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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

GREGORY KACHMAN,

Plaintiff,

v.

CHAD E. ROSS,

Defendant.

Case No. 3:17-cv-00660-MMD-WGC

ORDER

I. SUMMARY

Pro se state prisoner Plaintiff Gregory Kachman sued Defendant Washoe County Deputy Sheriff Chad E. Ross for shooting him in the spine after Defendant responded to a domestic dispute call made by Plaintiff's girlfriend, alleging Defendant used unconstitutionally excessive force. (ECF No. 1.) Defendant perhaps thought Plaintiff was trying to kill him with his truck. (ECF No. 8 at 3, 7.) Defendant has now moved to dismiss (the "Motion").¹ (ECF No. 8.) The Court will grant Defendant's Motion because Plaintiff's constitutional claim is barred by Heck v. Humphrey, 512 U.S. 477 (1994).

II. BACKGROUND

Plaintiff asserts a claim of excessive force under the Fourth and Fourteenth Amendments under 42 U.S.C. § 1983, and state law claims of assault and battery against Defendant stemming from the events briefly described above. The Court refers to its prior order in this case for a description of those events as Plaintiff alleges they took place. (ECF No. 3 at 4-5.) In that prior order, the Court found that Plaintiff's claim

¹The Court has also reviewed Plaintiff's response (ECF No. 11), and Defendant's reply (ECF No. 12), along with their corresponding exhibits.

1 did not appear to be barred by Heck or its progeny. (Id. at 5.) However, facts presented
2 to the Court since that time must change the Court's analysis.

3 Plaintiff was also criminally charged in connection with the same events giving
4 rise to this case. Specifically, Plaintiff was arrested and charged with Assault Upon An
5 Officer With The Use Of A Deadly Weapon.² (ECF No. 8-1 at 2.) Plaintiff pled guilty to
6 this charge in the corresponding state-court criminal case. (ECF No. 8-3 at 2.) The
7 relevant portion of the plea agreement he signed states that Plaintiff was trying to kill
8 Defendant by running Defendant over with his truck at the time Defendant shot Plaintiff.
9 (Id.) Further, the plea agreement states that Defendant reasonably feared immediate
10 bodily harm because Plaintiff was trying to run Defendant over with his truck. (Id.)

11 Defendant moved to dismiss this case on the grounds of qualified immunity,
12 relying heavily on Plaintiff's admissions in his plea agreement in the state court criminal
13 case that he was trying to kill Defendant with his truck. (ECF No. 8 at 4-7.) Thus, the
14 argument goes, the force that Defendant used was not excessive as a matter of law—
15 police officers can use up to deadly force when they reasonably fear immediate bodily
16 harm. (Id. at 7.) Further, Defendant argued the Court should not exercise pendant
17 jurisdiction over the state law assault and battery claims because Plaintiff's federal claim
18 should be dismissed. (Id.)

19 In his response to Defendant's Motion, Plaintiff argued—and provided evidence to
20 support his argument—that he was not trying to kill Defendant with his truck when
21 Defendant shot him, and thus that Defendant did not reasonably fear imminent bodily
22 injury. (ECF No. 11 at 3-5, 11-12, 14.) Because this argument contradicts the facts
23 Plaintiff admitted to in his guilty plea in the corresponding state-court criminal case,
24

25 ²Plaintiff was also charged with, and later pled guilty to, stalking, but that charge is
26 not directly relevant to this case. (ECF No. 8 at 3, 8-3 at 4.) In addition, the Court takes
27 judicial notice of Plaintiff's state court criminal records, which Defendant attached as
28 exhibits to its Motion. See *Lee v. City of Los Angeles*, 250 F.3d 668, 688-89 (9th Cir.
2001) (finding that a court may take judicial notice of matters of public record without
converting a 12(b)(6) motion into a summary judgment motion). For convenience, the
Court will cite to the exhibits attached to Defendant's Motion in this order.

1 Defendant then argued in his reply that Plaintiff's claims are Heck-barred. (ECF No. 12
2 at 4-5.)

3 The Court gave Plaintiff an additional fifteen days to respond to Defendant's
4 argument that his claims are Heck-barred in a surreply, and warned him that his claims
5 may be dismissed on Heck grounds, even if he failed to respond within those fifteen
6 days. (ECF No. 13.) Plaintiff did not file a surreply within those fifteen days.

7 **III. LEGAL STANDARD**

8 A court may dismiss a plaintiff's complaint for "failure to state a claim upon which
9 relief can be granted." Fed. R. Civ. P. 12(b)(6). A properly pleaded complaint must
10 provide "a short and plain statement of the claim showing that the pleader is entitled to
11 relief." Fed. R. Civ. P. 8(a)(2); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007).
12 While Rule 8 does not require detailed factual allegations, it demands more than "labels
13 and conclusions" or a "formulaic recitation of the elements of a cause of action." *Ashcroft*
14 *v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 555). "Factual allegations
15 must be enough to rise above the speculative level." *Twombly*, 550 U.S. at 555. Thus, to
16 survive a motion to dismiss, a complaint must contain sufficient factual matter to "state a
17 claim to relief that is plausible on its face." *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550
18 U.S. at 570). Pro se pleadings, however, must be liberally construed. See *Balistreri v.*
19 *Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990).

