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6 UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
7 AT TACOMA

8 KEVIN JOSEPH SMITH,

9 Plaintiff,

10 v.

11 ELDON VAIL,

12 Defendant.
13

Case No. C10-5614RJB/JRC

ORDER ADOPTING A REPORT AND
RECOMMENDATION

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15 The Court, having reviewed the Report and Recommendation of Magistrate Judge J.
16 Richard Creatura (Dkt. 23), objections to the Report and Recommendation (Dkt. 25), defendant's
17 response to plaintiff's objections (Dkt. 26), and the remaining record, does hereby find and

18 ORDER:

- 19
20 1. In his objections, plaintiff contends that the Report and Recommendation was in error
21 because plaintiff had sufficient funds in his prison account to pay for sending out his
22 personal property, but that the property was never sent. Dkt. 25. Plaintiff further
23 claims that, because he had been released from Department of Corrections custody,
24 he could not request that his prison trust account be reopened. Dkt. 25. Even if
25 plaintiff is correct, the result does not change. Washington's tort claims provisions,
26 provide a damages remedy to persons who have suffered from the tortious conduct of
the State or its political subdivisions. *See* RCW 4.92 (claims against the State); RCW
72.02.045 (state and/or state officials liability for the negligent or intentional loss of
inmate property). The tort claims provisions of RCW 4.92 are subject to statutes of
limitations. *See* RCW 4.16. Even if plaintiff would now be barred by the statute of
limitations from filing a state tort action, he had an adequate post deprivation remedy
available to him at the time of the alleged wrongful action. Plaintiff has not stated a
claim for violation of his due process rights.

ORDER - 1

- 1 2. In addition to the above grounds for dismissal of this case, the court notes that
2 plaintiff has not alleged facts that the only named defendant, Eldon Vail, personally
3 participated in the alleged unlawful action. Finally, even assuming that plaintiff
4 could establish a due process claim, the claim would be barred by the statute of
5 limitations. Limitation periods in cases brought under 42 U.S.C. §1983 are determined
6 by reference to the applicable state's statute of limitations and the coordinate tolling
7 rules. *Rose v. Rinaldi*, 654 F.2d 546 (9th Cir. 1981). RCW 4.16.080(2) provides a
8 three year statute of limitations for injury to the person or rights of another, and that
9 statute applies to a case brought under Section 1983. *See Rose v. Rinaldi*, 654 F.2d at
10 547.
- 11 3. The Court **ADOPTS** the Report and Recommendation (Dkt. 23). This
12 action is **DISMISSED WITH PREJUDICE** for failure to state a claim.
13 The dismissal counts as a strike pursuant to 29 U.S.C. 1915 (g). Plaintiff's
14 *in forma pauperis* status is revoked for appeal pursuant to 28 U.S.C. 1915
15 (A)(3).
- 16 4. The Clerk is directed to send a copy of this Order to plaintiff, and to the Hon. J.
17 Richard Creatura.

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DATED this 4th day of January, 2011.



ROBERT J. BRYAN
United States District Judge