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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Gregory D. FOLEY,
Plaintiff,
v.
Corey KALDENBACH, et al.,
Defendants.

Case No.: 15-cv-1627-CAB-AGS

**REPORT AND RECOMMENDATION
TO GRANT DEFENDANTS'
MOTION TO DISMISS (ECF No. 102)**

A prisoner convicted of resisting arrest is typically prohibited from turning around and suing the arresting officers under 42 U.S.C. § 1983 for using excessive force. *See Heck v. Humphrey*, 512 U.S. 477, 486 n. 6 (1994). Plaintiff attempts to do so here, and his suit is indeed barred by *Heck*.

BACKGROUND¹

On September 1, 2013, police arrested plaintiff Gregory Foley at his home and shot him at least once. Based on this event, Foley was later convicted of resisting an officer by threats and violence, as well as two counts of willful cruelty to his elderly parents under circumstances likely to cause great bodily injury. (ECF No. 102-2, at 5.)

¹ The Court takes judicial notice of the California Court of Appeals decision, the verdicts in Foley’s underlying criminal case, and the information and amended information in that case. *See Lee v. City of L.A.*, 250 F.3d 668, 689 (9th Cir. 2001) (“A court may take judicial notice of ‘matters of public record’ without converting a motion to dismiss into a motion for summary judgment.” (citation omitted)). The Court denies the request to take judicial notice of the investigation report and the transcript portions attached to defendants’ motion and has not considered them in making its recommendation.

1 The parties bitterly dispute what led up to the arrest and shooting. According to the
2 trial evidence, a police officer responded to a 911 call from Foley’s home and found Foley’s
3 mother in the garage, “covered in blood and her face was badly swollen.” (ECF No. 102-2,
4 at 6.) She reported that she had been “assaulted and stabbed by Foley.” (*Id.*) While the
5 officer helped her, Foley opened the door to the garage from inside the house, prompting
6 the officer to order him to come out. Foley cursed at the officer and said, “Come in and get
7 me.” (*Id.*) Then he slammed the door. (*Id.*)

8 After more officers arrived, the police used a public address system to order Foley
9 out of the house, but he did not respond. “Ultimately[,] police entered the house and
10 engaged in a prolonged struggle to subdue Foley who was armed with a knife.” (ECF No.
11 102-2, at 6.) “Foley refused to drop the knife even after he had been hit with rubber bullets.”
12 (*Id.*) In the struggle, “Foley was shot once in the shoulder and then retreated to another
13 room” where a “police dog was sent to subdue Foley who continued to fight until an officer
14 struck him in the head.” (*Id.*)

15 After his conviction, Foley brought this civil-rights action, claiming the officers used
16 excessive force and fabricated evidence against him. (ECF No. 88, at 9-10, 29.) He also
17 alleges that the officers’ employer, defendant City of Oceanside, failed to adequately train
18 or supervise them. (ECF No. 88, at 12-13.)

19 In his second amended complaint, Foley asserts that on the day of his arrest he
20 “observed his father telling officers to get out of his house.” (ECF No. 88, at 9.) Foley
21 asked the officers what they wanted, “and they stated they were there to help.” (*Id.*) But
22 rather than helping, officers opened fire, shooting Foley twice—in the stomach and in the
23 leg—and missing with a third round. (*See id.*) Foley stumbled back into his room and
24 collapsed on his bed, where he was set upon by a police canine, which “severely injured”
25 his right arm. (*Id.*) Finally, an officer came forward and punched Foley in the head,
26 fracturing his skull, and then shot Foley in the chest with his service pistol. (*Id.*)

27 Arguing that the criminal jury necessarily rejected Foley’s version of events, the
28 officers and City of Oceanside now move to dismiss the second amended complaint.

1 DISCUSSION

2 In *Heck v. Humphrey*, 512 U.S. 477 (1994), the Supreme Court made clear that
3 convicted criminals may not use civil-rights lawsuits under 42 U.S.C. § 1983 to indirectly
4 challenge their convictions. Such suits present federal courts with a simple question: Would
5 the lawsuit’s success “‘necessarily imply’ or ‘demonstrate’ the invalidity of the earlier
6 conviction or sentence”? *Smith v. City of Hemet*, 394 F.3d 689, 695 (9th Cir. 2005)
7 (en banc) (citations omitted). If so, the suit is barred, “unless the plaintiff can demonstrate
8 that the conviction or sentence has already been invalidated.” *Heck*, 512 U.S. at 487.

9 **A. Excessive-Force Claim**

10 A jury convicted Foley of resisting an executive officer by threats and violence, in
11 violation of California Penal Code § 69. (ECF No. 102-2, at 5.) That jury necessarily found,
12 as an element of this offense, that “the officer was performing his *lawful* duty.” *See*
13 *Campbell v. Jenkins*, Civil No. 14-CV-2837-WVG, 2016 WL 1600168, at *12 (S.D. Cal.
14 Apr. 21, 2016) (emphasis added). Yet to prevail on his excessive-force claim, Foley would
15 have to prove the opposite—that the officer used excessive force and was therefore
16 performing his duties *unlawfully*. This claim seems to undermine Foley’s conviction,
17 which runs afoul of *Heck*.

