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4 **UNITED STATES DISTRICT COURT**
5 **EASTERN DISTRICT OF CALIFORNIA**
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8) 1:15-cv-00283 AWI-EPG
9)
10) **ORDER ADOPTING FINDINGS AND**
11) **RECOMMENDATIONS DISMISSING**
12) **PLAINTIFF’S COMPLAINT IN PART**
13) (Doc. 9)
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BRUCE BERNA,
Plaintiff,
v.
LUKE POWELL, *et al.*,
Defendant.

15 Plaintiff Bruce Berna (“Plaintiff”) is a state prisoner proceeding pro se and in forma
16 pauperis in this civil rights action. This action proceeds on Plaintiff’s August 24, 2015, First
17 Amended Complaint against Luke Powell, Frank Navarro, Lee Cariaga, Alfredo Fuerto, and
18 Alfred Fausto (“Defendants”) alleging claims of perjury and unlawful search in violation of the
19 Fourth Amendment pursuant to 42 U.S.C. § 1983. This matter was referred to a United States
20 Magistrate Judge for initial screening pursuant to 28 U.S.C. § 636(b)(1)(B), 28 U.S.C. §
21 1915(e)(2), and Local Rule 302.

22 On November 13, 2015, the Magistrate Judge issued Findings and Recommendations that
23 (1) Plaintiff’s claims against Defendants Cariaga, Fuerto, and Frausto be dismissed, (2)
24 Plaintiff’s perjury claim be dismissed, and (3) Plaintiff be permitted to proceed on his Fourth
25 Amendment claim for unlawful search against defendants Powell and Navarro. The Findings
26 and Recommendations were served on the parties and contained notice that any objections must
27 be filed within thirty days. Plaintiff filed objections on December 4, 2015.
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1 In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C), this Court has conducted
2 a de novo review of this case. Having carefully reviewed the entire file, including Plaintiff's
3 objections, the Court finds the Findings and Recommendations to be supported by the record and
4 by proper analysis.

5 In brief summary, Plaintiff offered no allegations indicating any wrongdoing by
6 Defendants Carriga, Fuerto, and Frausto. Instead, Plaintiff asks that those defendants not be
7 dismissed so that Plaintiff will be permitted to "question [those] three directly as defendants..."
8 Plaintiff does not state a claim against Carriga, Fuerto, or Frausto. They are dismissed from this
9 action.

10 Turning to Plaintiff's § 1983 perjury claim, as the Magistrate Judge explained, witnesses
11 are immune from § 1983 liability for their testimony. Doc. 9 at 4 (citing *Rehberg v. Paulik*, ---
12 U.S. ---, 132 S.Ct. 1497, 1505 (2012)). Plaintiff does not challenge that finding. Rather, he seeks
13 to amend his complaint to allege a claim of malicious prosecution against the officers. A
14 malicious prosecution suit is the quintessential example of a civil action that could undermine the
15 validity of a prisoner's conviction. The United States Supreme Court specifically rejected a claim
16 of malicious prosecution when the underlying condition still stood. *Heck v. Humphrey*, 512 U.S.
17 477, 484-486 (1994). The Court will not permit Plaintiff to amend his complaint to allege a
18 malicious prosecution claim because such a claim would be *Heck* barred and immediately
19 subject to dismissal. *Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1298 (9th Cir. 1998)
20 (holding that a court need not allow amendment where such amendment would be immediately
21 subject to dismissal).

22 The Magistrate Judge found that Plaintiff's § 1983 Fourth Amendment unlawful search
23 claim survived dismissal. This Court agrees. Because Plaintiff's conviction was based on a plea
24 of nolo contendere to felon in possession of a weapon it would not be impacted by a finding that
25 the search of his residence was invalid. *Lockett v. Ericson*, 656 F.3d 892, 897 (9th Cir. 2011) (
26 Because plaintiff's "conviction 'derives from his plea [of no contest] ... [t]he validity of [his]
27 conviction 'does not in any way depend on the legality' of the search..." (editing marks
28 omitted); *but see Leon v. San Jose Police Dept.*, 2013 WL 5487543 (N.D. Cal. Sept. 2013)

1 (explaining that *Lockett* is inconsistent with prior Ninth Circuit precedent where it has applied
2 the *Heck* bar to convictions based on pleas of no contest). That claim stands.¹

3 Finally, Plaintiff also seeks to amend his complaint to include injunctive relief. Plaintiff
4 indicates that he feels threatened by (apparently all) law enforcement and fears that officers may
5 plant drugs on him or find other reasons to falsely arrest him. Plaintiff has not named any police
6 department and does not have standing to sue any department without at least alleging a non-
7 hypothetical and non-speculative, immediate threat of injury. *See City of Los Angeles v. Lyons*,
8 461 U.S. 95, 106 (1983). Plaintiff has not articulated a basis for the Court to permit him to
9 amend his complaint to seek injunctive relief. Plaintiff is not precluded from filing a motion to
10 amend, laying out the basis for his standing to sue a police department.

11 Based on the foregoing, IT IS HEREBY ORDERED that:

- 12 1. The Findings and Recommendations, filed November 13, 2015, are adopted in
13 full;
- 14 2. Plaintiff's claim against Defendants Cariaga, Fuerto, and Frausto are
15 DISMISSED WITH PREJUDICE;
- 16 3. Plaintiff's claim against Defendant Powell and Navarro under § 1983 based on
17 alleged perjury in his criminal case is DISMISSED WITH PREJUDICE; and
- 18 4. Plaintiff's claim against Defendants Powell and Navarro under 42 U.S.C. § 1983
19 based on the alleged unlawful search of his residence on September 11, 2011, is
20 permitted to proceed.

21 IT IS SO ORDERED.

22 Dated: December 29, 2015

23 
24 SENIOR DISTRICT JUDGE

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27 _____
28 ¹ Plaintiff will not be permitted to litigate any matter in this action that would undermine his criminal conviction. Even if successful, he will not be compensated the time that he was incarcerated or for any penalty or consequence arising from his conviction.