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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

STEVEN YOUNT, Plaintiff and Appellant, v. CITY OF SACRAMENTO et al., Defendants and Respondents.	C046869 (Super. Ct. No. 01AS04272)

APPEAL from a judgment of the Superior Court of Sacramento County, Richard K. Park, Judge. Reversed.

Brian T. Dunn for Plaintiff and Appellant.

Samuel L. Jackson, City Attorney, and Matthew D. Ruyak, Deputy City Attorney, for Defendants and Respondents.

Plaintiff Steven Yount suffered personal injuries when Sacramento Police Officer Thomas Shrum shot him in the left buttock while four officers were trying to subdue and transport him to jail following his arrest for driving under the influence

*Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of part IV of the Discussion.

of alcohol (DUI). As Yount, who was handcuffed and in leg restraints, struggled and squirmed, Officer Shrum, intending to draw and fire his Taser gun, instead pulled out and discharged his nine-millimeter pistol.

As a result of the incident, Yount pleaded no contest to violating Penal Code section 148,[1] obstructing an officer in the performance of his duties. He then brought this suit against the City of Sacramento and Officer Shrum for damages under title 42 United States Code section 1983 (hereafter federal section 1983) alleging, inter alia, that Shrum violated his civil rights by using unnecessary and grossly excessive force on him during the encounter.

By stipulation of the parties, a court trial was held on the issue of whether Yount's civil rights claim was barred as a matter of law by his section 148 plea. After hearing witnesses and reviewing the criminal file pertaining to Yount's plea, the trial court ruled that under the doctrine announced by the United States Supreme Court in *Heck v. Humphrey* (1994) 512 U.S. 477 [129 L.Ed.2d 383] (*Heck*),[2] Yount's lawsuit was barred. Judgment was entered for defendants.

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[1] Undesignated statutory references are to the Penal Code.

[2] We discuss the *Heck* doctrine in more detail in the Discussion, *post*. In a nutshell, however, the rule provides that any civil rights claim under federal section 1983 that impugns or collaterally attacks the claimant's prior criminal conviction may not be maintained unless that conviction has first been vacated. (*Heck*, *supra*, 512 U.S. at pp. 486-487 [129 L.Ed.2d at pp. 393-394].)

We shall conclude that on the record of the trial court, Yount's federal section 1983 cause of action did not necessarily imply the invalidity of his misdemeanor conviction for obstructing the officers in the course of their duties. Because the *Heck* defense does not preclude the maintenance of Yount's lawsuit, we shall reverse.

FACTUAL BACKGROUND

Alleging he was the victim of excessive force by Officer Shrum, Yount filed a multi-count complaint alleging civil rights violations under federal section 1983 as well as civil tort theories of relief. Defendants twice brought motions for summary judgment, each of which was denied.

By the time of trial, Yount had elected to proceed on two causes of action--his civil rights claim under federal section 1983 and common law battery. In pretrial proceedings, the trial court solicited briefing and argument from the parties on the issue of whether Yount's suit was foreclosed by his plea of no contest to violating section 148. After extensive trial briefs were submitted, the parties stipulated to bifurcate the proceedings and to conduct a bench trial on the applicability of the *Heck* defense.

Summary of the Evidence

The court heard from several witnesses including the officers and a security guard who took Yount into custody. Yount did not testify, but excerpts from his deposition were read, which established that he had no memory of the occurrences

that night. The testimony of percipient witnesses to the events leading up to the shooting is summarized below.

In the early morning hours of March 10, 2001, Daniel Powell, a private security guard, noticed a man near the 7-Eleven store on La Riviera Drive attempting to get in his car. The man, later identified as Yount, appeared to be under the influence of alcohol. Powell flagged down Sacramento Police Officer Samuel Davis, and pointed to a white vehicle in which Yount was attempting to drive off.

Officer Davis approached Yount and noticed that his eyes were glassy and he appeared to be inebriated. Davis asked Yount to step out of his vehicle. As Yount opened the door, he lost his balance and fell onto Davis. Yount smelled of alcohol, so Officer Davis directed him to get into the back seat of his police car. Yount walked over to Davis's car, but refused to get in the back seat. With Davis's assistance, Yount was finally placed in the back seat.

Once in the back seat, Yount's attitude changed. He began banging around in the car, screaming obscenities and directing racial slurs at Officer Davis, who is Black. Yount continued to resist for three to five minutes.

Finally, Officer Davis pulled Yount out of the patrol car, got him on the ground and, with the assistance of nearby security guards, managed to place him in handcuffs. As far as Davis was concerned, Yount was formally under arrest at this point.

Minutes later, Sacramento Police Officers Daniel Swafford and Thomas Shrum and California State University Police Officer Debra Hatfield arrived to provide backup assistance. As the officers were filling out paperwork for a DUI report, Yount again became hostile and violent in the back of the patrol car. He was kicking, screaming, yelling obscenities and banging his head against the passenger window. Officers Shrum, Swafford and Hatfield opened the door and tried to get Yount to calm down, but he was uncooperative, hostile and irrational. At one point Yount put his legs outside the patrol car, prompting Officer Swafford to apply his Taser gun, which calmed Yount temporarily and enabled the officers to get him back inside the car.

