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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

HERMAN TAMRAT,
Plaintiff,

v.

ROBERT SCHREEDER, et al.,
Defendants.

Case No. [20-cv-01323-PJH](#)

**ORDER OF DISMISSAL WITH LEAVE
TO AMEND**

Plaintiff, a state prisoner, proceeds with a pro se civil rights complaint under 42 U.S.C. § 1983. The original complaint was dismissed with leave to amend and plaintiff has filed a second amended complaint.

DISCUSSION

STANDARD OF REVIEW

Federal courts must engage in a preliminary screening of cases in which prisoners seek redress from a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). In its review the court must identify any cognizable claims, and dismiss any claims which are frivolous, malicious, fail to state a claim upon which relief may be granted, or seek monetary relief from a defendant who is immune from such relief. *Id.* at 1915A(b)(1),(2). Pro se pleadings must be liberally construed. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990).

Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." "Specific facts are not necessary; the statement need only "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests."" *Erickson v. Pardus*, 551 U.S. 89, 93 (2007)

1 (citations omitted). Although in order to state a claim a complaint “does not need detailed
2 factual allegations, . . . a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment]
3 to relief' requires more than labels and conclusions, and a formulaic recitation of the
4 elements of a cause of action will not do. . . . Factual allegations must be enough to
5 raise a right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly*, 550
6 U.S. 544, 555 (2007) (citations omitted). A complaint must proffer "enough facts to state
7 a claim to relief that is plausible on its face." *Id.* at 570. The United States Supreme
8 Court has recently explained the “plausible on its face” standard of *Twombly*: “While legal
9 conclusions can provide the framework of a complaint, they must be supported by factual
10 allegations. When there are well-pleaded factual allegations, a court should assume their
11 veracity and then determine whether they plausibly give rise to an entitlement to relief.”
12 *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

13 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential
14 elements: (1) that a right secured by the Constitution or laws of the United States was
15 violated, and (2) that the alleged deprivation was committed by a person acting under the
16 color of state law. *West v. Atkins*, 487 U.S. 42, 48 (1988).

17 **LEGAL CLAIMS**

18 Plaintiff alleges that he was illegally arrested and prosecuted, and defendants
19 used excessive force during the arrest.

20 **Legal Standards**

21 An allegation of the use of excessive force by a law enforcement officer in
22 effectuating an arrest states a valid claim under 42 U.S.C. § 1983. *See Rutherford v. City*
23 *of Berkeley*, 780 F.2d 1444, 1447 (9th Cir. 1986), *overruled on other grounds by Graham*
24 *v. Connor*, 490 U.S. 386 (1989); *see also Byrd v. Phoenix Police Dep’t*, 885 F.3d 639,
25 641-42 (9th Cir. 2018) (pro se allegations that police officers “beat the crap out of” plaintiff
26 and caused him severe injury enough to support a legally cognizable claim under §
27 1983). Excessive force claims which arise in the context of an arrest or investigatory stop
28 of a free citizen are analyzed under the Fourth Amendment reasonableness standard.

1 See *Graham v. Connor*, 490 U.S. 386, 394-95 (1989).

2 A claim of unlawful arrest is cognizable under § 1983 for violation of the Fourth
3 Amendment's prohibition against unreasonable search and seizure if the complaint
4 alleges that the arrest was without probable cause or other justification. See *Pierson v.*
5 *Ray*, 386 U.S. 547, 555-558 (1967); *Yousefian v. City of Glendale*, 779 F.3d 1010, 1014
6 n.1. (9th Cir. 2015) (absence of probable cause is essential element of § 1983 false
7 arrest claim). And a claim of unlawful detention/imprisonment is cognizable under § 1983
8 for violation of the Fourteenth Amendment's guarantee of due process if the arrest was
9 without probable cause or other justification and the defendant knew or should have
10 known that plaintiff was entitled to release. See *Baker v. McCollan*, 443 U.S. 137, 142-
11 145 (1979); *Lee v. County of Los Angeles*, 250 F.3d 668, 684-85 (9th Cir. 2001) (plaintiff
12 stated due process claim where police allegedly arrested plaintiff's son without probable
13 cause, detained him without verifying that he was the person for whom police had an
14 arrest warrant, despite his obvious mental incapacity, and detained him for one day
15 before extradition hearing, which led to his incarceration in another state for two years).
16 *But cf. Gant v. County of Los Angeles*, 772 F.3d 608, 619, 621-22 (9th Cir. 2014)
17 (because plaintiff did not inform defendants of his mistaken identity and because he
18 received a prompt hearing, his due process claim based on unlawful post-arrest detention
19 failed).

