plaintiff was
14 notified that his appeal was rejected because plaintiff did not submit, with his third level
15 submission, California Department of Corrections and Rehabilitation Form 1858: “Rights and
16 Responsibility Statement.” Id. at 7. Plaintiff was advised he “should the take corrective action
17 necessary and resubmit the appeal within the timeframes specified in [California Code of
18 Regulations] 3084.6(a) and . . . 3084.8(b).” The evidence presented by defendants indicates
19 plaintiff never re-submitted his grievance and, therefore, that plaintiff did not “properly” exhaust
20 administrative remedies.

21 At his deposition, plaintiff asserted that he did re-submit his grievance to the third level in
22 either “October or September” by giving it to an unidentified correctional officer at Hight Desert.
23 Plaintiff never received a response to his re-submission. Dep. Tr. at 54-55. When asked if he
24 ever inquired of the third level regarding the processing of his re-submitted grievance, plaintiff
25 indicated that he did not. Id. at 55.

26 There are three major problems with plaintiff’s deposition testimony. First, his grievance
27 was rejected in January 2017, so it is not possible that the grievance was resubmitted in “October
28 or September” of 2016. Also, under 15 Cal. Code Regs. § 3084.8, plaintiff’s re-submission

1 would have been due 30 days after the rejection; if plaintiff submitted in “October or September”
2 of 2017, it would not have been timely.

3 Second, as indicated above, plaintiff asserts he resubmitted his grievance by giving it to an
4 unidentified correctional officer at High Desert. However, at the beginning of his deposition
5 plaintiff indicated that he was transferred to the California Medical Facility (CMF) in Vacaville in
6 either December 2016, or January 2017, Dep. Tr. at 9-10, and the notice of rejection with respect
7 to plaintiff’s original third level submission was sent to plaintiff at CMF on January 3, 2017.
8 ECF No. 24-7 at 7.

9 Finally, even if the court found that there is evidence plaintiff resubmitted his grievance in
10 a timely fashion, plaintiff has not shown that the third level of review’s failure to render a
11 decision on the resubmission rendered what was left of the grievance process “effectively
12 unavailable” to plaintiff. See Albino, 747 F.3d at 1172. Nothing before the court suggests that if
13 plaintiff, at some point shortly after the 60-working-day time limit for the third level to respond to
14 the resubmission expired (15 Cal. Code Regs. § 3084.8), inquired why his resubmission had not
15 been addressed and presented evidence indicating the grievance was timely-submitted, the third
16 level would not have issued a decision on the re-submission.

17 Because plaintiff did not submit any grievance regarding the actions of defendant Cooper
18 and because there is no genuine issue of material fact as to whether plaintiff “properly” exhausted
19 administrative remedies with respect to any claim he might have against defendant Sharpe,
20 defendants are entitled to summary judgment.

21 III. Heck

22 Defendants point to evidence indicating plaintiff pled guilty to felony battery for kicking
23 defendant Sharpe during the events occurring on the morning of August 9, 2016, and argue that
24 any claim plaintiff may have for excessive force during those same events is precluded under
25 Heck v. Humphry, 512 U.S. 477, 487 (1994).¹ Under Heck a plaintiff cannot proceed on a §1983

26 ¹ Per defendants’ request (ECF No. 25), the court judicially notices, pursuant to Rule 201 of the
27 Federal Rules of Evidence, that “on July 13, 2017, [plaintiff] was found guilty of the offense of
28 battery on a non-confined person in violation of California Penal Code section 4501.5, and
sentenced to a term of two years imprisonment consecutive to his existing terms. . .” See ECF

1 claim if success on the claim would imply the invalidity of a criminal conviction. Id. at 487. In
2 this instance, it is at least possible that defendants could have used excessive force against
3 plaintiff in violation of the Eighth Amendment by slamming plaintiff to the ground even if, at
4 some point, plaintiff committed battery against Sharpe by kicking him. Accordingly, the Heck
5 bar does not apply.

6 In accordance with the above, IT IS HEREBY RECOMMENDED that

- 7 1. Defendants' motion for summary judgment (ECF No. 24) be granted; and
- 8 2. This case be closed.

9 These findings and recommendations are submitted to the United States District Judge
10 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
11 after being served with these findings and recommendations, any party may file written
12 objections with the court and serve a copy on all parties. Such a document should be captioned
13 "Objections to Magistrate Judge's Findings and Recommendations." Any response to the
14 objections shall be served and filed within fourteen days after service of the objections. The
15 parties are advised that failure to file objections within the specified time may waive the right to
16 appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

17 Dated: January 16, 2019

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19 CAROLYN K. DELANEY
20 UNITED STATES MAGISTRATE JUDGE

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No. 24-5 at 25.