20 In *Iqbal*, the Supreme Court clarified the two-step approach district courts are to
21 apply when considering motions to dismiss. First, a district court must accept as true all
22 well-pleaded factual allegations in the complaint; however, legal conclusions are not
23 entitled to the assumption of truth. See *Iqbal*, 556 U.S. at 678. Mere recitals of the
24 elements of a cause of action, supported only by conclusory statements, do not suffice.
25 See *id.* at 678. Second, a district court must consider whether the factual allegations in
26 the complaint allege a plausible claim for relief. See *id.* at 679. A claim is facially
27 plausible when the plaintiff's complaint alleges facts that allow a court to draw a
28 reasonable inference that the defendant is liable for the alleged misconduct. See *id.* at

1 678. Where the complaint does not permit the court to infer more than the mere
2 possibility of misconduct, the complaint has “alleged—but it has not show[n]—that the
3 pleader is entitled to relief.” See *id.* at 679 (alteration in original) (internal quotation
4 marks omitted). When the claims in a complaint have not crossed the line from
5 conceivable to plausible, the complaint must be dismissed. See *Twombly*, 550 U.S. at
6 570.

7 **IV. DISCUSSION**

8 For the reasons explained below, the Court finds that Plaintiff’s constitutional
9 claim is Heck-barred. The Court will dismiss it without prejudice. Further, the Court will
10 decline to exercise supplemental jurisdiction over Plaintiff’s state law claims, and also
11 dismiss them without prejudice.

12 In *Heck*, the Supreme Court held that “in order to recover damages for [an]
13 allegedly unconstitutional conviction or imprisonment, or for other harm caused by
14 actions whose unlawfulness would render a conviction or sentence invalid, a § 1983
15 plaintiff must prove that the conviction or sentence has been reversed on direct appeal,
16 expunged by executive order, declared invalid by a state tribunal authorized to make
17 such determination, or called into question by a federal court’s issuance of a writ of
18 habeas corpus, 28 U.S.C. § 2254.” *Heck*, 512 U.S. at 486-87. “A claim for damages
19 bearing that relationship to a conviction or sentence that has not been . . . invalidated is
20 not cognizable under § 1983.” *Id.* at 487. “Thus, when a state prisoner seeks damages in
21 a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff
22 would necessarily imply the invalidity of his conviction or sentence; if it would, the
23 complaint must be dismissed unless the plaintiff can demonstrate that the conviction or
24 sentence has already been invalidated.” *Id.*

25 Heck applies to Plaintiff’s constitutional claim here. Judgment in Plaintiff’s favor
26 would necessarily imply the invalidity of his conviction and its corresponding guilty plea.
27 To win this case, Plaintiff would have to show that Defendant used unconstitutionally
28 excessive force against him. However, Plaintiff admitted in his guilty plea that he placed

1 Defendant in reasonable apprehension of immediate bodily harm when he attempted to
2 kill Defendant with his truck. (ECF Nos. 8-3 at 3, 8-2.) This is an element of the offense
3 Plaintiff pleaded guilty to. See NRS § 200.471(1)(a)(2), (2)(c). Further, applicable
4 constitutional law authorizes Defendant, a police officer, to use up to deadly force when
5 placed in reasonable apprehension of serious physical harm. See, e.g., *Brosseau v.*
6 *Haugen*, 543 U.S. 194, 197-98 (2004). Given the facts he admitted to in his plea
7 agreement, Plaintiff would accordingly have to invalidate his conviction to prevail in this
8 case, and he has not—meaning that his claims are Heck-barred. See *Heck*, 512 U.S. at
9 487; see also *Smithart v. Towery*, 79 F.3d 951, 952 (9th Cir. 1996) (stating to the extent
10 that the plaintiff sought to “invalidate his assault conviction, whether expressly or by
11 implication, we affirm the district court’s dismissal.”).

12 Having dismissed the claim over which the Court had original jurisdiction, the
13 Court declines to exercise supplemental jurisdiction over Plaintiff’s remaining state law
14 claims for assault and battery. See 28 U.S.C. § 1367(c)(3) (“The district courts may
15 decline to exercise supplemental jurisdiction over a claim under subsection (a) if . . . the
16 district court has dismissed all claims over which it has original jurisdiction.”).

17 **V. CONCLUSION**

18 The Court notes that the parties made several arguments and cited to several
19 cases not discussed above. The Court has reviewed these arguments and cases and
20 determines that they do not warrant discussion as they do not affect the outcome of
21 Defendant’s Motion.

22 It is therefore ordered that Defendant’s motion to dismiss (ECF No. 8) is granted.
23 Plaintiff’s constitutional claim is barred under Heck and is dismissed without prejudice.
24 The Court declines to exercise supplemental jurisdiction over the state law claims and
25 therefore dismisses them without prejudice.

26 The Clerk of the Court is directed to enter judgment accordingly and close this
27 case.

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DATED THIS 2nd day of November 2018.



MIRANDA M. DU
UNITED STATES DISTRICT JUDGE