20 In order to recover damages for an allegedly unconstitutional conviction or
21 imprisonment, or for other harm caused by actions whose unlawfulness would render a
22 conviction or sentence invalid, a 42 U.S.C. § 1983 plaintiff must prove that the conviction
23 or sentence has been reversed on direct appeal, expunged by executive order, declared
24 invalid by a state tribunal authorized to make such determination, or called into question
25 by a federal court's issuance of a writ of habeas corpus. *Heck v. Humphrey*, 512 U.S.
26 477, 486-487 (1994). A claim for damages bearing that relationship to a conviction or
27 sentence that has not been so invalidated is not cognizable under § 1983. *Id.* at 487.

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1 In *Wallace v. Kato*, 549 U.S. 384, 393 (2007), the Court held that the “*Heck* rule for
2 deferred accrual is called into play only when there exists ‘a conviction or sentence that
3 has not been . . . invalidated,’ that is to say, an ‘outstanding criminal judgment.’” *Id.* at
4 391-93 (quoting *Heck*, 512 U.S. at 486-87). The *Heck* rule delays accrual only if there is
5 an existing conviction on the date the statute of limitations begins to run, which in the
6 case of wrongful arrest or wrongful imprisonment claims is when the plaintiff’s
7 confinement is no longer without legal process, but rather becomes a confinement
8 pursuant to legal process – that is, for example, when he or she is bound over by a
9 magistrate or arraigned on charges. *Id.* at 389-90. The Court stated that the contention
10 that “an action which would impugn *an anticipated future conviction* cannot be brought
11 until that conviction occurs and is set aside” goes “well beyond *Heck*” and rejected it. *Id.*
12 at 393 (italics in original). Although the Court was only considering when the statute of
13 limitations began running on a false arrest/false imprisonment claim, the discussion
14 quoted suggests that *Heck* does not apply if there is no extant conviction – for instance, if
15 plaintiff has only been arrested or charged.

16 If a plaintiff files a § 1983 false arrest claim before he or she is convicted, or files
17 any other claim related to rulings that likely will be made in a pending or anticipated
18 criminal trial, it is within the power of the district court, and accords with common practice,
19 to stay the civil action until the criminal case or the likelihood of a criminal case is ended.
20 *Id.* at 393-94. If the plaintiff is then convicted, and if the stayed civil suit would impugn
21 that conviction, *Heck* requires dismissal; otherwise, the case may proceed. *Id.* at 394.

22 Local governments are “persons” subject to liability under 42 U.S.C. § 1983 where
23 official policy or custom causes a constitutional tort, see *Monell v. Dep’t of Social Servs.*,
24 436 U.S. 658, 690 (1978); however, a city or county may not be held vicariously liable for
25 the unconstitutional acts of its employees under the theory of respondeat superior, see
26 *Board of Cty. Comm’rs. of Bryan Cty. v. Brown*, 520 U.S. 397, 403 (1997); *Monell*, 436
27 U.S. at 691. To impose municipal liability under § 1983 for a violation of constitutional
28 rights resulting from governmental inaction or omission, a plaintiff must show: “(1) that he

1 possessed a constitutional right of which he or she was deprived; (2) that the municipality
2 had a policy; (3) that this policy amounts to deliberate indifference to the plaintiff's
3 constitutional rights; and (4) that the policy is the moving force behind the constitutional
4 violation." *Oviatt By and Through Waugh v. Pearce*, 954 F.2d 1470, 1474 (9th Cir. 1992)
5 (quoting *City of Canton v. Harris*, 489 U.S. 378, 389 (1989) (internal quotation marks
6 omitted). Proof of random acts or isolated incidents of unconstitutional action by a non-
7 policymaking employee are insufficient to establish the existence of a municipal policy or
8 custom. See *Rivera v. County of Los Angeles*, 745 F.3d 384, 398 (9th Cir. 2014).

