

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

OCT 5 2017

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

EMANUEL L. FINCH, Sr.,

No. 15-35971

Plaintiff-Appellant,

D.C. No. 3:15-cv-05305-RBL

v.

MEMORANDUM*

DET. BRADLEY GRAHAM; DET.
CYNTHIA BROOKS,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Washington
Ronald B. Leighton, District Judge, Presiding

Submitted September 26, 2017**

Before: SILVERMAN, TALLMAN, and N.R. SMITH, Circuit Judges.

Washington state prisoner Emanuel L. Finch, Sr. appeals pro se from the district court's summary judgment in his 42 U.S.C. § 1983 action alleging various constitutional claims arising from his arrest and interrogation. We have jurisdiction under 28 U.S.C. § 1291. We review de novo. *Hooper v. County of*

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

San Diego, 629 F.3d 1127, 1129 (9th Cir. 2011). We affirm.

The district court properly granted summary judgment on Finch's action on the basis that it was barred by *Heck v. Humphrey*, 512 U.S. 477 (1994), because success on Finch's claims would necessarily imply the invalidity of Finch's conviction or sentence, and Finch failed to prove that either has been invalidated. *See* 512 U.S. at 486-87 (holding that, "in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid," a plaintiff must prove that the conviction or sentence has been invalidated).

The district court did not abuse its discretion by denying Finch's motion for an extension to conduct discovery because Finch failed to show how allowing discovery would have precluded summary judgment. *See Tatum v. City and County of San Francisco*, 441 F.3d 1090, 1100 (9th Cir. 2006) (setting forth standard of review and requiring a movant to "identify by affidavit the specific facts that further discovery would reveal, and explain why those facts would preclude summary judgment").

Finch's request to submit the case on the briefs (Docket Entry No. 17) is

granted. All other pending motions are denied.

AFFIRMED.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON
AT TACOMA

EMANUEL L. FINCH, SR.,

Plaintiff,

v.

BRADLEY GRAHAM, et al.,

Defendant.

JUDGMENT IN A CIVIL CASE

CASE NO. 15-cv-05305 RBL

Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

Decision by Court. This action came to consideration before the Court. The issues have been considered and a decision has been rendered.

THE COURT HAS ORDERED THAT: the Court adopts the Report and
Recommendation. Defendants' Motion for Summary Judgment is GRANTED IN FULL.

Dated December 3, 2015.

William M. McCool
Clerk of Court

s/Mary Trent
Deputy Clerk

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

EMANUEL L. FINCH, SR.,

Plaintiff,

V.

BRADLEY GRAHAM, et al.,

Defendants.

CASE NO. 15-cv-05305 RBL

ORDER ADOPTING REPORT AND RECOMMENDATION

The Court, having reviewed the Report and Recommendation of Magistrate Judge J. Richard Creature, objections to the Report and Recommendation, if any, and the remaining record, does hereby find and **ORDER**:

(1) The Court adopts the Report and Recommendation.

(2) Defendants' Motion for Summary Judgment is GRANTED IN FULL and the court denies plaintiff's request for an extension to complete discovery

DATED this 3rd day of December, 2015.

Ronald B. Geighen

Ronald B. Leighton
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

EMANUEL L FINCH SR,

Plaintiff,

v.

BRADLEY GRAHAM et al.,

Defendants.

CASE NO. 3:15-CV-05305-RBL-JRC

REPORT AND RECOMMENDATION

NOTED FOR: NOVEMBER 13, 2015

The District Court has referred this 42 U.S.C. § 1983 civil rights action to United States

Magistrate Judge J. Richard Creatura pursuant to 28 U.S.C. § 636(b)(1)(A) and (B), and local
Magistrate Judge Rules MJR1, MJR3 and MJR4.

Before the Court is defendants Brooks and Graham's Motion for Summary Judgment.

See Dkt. 23. Defendants argue that plaintiff's claims are time-barred and barred by *Heck* as plaintiff's conviction has not been invalidated. Dkt. 23 at 4-5. The Court concludes that plaintiff's claim is barred under *Heck* as plaintiff has not had his conviction invalidated and has failed to rebut defendants' motion for summary judgment regarding his claim that defendants failed to read plaintiff his Miranda rights and denied plaintiff access to a telephone and counsel during an arrest in 2010. Accordingly, the Court recommends granting defendants' Motion for Summary Judgment. The Court also recommends denying plaintiff's request for more time and discovery.

