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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

CHRISTOPHER LULL,  
  
Plaintiff,  
  
v.  
  
COUNTY OF SACRAMENTO, CORY  
STEWART, MICHAEL DOANE, and  
DOES 1 to 100,  
  
Defendants.

No. 2:17-cv-1211-TLN-EFB PS

FINDINGS AND RECOMMENDATIONS

This case was before the court on January 8, 2020, for hearing on plaintiff’s motion for reconsideration of the court’s March 30, 2018 order dismissing plaintiff’s Fourth Amendment claim without leave to amend.<sup>1</sup> Attorney Wendy Motooka appeared on behalf of defendant Stewart, and plaintiff appeared pro se. At the hearing, the parties were directed to submit supplemental briefs addressing what constitutes a violation of California Penal Code § 148(a)(1), the required elements to establish a violation, and what specific conduct by plaintiff amounted to such a violation. *See* ECF No. 55 at 1-2. The parties have since filed their supplemental briefs. ECF Nos. 56 & 57.

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<sup>1</sup> The case was also before the court on plaintiff’s motion to compel further deposition testimony from defendant Stewart. ECF No. 48. That motion was previously granted in a separate order. ECF No. 55.

1           Having considered the parties' briefs and the arguments made at the hearing, the court  
2 now recommends that plaintiff's motion for reconsideration be granted.

3 I.     Background

4           This case arises out of plaintiff's July 17, 2016 arrest, which occurred when plaintiff was  
5 loading a kayak onto a vehicle that was parked in a restricted area of a Sacramento County park.  
6 Shortly after commencing this action, plaintiff amended his complaint as a matter of course. *See*  
7 Fed. R. Civ. P. 15(a)(1). The first amended complaint alleged, among other things, that defendant  
8 Stewart violated the Fourth Amendment by arresting plaintiff without probable cause. ECF No.  
9 4. Defendant Stewart moved to dismiss that complaint pursuant to Federal Rule of Civil  
10 Procedure 12(b)(6). ECF No. 10. Stewart argued that plaintiff's Fourth Amendment claim failed  
11 because: (1) the first amended complaint's allegations establish that there was probable cause to  
12 arrest plaintiff for violation of California Penal Code § 148(a)(1); the claim is barred by *Heck v.*  
13 *Humphrey*, 512 U.S. 477, 487 (1994) and the doctrine of equitable estoppel; and Stewart is  
14 entitled to qualified immunity. ECF No. 10-1 at 10-15.

15           The court agreed that plaintiff's Fourth Amendment claim was barred by *Heck* because  
16 state court records showed he had entered a no contest plea to violating section 148(a)(1) and that  
17 his sentencing was scheduled for September 17, 2017. ECF No. 10-2 at 18-19. The court also  
18 concluded that the allegations concerning plaintiff's arrest, although limited, demonstrated that  
19 plaintiff obstructed Stewart's ability to perform his official duties, thereby establishing probable  
20 cause for plaintiff's arrest.<sup>2</sup> ECF Nos. 15 & 21. Consequently, plaintiff's Fourth Amendment  
21 claim was dismissed without leave to amend. Leave to amend was granted for other claims. *Id.*

22           Plaintiff subsequently filed a second amended complaint that included additional factual  
23 allegations surrounding his arrest. ECF No. 22. These new allegations, taken as true for purposes  
24 Rule 12(b)(6), show that while plaintiff did initially attempt to walk around Stewart, he ceased all  
25 physically evasive conduct upon Stewart physically stopping him and informing him that he was

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28           <sup>2</sup> In light of these findings, the court declined to reach Stewart's judicial estoppel  
argument.

1 being detained. At that point, when it was clear he was be detained, there was no evasive conduct  
2 whatsoever.

3 Stewart again moved to dismiss under Rule 12(b)(6). ECF No. 24. That motion was  
4 accompanied by a request for judicial notice of state court records reflecting that plaintiff's no  
5 contest plea to violating section 148(a)(1) had been withdrawn and his criminal case had been  
6 dismissed after completion of a deferred entry of judgment program.<sup>3</sup> See 24-2 at 16.

7 That motion was granted in part and denied in part. ECF Nos. 34 & 37. Despite the new  
8 allegations and evidence showing dismissal of the plaintiff's criminal case, plaintiff's Fourth  
9 Amendment claim was stricken because it had previously been dismissed without leave to amend  
10 and plaintiff did not advance an argument in support of reconsidering that prior order. ECF No.  
11 34 at 4-5. The instant motion for reconsideration now advances those arguments.

12 At the hearing, the parties agreed that plaintiff's Fourth Amendment claim is not barred by  
13 *Heck* because his criminal case was dismissed. But they continue to disagree about whether the  
14 second amended complaint's allegations demonstrate that plaintiff's actions established probable  
15 cause for violation of California Penal Code § 148(a)(1).