Soon, however, Yount resumed kicking, screaming and banging in the back of the patrol car. Just as Officer Davis walked toward the rear door of the car, Yount kicked the window out, causing glass to explode and shatter.

For safety reasons, the officers decided to transfer Yount to another patrol car. They tried to get him out of the car voluntarily, but he would not cooperate. Finally, Officers Davis and Hatfield forcibly extricated Yount from the back seat. As he fell out of the car, Yount landed on top of Officer Davis, injuring Davis's elbow. The officers then tried to pick Yount up and carry him to another patrol car. The task was difficult, because Yount kicked, screamed and spat on the officers.

Officer Davis rolled Yount over on the ground and put his knee into Yount's back while the other officers held him down

and applied leg restraints. Because Yount continued to resist and thrash about, Officer Shrum decided to apply his Taser. Shrum told the other officers to "hold on," that he was going "tase him." Shrum reached into his holster and drew what he thought was his Taser gun. Aiming toward the back of Yount's thigh, Shrum pulled the trigger and heard a pop. He looked at his hand and realized he had discharged his pistol. Shrum exclaimed "Oh god, I shot, I shot." Once they ascertained that Yount had suffered a gunshot wound, the attending officers summoned medical assistance.

The trial court took judicial notice of the entire criminal case file in *People v. Yount* (Super. Ct. Sacramento County, 2001, No. 01F02606), including the charging documents and the reporter's transcript of the hearing at which the plea was taken. That record disclosed that the People filed an amended complaint charging Yount, inter alia, with violating section 69, a felony, to wit: unlawfully attempting, by means of threats and violence, to interfere and prevent the officers from performing their duties. As a result of a plea bargain, Yount pleaded no contest to the reduced charge of violating section 148, which punishes as a misdemeanor one who "willfully resists, delays, or obstructs any . . . peace officer . . . in the discharge or attempt to discharge any duty of his or her office or employment . . . ." (§ 148, subd. (a)(1) (hereafter § 148(a)(1).) Yount stipulated, and the trial court in the

criminal court found, that there was a factual basis for the plea.

DISCUSSION

I. Procedural Posture of the Case

Although the trial court did not expressly so state, the hearing it conducted can only be construed as a bench trial on the special defense raised by the *Heck* doctrine. (*Heck*, *supra*, 512 U.S. 477 [129 L.Ed.2d 383].) "It has long been held that special defenses that abate or bar the claim of the plaintiff may be tried before other issues, for a decision in the defendant's favor may render unnecessary the effort and expense of a complete trial." (7 Witkin, Cal. Procedure (4th ed. 1997) Trial, § 164, p. 191.) This procedure is commonly used where defenses such as the statute of limitations and res judicata are interposed (*id*. at p. 192), but Code of Civil Procedure section 597 authorizes it for *any* defense not involving the merits, which, if valid, would bar the plaintiff's suit (7 Witkin, *supra*, § 164 at p. 192).

The record is clear that the trial court proceeding here did not constitute a trial on the merits, but rather an evidentiary hearing on a special defense, pursuant to Code of Civil Procedure section 597: The trial court solicited a waiver of Yount's right to jury trial *only* with respect to the *Heck* issue. It also repeatedly declared irrelevant evidence offered to prove that the force used by Officer Shrum was excessive, and several times emphasized that the question before it was not

whether excessive force was used, but whether Yount's claim was foreclosed by his plea in the criminal case.

We conclude the *Heck* issue was the only one adjudicated by the trial court. Indeed, given the limited nature of the stipulation, the court *could not* reach the underlying merits of Yount's tort claims without violating his right to a jury trial. (See *Jefferson v. County of Kern* (2002) 98 Cal.App.4th 606, 619-620; *Ceriale v. Superior Court* (1996) 48 Cal.App.4th 1629, 1635-1636.)

II. Standard of Review

The sole question before the trial court was whether Yount's federal section 1983 claim and related common law battery cause of action were foreclosed by the United States Supreme Court's holding in *Heck*. The trial court answered that question in the affirmative. There was no substantial conflict in the testimony of the witnesses to the incident. Resolution of the issue requires the application of legal principles to an undisputed set of facts, after trial of a special defense. This is a pure question of law, which we review de novo. (*Gavin W. v. YMCA of Metropolitan Los Angeles* (2003) 106 Cal.App.4th 662, 669-670.)[3]

[3] Defendants misapprehend this principle in arguing that the trial court's descriptions or characterizations of Yount's arrest must be reviewed under the deferential substantial evidence test. The trial court's sole function here was to decide whether, on a set of undisputed facts, there was no liability as a matter of law. That is a legal question, not a factual one.

III. Analysis

A . *The Heck Rule*

In *Heck,* a man convicted of voluntary manslaughter brought a federal section 1983 suit against local officials who had investigated and prosecuted him, asserting they had engaged in unlawful acts that led to his arrest and conviction. (*Heck, supra,* 512 U.S. at pp. 478-479 [129 L.Ed.2d at p. 389].)