FACTS

2 Plaintiff is currently incarcerated at Stafford Creek Corrections Center. Dkt. 13 at 2. In
3 his complaint, plaintiff claims that on August 13, 2010, he was escorted from his home by
4 defendant Detective Brooks and non-party Detective Miller of the Tacoma Police Department.
5 Dkt. 13 at 3. Plaintiff alleges he was placed in restraints in the back of the detectives' car. *Id.*
6 Plaintiff alleges that neither defendant Brooks nor Miller read him his rights. *Id.* Plaintiff was
7 taken to the police station and placed in an interview room with defendant Brooks. *Id.* Plaintiff
8 alleges that defendant Graham entered the interview room and asked if it was okay to record the
9 conversation. *Id.* Plaintiff alleges that he declined to allow the conversation to be recorded and
10 that defendant Graham then asked if the decline could be recorded. *Id.* Plaintiff alleges that
11 defendant Brooks took notes during this time. *Id.*

12 Plaintiff alleges that defendant Graham failed to read him his Miranda rights. *Id.* Plaintiff
13 also alleges he invoked his right to an attorney but defendant Graham refused his request and
14 continued with the interrogation. *Id.* Plaintiff alleges that defendant Graham also denied plaintiff
15 access to a telephone, the telephone number of the department of assigned counsel, and to
16 anyone else that could put plaintiff in touch with an attorney. *Id.*

17 Despite these allegations, plaintiff has failed to show that these claims resulted in an
18 invalidation of the convictions in state court

STANDARD OF REVIEW

Summary judgment is appropriate if “the pleadings, the discovery and disclosure materials on file, and any affidavits, show that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). There is a genuine issue of fact for trial if the record, taken as a whole, could lead a rational trier of fact to

1 find for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *see*
2 *also T. W. Elec. Service Inc. v. Pacific Electrical Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir.
3 1987). When presented with a motion for summary judgment, the court shall review the
4 pleadings and evidence in the light most favorable to the nonmoving party. *Anderson*, 477 U.S.
5 at 255 (*citing Adickes v. S.H. Dress & Co.*, 398 U.S. 144, 158-59 (1970)). Conclusory,
6 nonspecific statements in affidavits are not sufficient; and, the court will not presume "missing
7 facts." *Lujan v. National Wildlife Federation*, 497 U.S. 871, 888-89 (1990). However, "a pro se
8 complaint will be liberally construed" *Pena v. Gardner*, 976 F.2d 469, 471 (9th Cir.
9 1992) (*citing Estelle v. Gamble*, 429 U.S. 97, 106 (1976)) (other citation omitted).

10 In order to recover pursuant to 42 U.S.C. § 1983, a plaintiff must prove that: (1) the
11 conduct complained of was committed by a person acting under color of state law and that (2)
12 the conduct deprived a person of a right, privilege, or immunity secured by the Constitution or
13 laws of the United States. *Parratt v. Taylor*, 451 U.S. 527, 535 (1981), *overruled on other*
14 *grounds*, *Daniels v. Williams*, 474 U.S. 327 (1986).

15 DISCUSSION

16 A. Challenge to Lawfulness of a Conviction – *Heck Bar*

17 Plaintiff's alleges that during his arrest in 2010, he was not given: (1) Miranda warnings,
18 (2) access to a telephone, (3) the telephone number of the department of assigned counsel, and
19 (4) access to anyone that could put plaintiff in touch with an attorney. *See* Dkt. 13 at 3. However,
20 these allegations challenge to the lawfulness of plaintiff's criminal conviction. In *Heck v.*
21 *Humphrey*, 512 U.S. 477 (1994), the United States Supreme Court held that a §1983 claim that
22 calls into question the lawfulness of a plaintiff's conviction or confinement does not accrue

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1 “unless and until the conviction or sentence is reversed, expunged, invalidated, or impugned by
2 the grant of a writ of habeas corpus.” *Id.* at 489.

3 *Heck* generally bars all claims challenging the validity of an arrest, prosecution or
4 conviction. *See Guerrero v. Gates*, 442 F.3d 697, 703 (9th Cir. 2006) (*Heck* barred plaintiff's
5 claims of wrongful arrest, malicious prosecution and conspiracy among police officers to bring
6 false charges against him); *Cabrera v. City of Huntington Park*, 159 F.3d 374, 380 (9th Cir.
7 1998) (*Heck* barred plaintiff's false arrest and imprisonment claims until conviction was
8 invalidated). It also bars claims which “necessarily imply” the invalidity of a conviction. *See*,
9 *e.g.*, *Valdez v. Rosenbaum*, 302 F.3d 1039, 1049 (9th Cir. 2002) *cert. denied*, 538 U.S. 1047
10 (2003) (prisoner's Sixth Amendment claim of denial of access to telephone to call attorney while
11 a pretrial detainee barred by *Heck* because claim would necessarily imply invalidity of
12 subsequent conviction); *Trimble v. City of Santa Rosa*, 49 F.3d 583, 584–85 (9th Cir. 1995) (per
13 curiam) (Fifth Amendment claim alleging officer's failure to read *Miranda* warnings barred by
14 *Heck*); *Ortiz v. County of Los Angeles*, 2013 WL 2371181 at *4 (C.D. Cal. May 29, 2013) (civil
15 rights claims against police officers for not giving *Miranda* warnings barred by *Heck*).

