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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

CORNELL BROWN,
Plaintiff,
vs.
R. HARRIS, et al.,
Defendants.

1:12-cv-01472-LJO-GSA-PC
FINDINGS AND RECOMMENDATIONS,
RECOMMENDING THAT DEFENDANTS’
RULE 12(b)(6) MOTION TO DISMISS BE
DENIED
(Doc. 22; also resolves Doc. 39.)
OBJECTIONS, IF ANY, DUE WITHIN
THIRTY DAYS

I. BACKGROUND

Cornell Brown (“Plaintiff”) is a state prisoner proceeding pro se and in forma pauperis with this civil rights action pursuant to 42 U.S.C. § 1983. This case now proceeds on Plaintiff’s initial Complaint filed on September 10, 2012, against defendant Harris for excessive force in violation of the Eighth Amendment, and defendant Nelson for failure to protect Plaintiff in violation of the Eighth Amendment. (Doc. 1.)

On December 6, 2013, defendants Harris and Nelson (“Defendants”) filed an unenumerated Rule 12(b) motion to dismiss this action for failure to exhaust administrative remedies, and a Rule 12(b)(6) motion to dismiss for failure to state a claim on the ground that Plaintiff’s claims for relief under § 1983 are barred by Heck v. Humphrey, 512 U.S. 477 (1994) and Edwards v. Balisok, 520 U.S. 641, 648 (1997). (Doc. 22.) On January 27, 2014, Plaintiff

1 filed an opposition to the motions. (Doc. 27.) On January 29, 2014, Defendants filed a notice
2 of errata concerning the motions to dismiss. (Doc. 28.) On February 3, 2014, Defendants filed
3 a reply to Plaintiff’s opposition. (Doc. 29.) On February 14, 2014, Plaintiff filed a response to
4 Defendants’ notice of errata. (Doc. 30.) On April 30, 2014, Defendants filed a Request to
5 withdraw their exhaustion of remedies argument from the motion to dismiss, in light of the
6 Ninth Circuit’s recent opinion in Albino v. Baca, 747 F.3d 1162 (9th Cir. 2014). (Doc. 41.)
7 On May 7, 2014, Plaintiff filed an amended opposition to the motions to dismiss. (Doc. 42.)
8 On May 8, 2014, the court granted Defendants’ Request to withdraw their exhaustion of
9 remedies argument from the motion to dismiss. (Doc. 43.) On June 6, 2014, Defendants filed
10 an opposition to Plaintiff’s amended opposition. (Doc. 51.)

11 Defendants’ Rule 12(b)(6) motion to dismiss on the ground that Plaintiff’s claims for
12 relief under § 1983 are barred by Heck and Balisok is now before the court. (Doc. 22.)

13 **II. PLAINTIFF’S ALLEGATIONS**

14 Plaintiff is a state prisoner in the custody of the California Department of Corrections
15 and Rehabilitation (CDCR) at Pelican Bay State Prison in Crescent City, California. The
16 events at issue in the Complaint allegedly occurred at the California Correctional Institution
17 (CCI) in Tehachapi, California, when Plaintiff was incarcerated there. Plaintiff names as
18 defendants R. Harris and C. Nelson, Correctional Officers employed by the CDCR at CCI.

19 Plaintiff alleges that on April 12, 2012, at 0732 hours in the 4A Security Housing Unit
20 (SHU), he was escorted to the shower by Defendant Harris. Plaintiff alleges that Harris
21 “snatched him hard by the arm and stated in a low menacing voice that if you ever disrespect
22 me again, you are going to have serious problems.” (Complaint, Doc. 1 at 7:3-10.) Plaintiff
23 ignored the statement and did not speak. Plaintiff alleges that “after we both took a few more
24 steps, the Defendant intentionally stuck one of his legs in front of the Plaintiff’s legs and then
25 the Defendant slammed the Plaintiff down on the cement floor. Plaintiff was in restraints with
26 his hands handcuffed behind his back, so Plaintiff was unable to break the fall.” (Id. at 7:17-
27 24.) Plaintiff alleges that he fell face first onto the cement. Plaintiff alleges that Harris used
28 both hands to strike Plaintiff with his baton, using “power blows.” (Id. at 7:27-8:1.) Plaintiff

1 begged Harris to stop. Harris responded by punching Plaintiff in the face with a closed fist.
2 Plaintiff alleges that Defendant C/O Nelson “had a smile on his face as he stood by and
3 watched R. Harris brutally assault the Plaintiff.” (Id. at 8:5-7.)

4 Plaintiff alleges that he continued to call for help, and Defendant Harris stated that he
5 knew what would shut Plaintiff up. Plaintiff alleges that “as the Plaintiff screamed for help, the
6 Defendant stuck the nozzle part of the pepper spray in the Plaintiff’s mouth and continued to
7 spray the Plaintiff inside his mouth. This continued until the pepper spray container was
8 empty.” (Id. at 8:13-15.) Harris then dragged Plaintiff by his braided hair into the section.
9 Plaintiff alleges that at that point he vomited and then lost consciousness. Plaintiff alleges that
10 as a result, he suffered permanent damage in his right eye, blood clots in both legs, and had
11 “extensive” dental work performed. (Id. at 8:24.)

