

JUL 19 2011

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GABRIEL RALPH REYES,

Plaintiff - Appellant,

v.

JOE McGRATH, Warden; et al.,

Defendants - Appellees.

No. 10-15462

D.C. No. 4:07-cv-03932-PJH

MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Phyllis J. Hamilton, District Judge, Presiding

Submitted July 12, 2011**

Before: SCHROEDER, ALARCÓN, and LEAVY, Circuit Judges.

Gabriel Ralph Reyes, a California state prisoner, appeals pro se from the district court's judgment dismissing his 42 U.S.C. § 1983 action alleging excessive force and deliberate indifference to serious medical needs in violation of the Eighth Amendment. We have jurisdiction under 28 U.S.C. § 1291. We review de novo a

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

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

dismissal under 28 U.S.C. § 1915A. *Resnick v. Hayes*, 213 F.3d 443, 447 (9th Cir. 2000). We affirm in part, reverse in part, and remand.

The district court properly dismissed the excessive force claims arising from the use of pepper spray and another chemical agent against inmates near Reyes's cell, because Reyes failed to allege that defendants acted "maliciously and sadistically for the very purpose of causing harm." *See Clement v. Gomez*, 298 F.3d 898, 903-04 (9th Cir. 2002).

However, Reyes has stated a colorable medical deliberate indifference claim against defendants Harkins, Navarro, and Swift. Reyes sufficiently alleged in his complaint that these defendants were aware of both the potentially harmful effects of pepper spray generally and of the specific symptoms suffered by Reyes in the immediate aftermath of his exposure, and that they refused to provide Reyes with any means through which to mitigate such harmful effects. *See id.* at 904 (deliberate indifference claim may lie where prison officials "were aware of the harmful effects of the pepper spray and of the inadequacy of their ventilation methods and yet purposefully refused to provide showers, medical care, or combative instructions or to develop an adequate policy to address obvious risks"). Accordingly, we remand for further proceedings on Reyes's deliberate indifference claim against defendants Harkins, Navarro, and Swift.

Reyes's remaining contentions are unpersuasive.

The parties shall bear their own costs on appeal.

AFFIRMED in part, REVERSED in part, and REMANDED.