Because the plaintiff's federal section 1983 claim impugned the validity of his criminal conviction, the high court analogized the situation to the common law tort action of malicious prosecution, which requires termination of the prior criminal proceeding in favor of the accused. This requirement avoids collateral attacks on the conviction, and avoids conflicting resolutions in different courts arising from the same facts. (*Heck, supra,* 512 U.S. at pp. 484-486 [129 L.Ed.2d at pp. 392-393].) The Supreme Court continued: "[T]he hoary principle that civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments applies to [federal section] 1983 damages actions that necessarily require the plaintiff to prove the unlawfulness of his conviction or confinement, just as it has always applied to actions for malicious prosecution." (*Id.* at p. 486 [129 L.Ed.2d at pp. 393-394].) Thus, in order to maintain a claim for damages under federal section 1983 for harm caused by actions, which, if they were unlawful, would render a conviction invalid, the plaintiff must prove the conviction has been vacated,

reversed, expunged or impugned by a grant of a writ of habeas corpus. (*Id.* at p. 489 [129 L.Ed.2d at p. 396].)

A straightforward illustration of the rule can be seen in *Nuno v. County of San Bernardino* (C.D.Cal. 1999) 58 F.Supp.2d 1127 (*Nuno*). In that case, Nuno pleaded nolo contendere to obstructing a peace officer in violation of section 148 and carrying a concealed firearm. He later filed an action under federal section 1983, claiming he was detained unreasonably, falsely accused of committing a crime, assaulted and battered. (*Nuno*, at pp. 1129-1130.)

The court ruled Nuno could not maintain his action without showing the conviction had been vacated or expunged, explaining: "[P]laintiff's allegations that he was subjected to excessive force during his arrest, if proven, would necessarily imply the invalidity of his obstruction of a peace officer conviction. Under [section 148], a necessary element of a criminal prosecution for obstruction of a peace officer is that the obstruction must have occurred while the officer was engaged in the lawful performance of his or her duties. . . . [¶] An officer cannot be engaged in the lawful performance of her duties if she is subjecting an arrestee to excessive force . . . . [¶] The Supreme Court explained in footnote 6 of the *Heck* opinion that a successful federal section 1983 action, premised on a police officer's use of excessive force during an arrest, would necessarily imply the invalidity of the plaintiff's conviction for resisting that arrest in a state

where the lawfulness of the resisted arrest was a prima facie element of the resisting-arrest offense." (*Nuno, supra,* 58 F.Supp.2d at p. 1133.)

No factual details of the arrest were recited in *Nuno*. Hence, there is no reason to doubt the district court's characterization of Nuno's federal section 1983 action as a collateral attack on his criminal conviction, impermissible under *Heck*.

B. *The Sanford Case*

In *Sanford v. Motts* (9th Cir. 2001) 258 F.3d 1117 (*Sanford*), the plaintiff Sanford was placed in handcuffs by one Officer Motts after she interfered with her boyfriend's arrest. She alleged that, while she was handcuffed, Motts punched her in the face when she made a rude comment to him. After pleading nolo contendere to a section 148 charge of interfering with an officer, Sanford filed a civil rights action based upon Motts's alleged use of excessive force. (*Id*. at pp. 1118-1119.)

The Ninth Circuit Court of Appeals held that Sanford's nolo plea was *not* barred because the plea did not conclusively resolve the question of whether Motts was acting lawfully at the time he allegedly used excessive force. The court stated: "Nothing in her testimony identifies the act of which [Sanford] was convicted as being a resistance to Motts'[s] punch. Nothing in the record identifies the punch as an arrest. Nothing in the record informs us what the factual basis was for Sanford's plea of nolo." (*Sanford, supra,* 258 F.3d at p. 1120.) The *Sanford*

court concluded: "Excessive force used after an arrest is made does not destroy the lawfulness of the arrest. Sanford's conviction required that Motts be acting lawfully in the performance of his duties 'at the time the offense against him was committed.' [Citation.] Hence, if Motts used excessive force subsequent to the time Sanford interfered with his duty, success in her federal section 1983 claim will not invalidate her conviction. *Heck* is no bar. If Motts had shot and wounded her instead of punching her while she stood handcuffed, there would be no doubt that she could sue him for violation of her civil rights. If she can prove the punch was delivered after she was arrested, she has an equally strong case." (*Ibid*.)

C. *Susag and Smith I*

In *Susag v. City of Lake Forest* (2002) 94 Cal.App.4th 1401 (*Susag*), the plaintiff Cory Susag (Cory) tried to prevent a deputy sheriff from removing, by tow truck, a car with an expired registration parked near his family's auto body shop. When the deputy ordered him out of the car, Cory cursed at him, started the car and accelerated the engine. After he ignored additional orders to get out of the car, the deputy pepper-sprayed him. Undeterred, Cory pushed the deputy and engaged in further defiance. Finally, additional officers arrived, overcame Cory's resistance and took him into custody. (*Id*. at p. 1406.)

After being convicted by a jury of a misdemeanor obstruction charge, Cory sued the sheriff's department and

several deputies for civil rights violations, alleging that the officers beat and threatened him. The defendants obtained summary judgment based on the *Heck* doctrine. (*Susag, supra,* 94 Cal.App.4th at p. 1407.)