12 **III. RULE 12(b)(6) MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM**

13 A motion to dismiss pursuant to Rule 12(b)(6) operates to test the sufficiency of the
14 complaint. “A state prisoner cannot use a § 1983 action to challenge the ‘fact or duration of his
15 confinement,’ because such an action lies at the ‘core of habeas corpus.’” Simpson v. Thomas,
16 528 F.3d 685, 693 (9th Cir. 2008) (quoting Preiser v. Rodriguez, 411 U.S. 475, 489 (1973)).
17 Thus, where a § 1983 action seeking damages alleging constitutional violations that would
18 necessarily imply the invalidity of a conviction or sentence, the prisoner must first establish
19 that the underlying sentence or conviction has already been invalidated on appeal, by a habeas
20 petition, or terminated in his favor via some other similar proceeding. Heck, 512 U.S. at 438-
21 37. This “favorable termination” rule applies to prison disciplinary proceedings, if those
22 proceedings resulted in the loss of good-time or behavior credits. Balisok, 520 U.S. at 646-48
23 (holding that claim for monetary and declaratory relief challenging validity of procedures used
24 to deprive prisoner of good-time credits is not cognizable under § 1983); see also Wilkinson v.
25 Dotson, 544 U.S. 74, 81-82 (2005) (explaining that “a state prisoner’s § 1983 action is barred
26 (absent prior invalidation) no matter the relief sought (damages or equitable relief), no matter
27 the target of the prisoner’s suit (state conduct leading to conviction or internal prison
28 proceedings) if success in that action would necessarily demonstrate the invalidity of

1 confinement or its duration” (emphasis omitted)). Stated another way, a § 1983 claim is barred
2 if the “plaintiff could prevail only by negating ‘an element of the offense of which he has been
3 convicted.’” Cunningham v. Gates, 312 F.3d 1148, 1153-54 (9th Cir. 2002) (citing Heck, 512
4 U.S. at 487 n. 6). However, when the § 1983 claim does not necessarily implicate the
5 underlying disciplinary action (or criminal conviction), it may proceed. See Muhammad v.
6 Close, 540 U.S. 749, 754-55 (2004).

7 **A. Defendants’ Rule 12(b)(6) Motion**

8 Defendants argue that Plaintiff’s claims for relief are barred by Heck and Balisok,
9 because success in this lawsuit would invalidate the prison disciplinary finding of Plaintiff’s
10 guilt for resisting a peace officer and his resulting loss of credits concerning the same incident.
11 Evidence in Plaintiff’s Complaint shows that on April 26, 2012, Plaintiff was found guilty of
12 resisting a peace officer and assessed ninety days loss of behavioral/work credits, based on the
13 April 12, 2012 incident at issue in this case. (Doc. 1 at 28.) Defendants argue that if Plaintiff
14 succeeds on his theory of liability in this case – that he was the victim of an attack by defendant
15 Harris and that defendant Nelson failed to protect him -- it would imply the invalidity of the
16 disciplinary determination and loss of custody credits, and therefore Plaintiff’s claims are
17 barred in this § 1983 action.

18 **B. Plaintiff’s Opposition**

19 In Plaintiff’s amended opposition, he argues that the motion to dismiss as barred by
20 Heck and Balisok should be denied because his loss of credits, imposed as the result of a guilty
21 finding for resisting staff, was fully restored.

22 **C. Defendants’ Reply to the Amended Opposition**

23 In their reply to the amended opposition, Defendants argue that Plaintiff’s claims are
24 barred by Heck because the guilty finding against Plaintiff for resisting staff was not
25 overturned. Defendants assert that Plaintiff’s evidence shows that his credits were restored not
26 because he overturned his disciplinary conviction, but rather, because he remained disciplinary
27 free for a statutorily specified amount of time. (Doc. 42 at 8-9.) Defendants argue that under

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1 Heck, Plaintiff was required to overturn the finding of guilt and resultant loss of good-time
2 credits through a habeas proceeding, before filing this § 1983 lawsuit.

3 **D. Discussion**

4 Uncontroverted evidence in Plaintiff's Complaint shows that after a disciplinary hearing
5 conducted on April 26, 2012, Plaintiff was found guilty of resisting a peace officer in violation
6 of Cal. Code Regs., tit. 15 § 3005(a), and assessed a ninety day loss of credits. (Complaint,
7 Doc. 1 at 32-33.)