16 The evidence shows that, as a result of plaintiff's arrest in 2010, plaintiff was convicted
17 by a jury of first degree rape and first degree child molestation in 2011. Dkt. 27-1 (Plaintiff's
18 Judgment and Sentence dated June 3, 2011, Pierce County Superior Court Case No. 10-1-03475-
19 9). The Court also takes judicial notice of the fact that in 2013, plaintiff's conviction and 600–
20 month sentence was affirmed by the Washington Court of Appeals. *See State v. Finch*, 174
21 Wash. App. 1049 (2013). Courts may take judicial notice of adjudicative facts that are “not
22 subject to reasonable dispute.” Fed. R. Evid. 201(b). A fact is not subject to reasonable dispute,
23 and is thus subject to judicial notice, only where the fact is either “(1) generally known within
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1 the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by
2 resort to sources whose accuracy cannot reasonably be questioned.” Fed. R. Evid. 201(b).

3 In plaintiff’s response to defendants’ motion, plaintiff conclusively states that “this is not
4 a 1983 complaint against the defendant’s for ‘false arrest.’” Dkt. 29 at 3. Plaintiff then reiterates
5 the facts as alleged in his amended complaint. *See* Dkt. 29 at 3-7, Dkt. 13 at 3. Plaintiff does not
6 assert any facts showing that there is a genuine issue of material fact. Plaintiff does not present
7 any evidence that his conviction or sentence has been “reversed, expunged, invalidated, or
8 impugned by the grant of a writ of habeas corpus.” *See Heck*, 512 U.S. at 489. As plaintiff did
9 not provide the Court with evidence refuting defendants’ showing that plaintiff’s claims are
10 barred because he is challenging the lawfulness and validity of his arrest, no genuine issue of fact
11 remains. Accordingly, plaintiff’s claim that defendants failed to read him his Miranda rights and
12 denied him access to a telephone and counsel cannot survive defendants’ Motion for Summary
13 Judgment. The Court recommends granting defendants’ Motion for Summary Judgment.

14 Even assuming the complaint is not barred by *Heck*, the complaint fails to state a claim
15 for relief under §1983. Plaintiff alleges he was not given Miranda warnings, a telephone, or the
16 phone number for a lawyer. *See* Dkt. 13 at 3. A plaintiff may bring a §1983 action based upon
17 coerced statements taken in violation of the Fifth Amendment but only where government
18 officials use an incriminating statement to initiate or prove a criminal charge. *Stoot v. City of*
19 *Everett*, 582 F.3d 910, 925 (9th Cir. 2009); *see also Chavez v. Martinez*, 538 U.S. 760 (2003).
20 However, plaintiff’s amended complaint presents no facts showing that he actually made any
21 incriminating statements that led to a criminal prosecution, and thus, he has failed to state a claim
22 for relief under §1983.

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1 Because the Court finds that plaintiff's claims are *Heck*-barred, the Court does not also
2 address whether plaintiff's claims are also time-barred under the statute of limitations.

3 **B. Plaintiff's Request for an Extension to Complete Discovery**

4 In plaintiff's response to defendants' Motion for Summary Judgment, he asks the Court
5 for "more time and discovery." Dkt. 29 at 2. A court may deny a request for additional discovery
6 where the request is not relevant to the issues presented on the motion for summary judgment.
7 See *Self Directed Placement Corp. v. Control Data Corp.*, 908 F.2d 462, 465 (9th Cir. 1990);
8 *City of Springfield v. Washington Public Power Supply System*, 752 F.2d 1423, 1427 (9th Cir.
9 1985). The Court finds that the issues raised in defendants' motion are legal issues and discovery
10 would not affect the outcome of the analysis. Thus, the Court finds that a continuance is not
11 warranted.

12 **CONCLUSION**

13 Therefore, for the stated reasons, defendants' Motion for Summary Judgment should be
14 granted in full. The Court also recommends denying plaintiff's request for an extension to
15 complete discovery. Pursuant to 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b), the parties shall
16 have fourteen (14) days from service of this Report to file written objections. See also Fed. R.
17 Civ. P. 6. Failure to file objections will result in a waiver of those objections for purposes of *de*
18 *novo* review by the district judge. See 28 U.S.C. § 636(b)(1)(C). Accommodating the time limit
19 imposed by Fed. R. Civ. P. 72(b), the clerk is directed to set the matter for consideration on
20 **November 13, 2015**, as noted in the caption.