The *Susag* court affirmed. It held that Cory's allegations of excessive force, if proven, would necessarily imply the invalidity of his "resisting arrest" conviction, since an officer using excessive force cannot lawfully make an arrest. Hence, the lawsuit was precluded by *Heck*. (*Susag, supra,* 94 Cal.App.4th at pp. 1409, 1413.) Cory contended that because "the record in his criminal case, which is not before us, does not reflect which acts formed the basis for his conviction, . . . he can pursue his [federal] section 1983 action for the officer's use of pepper spray before he was ultimately subdued and placed in the patrol car." (*Id*. at pp. 1409-1410.) The court disagreed, concluding "that any claim of excessive force based on discrete acts that occurred immediately preceding Cory's arrest is barred by the Supreme Court's holding in [*Heck*,] *supra,* 512 U.S. 477 [129 L.Ed.2d 383], since a finding in his favor would necessarily imply the invalidity of his conviction under . . . section 148, subdivision (a)." (*Id.* at p. 1410.) The court distinguished *Sanford* on the basis that the facts there indicated the officer punched the plaintiff *after* effectuating an arrest. (*Susaq*, at p. 1410.) Because his federal section 1983 claim was barred, *Susag* further held that

Cory's battery claim was equally precluded. (*Susag*, at pp. 1412-1413.)

In *Smith v. City of Hemet* (9th Cir. 2004) 356 F.3d 1138 (*Smith I*) (judg. vacated and rehg. granted en banc (2004) 371 F.3d 1045), the Ninth Circuit dismissed a federal section 1983 claim in a situation with a fact pattern similar to *Susag*'s: A police officer responding to a domestic disturbance call encountered Smith, who several times refused to obey the officers' instructions. When Smith continued his defiance, the officers came onto his front porch, pepper sprayed him and sprung a police canine, which bit him several times. (*Smith I*, at pp. 1139-1140, 1143.)

Smith pleaded guilty to a misdemeanor section 148 charge and sued the officers under federal section 1983 for violating his civil rights. (*Smith I, supra,* 356 F.3d at p. 1140.) In a two-to-one decision, the *Smith I* court held his claim was barred by the *Heck* rule. Following the logic of *Susag*, the court ruled that allowing Smith to proceed would imply that the officers were not acting lawfully in arresting him, a result incompatible with his conviction for resisting arrest. (*Smith I,* at pp. 1141-1143.) *Sanford* was again distinguished on the ground that the officer allegedly engaged in excessive force *after* the arrest had been accomplished. (*Smith I,* at p. 1143.)

D. *The Trial Court's Decision*

Yount's counsel, relying on *Sanford*, argued that his client engaged in a number of discrete acts prior to being shot by

Officer Shrum that could have been found to have impeded the officers in the performance of their duties, and that since the criminal record was silent, it *was defendants'* burden to prove that the acts of resistance on which Yount's conviction was predicated were the same acts which formed the basis for his excessive force claim. Indeed, counsel argued, the acts of obstruction that Yount admitted by virtue of his plea *must have* preceded the shooting, because (1) the shooting constituted excessive force as a matter of law; (2) an officer using excessive force cannot be acting in the performance of his duties; and (3) the People could not have charged Yount with resisting an officer who was acting outside the course of his duties.

Relying heavily on *Susag* and *Smith I,* the trial court disagreed. He viewed the entire chain of acts as part of a contiguous course of resistance by Yount to the officers' attempt to arrest him. We quote, in part, from the trial court's comments: "[T]his case is extreme. Your client's efforts to resist arrest were incredible, constant, relentless. There may have been some brief pauses, but nothing the officers did seem[ed] to work. [¶] You know, often, most of the time, I'm confident that an arrest is made technically and cleanly. And if thereafter excessive force is used, you got the *Sanford* doctrine that says, [y]ou get to go to court. [¶] . . . [¶] Arrests, as this case demonstrate[s], have to involve more than the technical, simple act of taking the suspect in custody. The

police have to get control of the suspect in making an arrest, not simply make the technical arrest. [¶] . . . [¶] But *Smith* says and I'm quoting, 'For Smith to proceed in his excessive force claim, he must allege facts that would support a finding that the police used excessive force after his arrest was effected.' [(*Smith I*, *supra*, 356 F.3d at pp. 1142-1143.)] [¶] And as I'm saying, his arrest wasn't effected in this case until they were in a position to safely transport him in another squad car downtown."

Like the court in *Susag*, the trial court here ruled that Yount's nolo plea encompassed a general admission to *all* the acts of resistance leading up to his "arrest," which did not occur until the officers had him safely under control. Accordingly, Yount could not state a federal section 1983 claim based on Officer Shrum's use of excessive force without running afoul of *Heck*.

In their respondents' brief, defendants reprise many of the themes struck by the trial court. Citing *Susag*, defendants contend that because his resistance to the officers' attempts to subdue him was continuous and relentless, "[Yount] was ultimately arrested and subdued only when [he] was shot." Under this state of affairs, they argue, Yount's criminal conviction for violating section 148 encompassed all the acts of resistance committed up until and including the "arrest."

E. *Smith II*

After the trial court entered judgment for defendants, the Ninth Circuit, sitting en banc, vacated *Smith I*, *supra*, 356 F.3d 1138 (by order at *Smith v. City of Hemet*, *supra*, 371 F.3d 1045) and issued a new decision superseding it, *Smith v. City of Hemet* (9th Cir. 2005) 394 F.3d 689 (*Smith II*) (cert. den. *sub nom. City of Hemet v. Smith* (2005) ___ U.S. ___ [162 L.Ed.2d 866]).