## 16 II. Legal Standards

17 Federal Rule of Civil Procedure 60 provides that a court may relieve a party of a final  
18 judgment or order for mistake, inadvertence, surprise, or excusable neglect. Fed. R. Civ. P.  
19 60(b)(1). "Reconsideration is appropriate if the district court (1) is presented with newly  
20 discovered evidence, (2) committed clear error or the initial decision was manifestly unjust, or (3)  
21 if there is an intervening change in controlling law." *School Dist. No. 1J v. AC and S, Inc.*, 5 F.3d  
22 1255, 1263 (9th Cir. 1993). Further, Local Rule 230(j) requires that a motion for reconsideration  
23 state, "what new or different facts or circumstances are claimed to exist which did not exist or  
24 were not shown upon such prior motion, or what other grounds exist for the motion," and "why  
25 the facts or circumstances were not shown at the time of the prior motion." E.D. Cal. L.R.  
26 230(j)(3)-(4).

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27  
28 <sup>3</sup> The state court records Stewart submitted with his earlier motion to dismiss did not  
reflect plaintiff's participation in a deferred entry of judgment program.

1 III. Discussion

2 A. California Penal Code § 148(a)(1)

3 To prevail on a § 1983 claim for false arrest a plaintiff must demonstrate that there was no  
4 probable cause to arrest him. *Cabrera v. City of Huntington Park*, 139 F.3d 374, 380 (1998).  
5 Plaintiff was allegedly arrested for violation of California Penal Code § 148(a)(1). “The legal  
6 elements of a violation of section 148, subdivision (a) are as follows: (1) the defendant willfully  
7 resisted, delayed, or obstructed a peace officer, (2) when the officer was engaged in the  
8 performance of his or her duties, and (3) the defendant knew or reasonably should have known  
9 that the other person was a peace officer engaged in the performance of his or her duties.” *In re*  
10 *Muhammed C.*, 95 Cal. App. 4th 1325, 1329 (2002) (citations omitted).

11 The court previously summarized the operative complaint’s allegations as follows:

12 The second amended complaint alleges that while plaintiff was  
13 loading a kayak onto a car, Stewart approached him and asked to talk  
14 to him. ECF No. 22 at 3, ¶ 11. Plaintiff responded by stating “no”  
15 and continuing to load the kayak on the vehicle. *Id.* Stewart  
16 subsequently asked plaintiff to provide identification, a request that  
17 plaintiff ignored. *Id.* at 4, ¶ 18. Stewart then allegedly stepped in  
18 front of plaintiff “to get [plaintiff’s] attention.” *Id.* at 4, ¶ 20.  
19 Plaintiff alleges that he tried to ignore Stewart by walking around  
20 him, *id.* at 4, ¶ 20, but Stewart placed his hands on plaintiff’s chest.  
21 *Id.* According to plaintiff, he immediately stopped and placed his  
22 hands in the air, and then asked if he was being detained. *Id.* at 4, ¶  
23 21. Stewart allegedly told plaintiff that he was being detained, and,  
24 according to plaintiff, plaintiff “immediately surrendered to Stewart  
25 and became docile.” *Id.* at 4, ¶ 21. When Stewart again asked  
26 plaintiff for identification, plaintiff continued his verbal criticism and  
27 made condescending remarks, including stating “you don’t need to  
28 know who I am.” *Id.* at 4, ¶ 22. Plaintiff then asked if he was being  
charged with an infraction, to which Stewart responded he “very well  
might be, yes.” *Id.* at 5, ¶ 24. According to the complaint, Stewart  
then placed plaintiff in handcuffs, searched his person, and placed  
him in the back of a patrol vehicle where he was detained for a period  
of approximately 45 minutes. *Id.* at 5, ¶¶ 24-27.

24 ECF No. 34 at 6-7.

25 These facts—which the court previously considered in conjunction to the second amended  
26 complaint’s First Amendment claim—“do not show that plaintiff engaged in any physical  
27 conduct that was obstructive, restrictive of restraint, or otherwise physically interfered with  
28 Stewart’s performance of his duties.” *Id.* at 7. Instead, they merely reflect that plaintiff verbally

1 criticized defendant Stewart and refused to comply with demands to produce identification. Such  
2 conduct cannot support an arrest for violation of Penal Code § 148. *See Martinelli v. City of*  
3 *Beaumont*, 820 F.2d 1491, 1494 (9th Cir. 1987) (“The court should have instructed the jury that  
4 the use of Section 148 to arrest a person for refusing to identify herself during a lawful Terry stop  
5 violates the Fourth Amendment’s proscription against unreasonable searches and seizures.”);  
6 *Mackinney v. Nielsen*, 69 F.3d 1002, 1007 (9th Cir. 1995) (“verbal challenges to the police are  
7 protected . . . verbal protests [that can]not support an arrest under § 148.”); *see also In re*  
8 *Gregory S.*, 112 Cal. App. 3d 764, 779 (1980) (“We find no authority to support the court’s legal  
9 conclusion that a person who merely refuses to identify himself or to answer questions in a  
10 context similar to that before us thereby violates Penal Code section 148 or otherwise furnishes  
11 ground for arrest.”).