18 In theory, Foley might attempt to avoid this conclusion by arguing that his resisting-
19 an-officer conviction arose out of a separate phase of his law-enforcement encounter than
20 the focus of his civil-rights lawsuit. For instance, Foley might concede that he initially
21 resisted arrest, but later—after he was subdued—an officer unlawfully used excessive force
22 on him. This hypothetical argument fails for two reasons. First, Foley has not advanced it.
23 He essentially denies resisting arrest altogether. And he has never disputed that it was one
24 continuous encounter. Second, the Ninth Circuit has already foreclosed it. In *Smith v. City*
25 *of Hemet*, the en banc Court held that a “jury’s verdict necessarily determines the
26 lawfulness of the officers’ actions throughout the whole course of the defendant’s conduct,
27 and any action alleging the use of excessive force would ‘*necessarily* imply the invalidity
28

1 of his conviction.” 394 F.3d at 699 n.5; *see also Beets v. Cty. of L.A.*, 669 F.3d 1038, 1045
2 (9th Cir. 2012) (reaffirming the *Smith* analysis).²

3 Thus, Foley’s criminal jury verdict dooms his excessive-force claim.

4 **B. Evidence-Fabrication Claims**

5 Foley also claims that various defendants falsified evidence and perjured themselves
6 at his criminal trial. (*See* 2d Am. Cmpl., ECF No. 88, at 10, 15, 18, 29.) Since the jury
7 relied on this evidence and testimony in convicting Foley, those claims are also plainly
8 *Heck*-barred. *See Guerrero v. Gates*, 442 F.3d 697, 703 (9th Cir. 2006) (holding that *Heck*
9 barred claims for “[w]rongful arrest, malicious prosecution, and a conspiracy among
10 Los Angeles officials to bring false charges against Guerrero,” because these allegations
11 “could not have occurred unless he were innocent of the crimes for which he was
12 convicted.”); *Daughtery v. Wilson*, No. 08cv0408-WQH (BLM), 2010 WL 2605815, at *7
13 (S.D. Cal. Apr. 14, 2010) (holding that “Plaintiff’s claims that Defendants committed
14 perjury, falsified police reports, and fabricated evidence necessarily imply the invalidity of
15 his convictions” and are necessarily “barred by *Heck*”); *accord Warren v. Fischl*, 674
16 F. App’x 71, 73 (2d Cir. 2017) (“The very premise of Appellant’s claims is that the
17 defendants conspired to fabricate evidence and testimony against him and introduced such
18 fabricated evidence and perjury at trial. Such claims, if proved, would demonstrate the
19 invalidity of his conviction.”); *Lewis v. Miller*, 677 F.3d 324, 333 (7th Cir. 2012) (same).

21
22 ² The Court recognizes that the Ninth Circuit came to the exact opposite conclusion
23 when the conviction rested on a guilty plea, rather than a jury verdict. *See Hooper v. Cty.*
24 *of San Diego*, 629 F.3d 1127, 1134 (9th Cir. 2011) (holding that a resisting-arrest
25 conviction based on a guilty plea “does not bar a § 1983 claim for excessive force under
26 *Heck* when the conviction and the § 1983 claim are based on different actions during ‘one
27 continuous transaction’”). This peculiar distinction is not without its critics. *See, e.g.,*
28 *Wilson v. City of Long Beach*, 567 F. App’x 485, 487 (9th Cir. 2014) (Watford, J.,
dissenting) (“For reasons that remain a mystery to me, . . . the analysis is different when
the defendant’s conviction results from a jury verdict rather than a guilty plea.”).
Nonetheless, Foley was convicted by a jury, so this Court is bound by the en banc decision
in *Smith*, as reaffirmed in *Beets*.

1 **C. Municipality Claims**

2 As Foley’s municipality-based claims all arise from the same excessive-force and
3 fabrication allegations, his action against the City of Oceanside must also be dismissed.
4 *See Larin v. Cty. of Santa Barbara*, Case No. CV 15-2734-GW (SP), 2016 WL 9244021,
5 at *7 (C.D. Cal. Dec. 13, 2016) (“[P]laintiff’s *Monell* and supervisory liability claims are
6 in any event barred because under *Heck* he cannot demonstrate an underlying constitutional
7 violation.”).

8 **D. Leave to Amend**

9 Due to the complete *Heck* bar, all of Foley’s civil-rights claims should be dismissed,
10 and there is no need to reach defendants’ other arguments. Any dismissal should be without
11 leave to amend, unless Foley can show that his conviction has been invalidated. *See Larin*,
12 2016 WL 9244021, at *7 (“[B]ecause amendment would be futile in light of *Heck*, the
13 dismissal should be without leave to amend.” (citation omitted)).

14 **CONCLUSION**

15 Because Foley’s success in this § 1983 case would necessarily cast doubt on his
16 conviction, *Heck v. Humphrey* bars his lawsuit. Thus, this Court recommends that
17 defendants’ motion to dismiss be **GRANTED** and that the second amended complaint be
18 dismissed without leave to amend. But the dismissal should be without prejudice to Foley’s
19 right to bring his claims again, if his conviction is overturned or invalidated.

20 Since the entire suit is *Heck*-barred, the Court denies Foley’s request for counsel.
21 (*See* ECF No. 105, at 86-92.)

22 The parties must file any objections to this report by January 25, 2018. *See* Fed. R.
23 Civ. P. 72(b)(2). The party receiving such objections must file any response by February 8,
24 2018. *See* Fed. R. Civ. P. 72(b)(2).

25 Dated: January 8, 2018

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27 _____
28 Hon. Andrew G. Schopler
United States Magistrate Judge