In *Smith II*, the en banc panel, by an eight-to-three vote, took a diametrically opposite view of the effect of Smith's section 148 plea than did the two-judge majority in *Smith I*, concluding that *Heck* was no bar to the civil rights action. (*Smith II*, *supra*, 394 F.3d at p. 693.)

In reaching its decision, the *Smith II* court first noted that Smith engaged in at least three or four acts of resistance, delay and obstruction *prior* to the time he was sprayed with pepper spray and bitten by the police dog. (*Smith II, supra,* 394 F.3d at pp. 696-697.) The court explained: "Our holding in *Sanford* was that a [federal section] 1983 action is not barred by *Heck* unless the alleged excessive force occurred *at the time* the offense under [section] 148(a)(1) was being committed. [Citation.] Thus, in this case, under *Sanford*, as long as the officers were acting lawfully *at the time* the violation of [section] 148(a)(1) took place, their alleged acts of excessive force, whether they occurred *before* or *after* Smith committed the acts to which he pled, would not invalidate his conviction." (*Smith II*, at p. 699.) Because the criminal court record of

Smith's plea to the section 148 charge was silent as to which acts of resistance or obstruction formed the basis for Smith's plea, and defendants did not demonstrate otherwise, pursuit of the federal section 1983 action did not *necessarily* invalidate his misdemeanor conviction and was therefore not barred by *Heck*. (*Smith II*, at p. 699.)

In a lengthy footnote, *Smith II* both distinguished *Susag* and disagreed with its reasoning. The court declared that *Susag* "misconstrues federal law in that it states, as the dissent emphasizes, that the burden shifted to the civil rights plaintiff to show that a favorable finding 'would not necessarily imply the invalidity of the conviction.' Federal law is to the contrary. See *Sanford*, [*supra,*] 258 F.3d at [p.] 1119 (placing the burden on the defendants to prove that plaintiff's success in her [federal section] 1983 action would necessarily imply the invalidity of her conviction). *Unless it is clear that the plaintiff's action will impugn the underlying conviction the* [*federal section*] *1983 action may proceed*. It is because of this misapplication of federal law that *Susag* reached the result it did." (*Smith II*, *supra*, 394 F.3d at p. 699, fn. 5, italics added.)[4]

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[4] *Smith II* also distinguished *Susag* on the ground that there the plaintiff's section 148 conviction was obtained through a jury verdict rather than a plea. The court reasoned that, unlike a guilty plea, the jury verdict necessarily determined the lawfulness of the officers' conduct throughout the entire course of events. (*Smith II*, *supra*, 394 F.3d at p. 699, fn. 5.) But because there is no way of knowing which discrete acts of

F. *Resolution*

The fact patterns of *Sanford, Susag*, and the *Smith* cases are virtually indistinguishable from our case and from each other. In each case, the plaintiff committed more than one act which obstructed, impeded or delayed the officers in performing their duties. In all cases, the criminal record did not disclose which act formed the factual basis of the section 148 conviction. And in every case, the civil rights plaintiff alleged that excessive force was used at some point during his or her encounter with the officers.

Why the differing results? The controversy seems to revolve around what conclusions must be drawn from the civil rights plaintiff's criminal conviction. The courts in *Susag*, *Smith I,* and the trial court here, viewed the plaintiff's criminal conviction as encompassing all of the possible acts of officer resistance, or at least placed the burden on *the plaintiff* to show that the prior criminal conviction pertained to acts separate and distinct from those which involved the officer's alleged use of excessive force.

On the other hand, the courts in *Sanford* and *Smith II* construed a silent record in defendant's favor: As long as the evidence supported an inference that the alleged use of excessive force was temporally distinct from the acts that could have formed the basis for the plea, *Heck* did not apply, since

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obstruction the jurors relied on in reaching a finding of guilt, we do not see the validity of the purported distinction.

the federal section 1983 claim did not *necessarily* impugn the outstanding criminal conviction. (See *Smith II*, *supra*, 394 F.3d at p. 699.)

To separate truth from legal fiction, it is first necessary to briefly revisit the *Heck* opinion. *Heck*, of course, did not involve a plaintiff resisting arrest or claiming to be the victim of excessive force by peace officers. The plaintiff in *Heck,* having been convicted of manslaughter, sought to recover damages from the investigators and prosecutors for, essentially, framing him. (*Heck*, *supra*, 512 U.S. at pp. 478-479 [129 L.Ed.2d at p. 389].) It was an uncomplicated case of a civil plaintiff launching a collateral attack upon the validity of his criminal conviction, a result inconsistent with principles of res judicata and the finality of judgments. (*Id*. at pp. 484-485 [129 L.Ed.2d at p. 393].)

In a footnote to *Heck*, Justice Scalia, writing for the majority, gave the following illustration, which seems to have set the tone for the current debate: "An example of . . . a [federal section] 1983 action that does not seek damages directly attributable to conviction or confinement but whose successful prosecution would necessarily imply that the plaintiff's criminal conviction was wrongful . . . would be the following: A state defendant is convicted of and sentenced for the crime of resisting arrest, *defined as intentionally preventing a peace officer from effecting a lawful arrest*. (This is a common definition of that offense. See *People v.*

Peacock [(1986)] 68 N.Y.2d 675, [676] [496 N.E.2d 683] [(*Peacock*)]; 4 C. Torcia, Wharton's Criminal Law [(14th ed. 1981)] § 593, p. 307.) He then brings a [federal section] 1983 action against the arresting officer, seeking damages for violation of his Fourth Amendment right to be free from unreasonable seizures. In order to prevail in this [federal section] 1983 action, he would have to negate an element of the offense of which he has been convicted." (*Heck*, *supra*, 512 U.S. at p. 486, fn. 6 [129 L.Ed.2d at p. 394], "*lawful*" italicized in original, other italics added.)