12 Stewart argues, however, that the arrest for violation of § 148 was lawful because he had  
13 probable cause to believe that plaintiff committed a parking violation, which permitted him to  
14 ascertain plaintiff’s identify. ECF No. 56 at 5-7. Parking violations are not criminal offenses in  
15 California, but they are sufficient to establish reasonable suspicion for conducting an  
16 investigatory stop. *Whren v. United States*, 517 U.S. 806, 810 (1996) (holding that a traffic  
17 violation is sufficient to establish the reasonable suspicion required to perform an investigatory  
18 traffic stop); *United States v. Choudhry*, 461 F.3d 1097, 1103 (9th Cir. 2006) (under California’s  
19 civil administrative process, a parking violation—although decriminalized—is part of the “traffic  
20 laws,” the violation of which establishes reasonable suspicion for an investigatory stop); *People v.*  
21 *Hart*, 74 Cal. App. 4th 479, 488 (1999) (“An officer may detain and cite a person for violating the  
22 Vehicle Code.”). Thus, an officer having probable cause to believe that a suspect violated  
23 California’s Vehicle Code, including a parking violation, may detain the suspect and demand  
24 satisfactory identification be produced. *People v. Hart*, 74 Cal. App. 4th 479, 493 (1999)  
25 (“[S]ince the defendant does not contest the fact that her van was parked illegally, Deputy Bicker  
26 lawfully detained her. Once detained, the defendant was obligated to identify herself.”); Cal Veh.  
27 Code § 40302. But the question Stewart presents is whether the parking violation provides an  
28 alternative basis to arrest plaintiff under § 148 for his verbal criticisms and statement “you don’t

1 need to know who I am.” ECF No. 22, at 4, ¶ 22. As addressed above, an arrest under §148  
2 cannot be based on plaintiff’s simple refusal to identify himself or to answer questions and given  
3 that a parking infraction itself is not grounds for an arrest, it is counterintuitive that the two in  
4 combination, without some further obstructing act, could lawfully support a valid arrest. But in  
5 any event, plaintiff was not arrested for unlawfully parking a vehicle in a restricted area, or for  
6 any other traffic violation. Instead, he was arrested for violating Penal Code § 148(a)(1), which  
7 cannot be predicated on a refusal to produce identification or engaging in protected speech. *See*  
8 *Martinelli*, 820 F.2d at 1494; *Mackinney*, 69 F.3d at 1007.

9 B. Judicial Estoppel

10 In his initial motion seeking dismissal of the first amended complaint, Stewart argued that  
11 plaintiff’s no contest plea to the charge of violating Penal Code § 148 requires dismissal of his  
12 wrongful arrest claim under the doctrine of judicial estoppel. The court did not reach that  
13 argument but addresses it now.

14 Judicial estoppel is an equitable doctrine that may be invoked at the court’s discretion.  
15 *Rissetto v. Plumbers and Steamfitters Local 343*, 94 F.3d 597, 601-02 (9th Cir. 1996). It serves to  
16 prevent a party from prevailing on an argument in one phase of a case and then relying on a  
17 contradictory argument to prevail in another phase. *New Hampshire v. Maine*, 532 U.S. 742, 749  
18 (2001). However, courts have frequently extended the doctrine to apply to prior statements made  
19 in other judicial proceedings. *Rissetto*, 94 F.3d at 604. Factors relevant to determining whether a  
20 party should be judicially estopped from advancing a position include: 1) the party’s position is  
21 “clearly inconsistent” with its earlier position; 2) the judicial acceptance of the party’s second  
22 position would create the “perception that either the first or the second court was misled;” and 3)  
23 the party would derive an unfair advantage or impose an unfair detriment if not estopped. *New*  
24 *Hampshire*, 532 U.S. at 750.

25 Stewart contends that plaintiff’s no contest plea to violating Penal Code § 148 is  
26 inconsistent with his current position that his arrest was unlawful. Although judicial estoppel has  
27 been applied to no contest pleas, the courts to do so consistently “emphasized that a plea itself is  
28 not dispositive, and that the circumstances in which the plea was made are critical.” *Caylor v.*

1 *City of Seattle*, 2013 WL 1855739, at 8 (W.D. Wash. Apr. 30, 2013) (collecting cases). Stewart  
2 has not submitted evidence concerning the circumstances surrounding plaintiff's plea. Nor has  
3 any factual basis been identified that could support a violation of § 148. Consequently, Stewart  
4 has failed to demonstrate that plaintiff is estopped from asserting his Fourth Amendment claim.

5 Accordingly, it is RECOMMENDED that:

- 6 1. Plaintiff's request for reconsideration (ECF No. 49) be granted; and
- 7 2. Plaintiff be permitted to proceed on the second amended complaint's Fourth  
8 Amendment claim.

9 These findings and recommendations are submitted to the United States District Judge  
10 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days  
11 after being served with these findings and recommendations, any party may file written  
12 objections with the court and serve a copy on all parties. Such a document should be captioned  
13 "Objections to Magistrate Judge's Findings and Recommendations." Any response to the  
14 objections shall be served and filed within fourteen days after service of the objections. The  
15 parties are advised that failure to file objections within the specified time may waive the right to  
16 appeal the District Court's order. *Turner v. Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez*  
17 *v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

18 DATED: September 11, 2020.

19   
20 EDMUND F. BRENNAN  
21 UNITED STATES MAGISTRATE JUDGE  
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