21 Dated this 20th day of October, 2015.

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24 J. Richard Creature
United States Magistrate Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

11 EMANUEL L FINCH SR,
12 Plaintiff,
13 v.
14 BRADLEY GRAHAM, CYNTHIA
15 BROOKS, JOE SOFIA,
Defendant

CASE NO. 3:15-CV-05305-RBL-JRC

ORDER ADOPTING REPORT AND
RECOMMENDATION

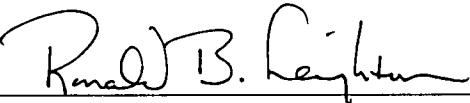
The Court, having reviewed the Report and Recommendation of Magistrate Judge J. Richard Creatura, objections to the Report and Recommendation, if any, and the remaining record, does hereby find and **ORDER:**

- (1) The Court adopts the Report and Recommendation.
- (2) Plaintiff's motion to voluntarily dismiss defendant Joe Sofia (Dkt. 15) is

GRANTED.

1 (3) This matter is re-referred to Magistrate Judge J. Richard Creatura for further
2 proceedings.

3 **DATED** this 28th day of September, 2015.
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7 Ronald B. Leighton
8 United States District Judge
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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

EMANUEL L FINCH SR,

Plaintiff,

V.

13 BRADLEY GRAHAM, CYNTHIA
BROOKS, JOE SOFIA,

Defendants.

CASE NO. 3:15-CV-05305-RBL-JRC

REPORT AND RECOMMENDATION

NOTED FOR: September 25, 2015

The District Court has referred this 42 U.S.C. § 1983 civil rights action to United States Magistrate Judge J. Richard Creatura pursuant to 28 U.S.C. § 636(b)(1)(A) and (B), and local Magistrate Judge Rules MJR1, MJR3 and MJR4.

Before the Court is plaintiff's voluntary motion to dismiss defendant C.C.O. 3 Joe Sofia (Dkt. 15). The undersigned recommends that the motion be granted.

BACKGROUND

The Court granted plaintiff *in forma pauperis* status May 11, 2015 (Dkt. 5). Plaintiff filed his complaint on the same date (Dkt. 6). After the Court's initial review of plaintiff's complaint, the Court issued an order to file an amended complaint on or before June 26, 2015

1 (Dkt. 7). The Court informed plaintiff that he had not named a defendant against whom he could
2 maintain a civil rights action (*id.*). Plaintiff filed his first amended complaint (Dkt. 8) on May 26,
3 2015 and an opening brief on June 3, 2015 (Dkt. 10). On June 29, 2015, the Court ordered that
4 plaintiff file a second amended complaint on the proper Court form that included all facts,
5 allegations and authority (Dkt. 12).

6 Plaintiff filed his second amended complaint against defendants Brooks, Graham and
7 Sofia on July 9, 2015 (Dkt. 13). On July 30, 2015, plaintiff filed a motion to voluntarily dismiss
8 defendant Sofia from this case (Dkt. 15). On August 6, 2015, defendant Sofia entered a waiver of
9 service (Dkt. 16). Defendant Sofia has not filed an answer to plaintiff's second amended
10 complaint.

11 DISCUSSION

12 Rule 41 of the Federal Rules of Civil Procedure sets forth the circumstances under which
13 an action may be dismissed. Under Rule 41(a)(1), an action may be dismissed by the plaintiff
14 without order of court:

15 (i) by filing a notice of dismissal at any time before service by the adverse party
16 of an answer or of a motion for summary judgment, whichever first occurs, or (ii)
17 by filing a stipulation of dismissal signed by all parties who have appeared in the
action.

18 Fed. R. Civ. P. 41(a)(1).

19 After service of an answer or a motion for summary judgment, dismissal by plaintiff must
20 be sought under Rule 41(a)(2), which provides, in part, that: "[e]xcept as provided in Rule
21 41(a)(1), an action may be dismissed at the plaintiff's request only by court order, on terms that
22 the court considers proper." Fed. R. Civ. P. 41(a)(2).

1 Plaintiff filed his motion to dismiss defendant Sofia prior to the filing of defendant's
2 answer. The Court recommends that plaintiff's motion to dismiss defendant Sofia (Dkt. 15) be
3 granted and that the Court dismiss this action against defendant Sofia without prejudice.

4 **WRITTEN OBJECTIONS**

5 Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil
6 Procedure, the parties shall have fourteen (14) days from service of this Report and
7 Recommendation to file written objections. See also Fed. R. Civ. P. 6. Failure to file objections
8 will result in a waiver of those objections for purposes of appeal. *Thomas v. Arn*, 474 U.S. 140
9 (1985). Accommodating the time limit imposed by Rule 72(b), the clerk is directed to set the
10 matter for consideration on **September 25, 2015**, as noted in the caption.

11 Dated this 2nd day of September, 2015.

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14 J. Richard Creatura
United States Magistrate Judge
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