What is important to observe about footnote 6 of *Heck* is the language we have italicized in the above quotation. Justice Scalia's example involves a case where the state criminal statute under which the plaintiff was convicted *defined* the crime as intentionally preventing a peace officer from *making a lawful arrest*. Indeed, the New York statute cited in *Peacock* contains that very definition (see *Peacock*, *supra*, 68 N.Y.2d 675 [496 N.E.2d 683], citing N.Y. Pen. Law, § 205.30 ["A person is guilty of resisting arrest when he intentionally prevents or attempts to prevent a . . . peace officer from effecting an authorized arrest . . . "]), as do the criminal codes of other states.[5]

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[5] See, e.g., Alabama Code section 13A-10-41, subdivision (a): "A person commits the crime of resisting arrest if he intentionally prevents or attempts to prevent a peace officer from affecting a lawful arrest of himself or of another person"; Alaska Statutes section 11.56.700, subdivision (a): "A person commits the crime of resisting or interfering with arrest if,

The cases applying *Heck* to California plaintiffs who have suffered section 148 convictions have proceeded upon the unspoken assumption that the crime of which the federal section 1983 plaintiffs stood convicted was the same crime described in *Heck*'s footnote 6; i.e., "resisting arrest." (*Heck*, *supra*, 512 U.S. at p. 486, fn. 6 [129 L.Ed.2d at p. 394].) Thus, *Susag* recites that "the lawfulness *of an arrest* is an essential element of the offense of resisting or obstructing a peace officer." (*Susag*, *supra*, 94 Cal.App.4th at p. 1409, italics added.) *Sanford* permits the federal section 1983 suit to proceed based on the possibility that the use of excessive force took place *after* the "arrest." (*Sanford*, *supra*, 258 F.3d at pp. 1119-1120.) *Smith I* viewed the federal section 1983 suit as *Heck*-barred on the ground that proof of its allegations would imply that the "*arrest* was unlawful." (*Smith I*, *supra*, 356 F.3d at p. 1142, italics added.) Even *Smith II* bifurcates the officers' conduct into the "investigative" stage and "arrest" stage, allowing Smith's suit to proceed because the guilty plea may have encompassed acts which took place prior to the arrest. (*Smith II*, *supra*, 394 F.3d at pp. 697-699.) All of these cases

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knowing that a peace officer is making an arrest, with the intent of preventing the officer from making the arrest, the person resists personal arrest or interferes with the arrest of another . . . "; and Revised Code of Washington section 9A.76.040, subdivision (1): "A person is guilty of resisting arrest if he intentionally prevents or attempts to prevent a peace officer from lawfully arresting him."

are analytically flawed for one simple reason: In California, there is no crime of "resisting arrest."[6]

Section 148 bears the caption, "Resisting . . . or obstructing [a peace] officer . . . ,"[7] and, in subdivision (a)(1), provides that any person who "*willfully resists, delays, or obstructs any public officer* [*or*] *peace officer . . . in the discharge or attempt to discharge any duty* of his or her office or employment" is guilty of a misdemeanor. (Italics added.) This definition has remained essentially unchanged for more than a century. (See Code commrs., Ann. Pen. Code, § 148 & note foll. (1st ed. 1872, Haymond & Burch, Commrs.-annotators) p. 67; Historical and Statutory Notes, 47 West's Ann. Pen. Code (1999 ed.) foll. § 148, p. 319.) Nowhere in section 148 is the term "arrest" found.

"'The legal elements of a violation of section 148, subdivision (a) are as follows: (1) the defendant willfully resisted, delayed, or obstructed a peace officer, (2) when the officer was engaged in the performance of his or her duties, and

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[6] Penal Code section 834a, enacted in 1957, states, "If a person has knowledge, or by the exercise of reasonable care, should have knowledge, that he is being arrested by a peace officer, it is the duty of such person to refrain from using force or any weapon to resist such arrest." However, as the California Supreme Court stated in *People v. Curtis* (1969) 70 Cal.2d 347, the statute "was meant at most to eliminate the common law defense of resistance to unlawful arrest, and not to make such resistance a new substantive crime." (*Id.* at pp. 354-355.)

[7] See heading for section 148, 47 West's Annotated Penal Code (2005 supp.) page 60.

(3) the defendant knew or reasonably should have known that the other person was a peace officer engaged in the performance of his or her duties.'" (*In re Muhammed C.* (2002) 95 Cal.App.4th 1325, 1329.) Clearly, these elements do not require an arrest or attempted arrest.

An "arrest" is defined in section 834 as "taking a person into custody, in a case and in the manner authorized by law." While other states have enacted statutes specifically criminalizing the act of resisting arrest (see fn. 6, *ante*), California's section 148 prohibits *any* act of willful interference with an officer's duties. Thus, despite its popular nickname, section 148 is *not* the crime of "resisting arrest" or its equivalent. The crime is more accurately described as "willful obstruction" and may be violated in multifarious ways *whenever* an officer is discharging a lawful duty (cf. *People v. Ritter* (1980) 115 Cal.App.3d Supp. 1, 5-6).