9 **Background**

10 Plaintiff states that he was in an altercation with a security guard at a shopping
11 mall that led to plaintiff being pepper sprayed by the security guard and the Santa Rosa
12 Police Department responding. He states that police officers arrived and with guns
13 drawn ordered him to get on the ground. Plaintiff did not comply, but he did place his
14 backpack on the ground to show a form of submission. Before being approached by
15 police officers, plaintiff stated that he couldn't breathe and needed help due to the pepper
16 spray.

17 Plaintiff states that defendant Police Officer Albini approached plaintiff and even
18 though plaintiff cooperated, Albini used excessive force in grabbing plaintiff's arms and
19 wrists and placing him on his stomach. Plaintiff states that Albini placed his knee with a
20 great deal of pressure on the back of plaintiff's back and back of his neck. Plaintiff was
21 then handcuffed. Defendant Police Office Rhodes placed plaintiff's legs in a twisted leg
22 lock compression that made it difficult to breathe. Plaintiff states that the excessive force
23 led to injuries and pain.

24 Plaintiff was then transported to the hospital. At the hospital, Rhodes told plaintiff
25 that the police viewed video footage from the shopping center which showed plaintiff
26 chasing the security guard with a knife and that the security guard was injured. Plaintiff
27 states that he did make an involuntary statement, but he was intimidated and is innocent.

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Discussion

Plaintiff presents many allegations in his amended complaint including several troubling allegations of excessive force. Plaintiff has presented sufficient allegations of excessive force against Albin and Rhodes. However, the amended complaint is still dismissed with leave to amend to provide more information for the court to determine if the claims may proceed at this time.

Plaintiff states that there was a criminal trial in September 2019, but it is not clear the result of the trial. Plaintiff is currently incarcerated in state prison, but it is also not clear if that is related to the underlying incident in the action. If plaintiff was convicted, then many of his claims may not proceed pursuant to *Heck* unless the conviction has been reversed or expunged. Depending on the criminal charges against plaintiff, it is possible that the excessive force claims could continue if this civil rights action would not imply that his conviction was invalid. If the criminal prosecution is continuing, then this case may be stayed.

Plaintiff was informed of the need to provide information regarding his conviction and charges, but he failed to provide this information in the amended complaint. If plaintiff files a second amended complaint, he must provide more information for the court to determine if this action can proceed. Plaintiff must describe why he is currently incarcerated and if it is for the underlying charges in this action. If he was convicted for the events in this case, he must describe the charges he was convicted of.

CONCLUSION

1. The amended complaint is **DISMISSED** with leave to amend in accordance with the standards set forth above. The second amended complaint must be filed no later than **November 16, 2020**, and must include the caption and civil case number used in this order and the words AMENDED COMPLAINT on the first page. Because an amended complaint completely replaces the original complaint, plaintiff must include in it all the claims he wishes to present. *See Ferdik v. Bonzelet*, 963 F.2d 1258, 1262 (9th Cir. 1992). He may not incorporate material from the original complaint by reference.

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Failure to file amended complaint may result in dismissal of this action.

2. It is the plaintiff's responsibility to prosecute this case. Plaintiff must keep the court informed of any change of address by filing a separate paper with the clerk headed "Notice of Change of Address," and must comply with the court's orders in a timely fashion. Failure to do so may result in the dismissal of this action for failure to prosecute pursuant to Federal Rule of Civil Procedure 41(b).

IT IS SO ORDERED.

Dated: October 13, 2020

/s/ Phyllis J. Hamilton
PHYLLIS J. HAMILTON
United States District Judge