8 In several cases, the Ninth Circuit has applied Heck's favorable termination requirement
9 to consider, and sometimes preclude, excessive force claims brought pursuant to 42 U.S.C. §
10 1983. For example, in Cunningham v. Gates, the Ninth Circuit found that § 1983 excessive
11 force claims filed by a prisoner who was convicted of felony murder and resisting arrest were
12 barred by Heck because his underlying conviction required proof of an "intentional provocative
13 act" which was defined as "not in self defense." Cunningham, 312 F.3d at 1152. A finding
14 that police had used unreasonable force while effecting the plaintiff's arrest, the court held,
15 would "call into question" the validity of factual disputes which had necessarily already been
16 resolved in the criminal action against him. Id. at 1154. However, in Smith v. City of Hemet,
17 394 F.3d 689 (9th Cir. 2005), the Ninth Circuit considered whether excessive force allegations
18 of a prisoner who pled guilty to resisting arrest pursuant to Cal. Penal Code § 148(a)(1) were
19 also barred by Heck and found that "Smith's § 1983 action was not barred . . . because the
20 excessive force may have been employed against him subsequent to the time he engaged in the
21 conduct that constituted the basis for his conviction." Id. at 693. Under such circumstances,
22 the Ninth Circuit held Smith's § 1983 action "neither demonstrated nor necessarily implied the
23 invalidity of his conviction." Id.; see, e.g., Guerrero v. Gates, 442 F.3d 697, 703 (9th Cir.
24 2003) ("Heck does not bar Guerrero's § 1983 excessive force claim ... because this claim does
25 not necessarily imply the invalidity of his conviction or sentence"); see also Sanford v. Motts,
26 258 F.3d 1117, 1120 (9th Cir. 2001) ("If the officer used excessive force subsequent to the time
27 Sanford interfered with the officer's duty, success in her section 1983 claim will not invalidate
28 her conviction. Heck is no bar"); Hooper v. County of San Diego, 629 F.3d 1127, 1134 (9th

1 Cir. 2011) (holding that a conviction for resisting arrest under Cal. Penal Code § 148(a)(1) does
2 not “bar a § 1983 claim for excessive force under Heck if the conviction and the § 1983 claim
3 are based on different actions during ‘one continuous transaction’”).

4 Here, unlike the defendants in Cunningham, Defendants have not shown that Plaintiff’s
5 excessive force and failure to protect claims against them are necessarily inconsistent with his
6 adjudication of guilt for resisting a peace officer. Thus, this court cannot say that Plaintiff’s
7 excessive force claims “necessarily imply the invalidity” of his conviction for resisting a peace
8 officer. Heck, 512 U.S. at 487. The factual context in which the force was used is disputed.
9 Thus, even though Plaintiff was found guilty of willfully resisting a peace officer, Defendants,
10 if Plaintiff’s allegations are believed, nevertheless may be found liable for responding
11 “maliciously and sadistically” with the intent to cause him harm and “deliberately indifferent to
12 a substantial risk of serious harm” to Plaintiff. See Hudson v. McMillian, 503 U.S. at 1, 7
13 (1992); Simpson v. Thomas, No. 2:03-cv-0591 MCE GGH, 2009 WL 1327147 at *4 (E.D. Cal.
14 May 12, 2009) (success on the plaintiff’s Eighth Amendment excessive force claim would not
15 necessarily invalidate his battery conviction pursuant to Cal. Code Regs., tit. 15 § 3005(c)
16 because “even if Defendant acted unlawfully by using excessive force, Plaintiff could still have
17 been guilty of battery”); accord Gipbsin v. Kernan, No. CIV S-07-0157 MCE EFB P, 2011 WL
18 533701 at *5-6 (E.D. Cal. 2011); Gabalys v. Plainer, No. CIV S-09-0253-CMK, 2010 WL
19 4880637 at *7 (E.D. Cal. 2010) (“It is possible for defendants to have used excessive force and
20 for plaintiff to have attempted to assault a correctional officer. Thus, success on plaintiff’s civil
21 rights claims would not necessarily imply that the guilty finding and resulting loss of good-time
22 credits is invalid.”); Candler v. Woodford, No. C 04-5453 MMC, 2007 WL 3232435 at *7
23 (N.D. Cal. Nov. 1, 2007) (“Because defendants have not shown that a finding of their use of
24 excessive force would necessarily negate an element of the resisting a peace officer offense, the
25 Court cannot conclude that plaintiff’s claims are barred under Heck”). Therefore, the court
26 finds that Plaintiff’s claims for excessive force and failure to protect are not barred under Heck
27 and Balisok, and Defendants’ Rule 12(b)(6) motion to dismiss should be denied.

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1 **IV. CONCLUSION AND RECOMMENDATIONS**

2 Based on the foregoing, **IT IS HEREBY RECOMMENDED** that Defendants’ Rule
3 12(b)(6) motion to dismiss for failure to state a claim, filed on December 6, 2013, be DENIED.

4 These Findings and Recommendations will be submitted to the United States District
5 Court Judge assigned to this action pursuant to the provisions of 28 U.S.C. § 636 (b)(1).
6 Within **thirty (30) days** after being served with a copy of these Findings and
7 Recommendations, any party may file written objections with the Court and serve a copy on all
8 parties. Such a document should be captioned “Objections to Magistrate Judge’s Findings and
9 Recommendations.” Any reply to the objections shall be served and filed within ten (10) days
10 after service of the objections. The parties are advised that failure to file objections within the
11 specified time may waive the right to appeal the order of the District Court. Martinez v. Ylst,
12 951 F.2d 1153 (9th Cir. 1991).

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14 **IT IS SO ORDERED.**

15 Dated: **June 9, 2014**

/s/ Gary S. Austin
16 UNITED STATES MAGISTRATE JUDGE
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