Because an arrest by a peace officer is not an element of a willful obstruction conviction under section 148, it is not helpful, as other cases have done, to parse out, temporally segregate or characterize the nature of the "arrest" that the misdemeanant "resisted" for purposes of determining whether *Heck* applies.[8] The method for determining whether a civil rights

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[8] Only the dissenting judge in *Smith I* recognized the mischief and confusion caused by inaccurately describing a section 148 violation as "resisting arrest." (*Smith I*, *supra*, 356 F.3d at p. 1150 (dis. opn. of Fletcher, J.).)

claim is *Heck*-barred because of a prior section 148 conviction is far simpler than a reading of these cases would suggest.

First, the court must determine, using the substantial evidence test, what acts or omissions may have formed the factual basis for the plaintiff's obstruction conviction. Second, the court must ascertain what alleged misconduct by the officer forms the factual basis for the civil rights claim (e.g., excessive force). The final step is to consider the relationship between the plaintiff's acts of obstruction and the officer's alleged misconduct. If the civil rights violation could only have occurred while plaintiff was engaged in the same act of resistance or obstruction that formed the basis for his or her section 148 conviction, the federal section 1983 claim is barred by *Heck*. By contrast, if the evidence discloses at least one violation of section 148 independent of and discrete from the officer's alleged misconduct, *Heck* does not apply.

Thus, in the factual scenario of the *Smith* cases, if the *only* act of willful obstruction Smith committed during the encounter was to resist the efforts of the officers to subdue him on his front porch, his excessive force claim would be barred by his section 148 conviction. This is true because (1) a person cannot be convicted of willful obstruction unless the officer was acting in the lawful performance of his or her duties (*In re Joseph F.* (2000) 85 Cal.App.4th 975, 982); (2) an officer using excessive force cannot be acting in lawful performance of his duties (*People v. Olguin (*1981)

119 Cal.App.3d 39, 44; *People v. White* (1980) 101 Cal.App.3d 161, 167); and (3) an obstruction conviction necessarily implies that the officer was discharging a lawful duty at the time. Therefore, in the above hypothetical, Smith's allegation of excessive force (pepper spray, dog bites, etc.) would be inconsistent with, and impugn the validity of, his section 148 conviction.

Of course, the actual facts were different. Smith disobeyed and resisted the officers a number of times before they came on to his porch to take him into custody. Indeed, both sides agreed that *any one* of these acts violated section 148(a)(1). (*Smith II*, *supra*, 394 F.3d at p. 697.) Since the criminal record did not rule out a conviction based on any of the other acts of delay or obstruction that took place prior to the resistance, which prompted the alleged use of excessive force, the Ninth Circuit properly concluded that Smith's federal section 1983 claim was not *Heck*-barred because its successful prosecution would not *necessarily* imply or demonstrate that the section 148 conviction was invalid. (*Smith II*, at p. 698.)

Likewise, the plaintiff in *Sanford* was properly allowed to pursue her federal section 1983 claim, not because she might have been already "under arrest" at the time the officer allegedly punched her, but because there was a factual basis for her willful obstruction plea based upon conduct separate from and independent of the act of defiance which prompted the punch.

G. *Application to the Present Case*

Having settled on an appropriate test for determining whether, under *Heck*, a plaintiff's underlying section 148 conviction precludes his prospective civil rights claim, its application to Yount's case is not difficult.

Although it is true that Yount interfered with the performance of the officers' duties at the time he was shot by Officer Shrum, the record is clear that he committed several independently identifiable prior acts of resistance and obstruction during the encounter, including (1) kicking, screaming and banging in the back of Officer Davis's patrol car; (2) disobeying Davis's order to sit down; (3) resisting the attempt by the officers and security guards to handcuff him; (4) kicking the window out of the patrol car, causing glass to shatter on Officer Davis; and (5) forcibly resisting the attempts of the officers to transfer him to another patrol car, including spitting at Officer Davis.[9]

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[9] The City's assertion at oral argument that Yount pleaded to obstructing *four officers* in the performance of their duties is factually inaccurate. Yount was originally charged with obstructing four named officers by means of threats or violence (§ 69), a felony. The district attorney subsequently amended the complaint to allege felonious resistance against *two* named officers. The plea, as memorialized in open court, was to "interfering with *a peace officer*," a misdemeanor offense that the parties stipulated was "reasonably related" to the charged felony. (Italics added.) Thus, the criminal record provides no basis for an inference that Yount admitted to obstructing more than one officer.

As in *Smith II*, any one of these prior acts was sufficient to support a conviction for willful obstruction of a peace officer. Yount's conduct in squirming and struggling at the time he was shot was only the latest in a series of acts of disobedience and obstruction, *any one of which* could have formed the factual basis for his plea.

To quote *Heck*, the crucial question is whether the plaintiff's federal section 1983 suit would "*necessarily* imply the invalidity of [the] conviction or sentence." (*Heck*, *supra*, 512 U.S. at p. 487 [129 L.Ed.2d at p. 394], italics added.) If it would, the suit may not proceed. "But if the . . . court determines that the plaintiff's action, even if successful, will *not* demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed . . . ." (*Ibid*.)

Had the only act that could have formed the basis for Yount's section 148 conviction been his resistance to the officers at the time he was shot, his claim would be barred by *Heck*. The uncontradicted evidence shows, however, that Yount violated the statute a number of times before Officer Shrum pulled out his firearm. The criminal court record recites only that Yount admitted there was a "factual basis" for his plea. That record is silent as to which act or acts formed the factual basis for Yount's admission. Thus, Yount's civil rights claim

based on excessive force would not necessarily impugn his criminal plea, and *Heck* is no bar.[10]

Truong v. Orange County Sheriff's Dept. (2005) 129 Cal.App.4th 1423, published since the close of briefing in this case, does not dictate a different result. There, the plaintiff Truong was booked on a shoplifting charge and ordered to disrobe and shower. According to her complaint, she initially balked, but after being surrounded by deputies, began to remove her sweater. As she did so, the deputies pounced on her and beat her up. (*Id.* at pp. 1425-1426.) Truong pleaded guilty to one count of violating section 148, subdivision (a), which was described on the plea form as "willfully and unlawfully resist[ing] and obstruct[ing] a peace officer's lawful order . . . to disrobe and take a shower." (*Id*. at p. 1426.) The trial court dismissed Truong's civil rights complaint based on *Heck*. In affirming, the Court of Appeal, Fourth Appellate District, Division Three, correctly observed that "[t]he central question is whether Truong's civil rights claim necessarily calls into question her conviction for violating . . . section 148." (*Truong*, at p. 1427.) The court concluded that it did, stating: "A chain of events began when Truong refused the lawful order that did not end until she was

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[10] As we have stated (pp. 13-14, *ante*), *Susag* held that if a plaintiff's federal section 1983 civil rights claim is *Heck*-barred, any common law battery claim based on the same set of facts is equally precluded. (*Susag, supra,* 94 Cal.App.4th at pp. 1412-1413.) Nothing we say here should be construed as disagreement with that portion of *Susag's* holding.

disrobed. This was not a case where the acts alleged to be violations of the plaintiff's civil rights occurred hours, or even minutes, after the act which led to the plaintiff's conviction; the acts occurred mere moments later. Asserting that the crime was somehow over because the plaintiff changed her mind and started to remove her sweater is temporal hairsplitting, and would place deputies in untenable situations, where they are required to guess the mind-set of the arrestee. We agree with the trial court that Truong's refusal to obey the lawful order and the events that led to her injuries are part of an unbreakable chain of events. Therefore, the limit set forth in *Heck* applies here, and Truong's civil rights claim cannot be maintained." (*Truong*, at p. 1429.)

Although the *Truong* court*'s* "chain of events" language is unfortunately redolent of the faulty analysis used in *Smith I* and *Susag*, its disposition was correct for a different reason: The plea form that Truong signed specified that her *refusal to obey a lawful order to disrobe* was the act which formed the factual basis for her conviction, the same act of resistance which the officers responded to by the use of force. Accordingly, Truong's criminal case record conclusively demonstrated that the alleged misconduct upon which her tort action was based occurred while she was engaged in the same act of resistance or obstruction that formed the basis for her section 148 conviction. Allowing Truong to maintain a civil

rights suit would have impeached her section 148, subdivision (a) conviction, in direct violation of *Heck*.

The facts in our case are plainly distinguishable from *Truong*, because plaintiff delayed or obstructed the officers several times in many different ways over an extended period, yet the criminal record is silent as to which act or acts constituted the factual basis for the plea.

We conclude the trial court erred in giving judgment for defendants based on *Heck*. The special defense should have been disallowed and the case allowed to proceed.

IV. Other Issues

Both parties ask for relief extending above and beyond the ruling made by the trial court. Yount claims that since it is "undisputed" that Officer Shrum used "excessive and unreasonable force" by shooting him with a firearm, this court should reverse with directions to enter judgment for the plaintiff on both the federal section 1983 and common law battery claims. At the other end of the spectrum, defendants advance several arguments having nothing to do with the *Heck* defense, which are offered as alternative grounds for affirming the judgment.

All of these arguments fundamentally misapprehend the limited scope of what was decided by the trial court. As the trial court correctly recognized, the only issue before it was whether under *Heck*, Yount's excessive force claim was precluded by his prior section 148 plea. The underlying merits of Yount's lawsuit were not at issue. (See *Southern Pac. Co. v. Superior*

Court (1924) 69 Cal.App. 106, 113 [merits of the case are not a proper subject of inquiry where trial held on the special defense of plea in abatement].)

Our only task here is to determine the correctness of the trial court's ruling on the *Heck* defense. None of the collateral issues that the parties here seek to raise were litigated or adjudicated below. Consequently, none of them is cognizable on this appeal.

The net effect of our reversal is to eliminate the *Heck* defense as an issue in the case. All other issues, whether of fact or of law, remained unresolved and subject to further adjudication in the trial court.

DISPOSITION

The judgment is reversed. Plaintiff shall recover his costs on appeal. (Cal. Rules of Court, rule 27(a).) **(*CERTIFIED FOR PARTIAL PUBLICATION.*)**

BUTZ, J.

We concur:

BLEASE, Acting P. J.

MORRISON, J.