Shaw v. Sacramento County Sheriff's Dep't. et al.

APPENDIX

NOT FOR PUBLICATION

FILED

JUN 23 2020

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SHEENA SHAW, Plaintiff-Appellant, v. SACRAMENTO COUNTY SHERIFF'S DEPARTMENT; et al., Defendants-Appellees.	No. 18-17184 D.C. No. 2:16-cv-00729-TLN-CKD MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
Troy L. Nunley, District Judge, Presiding

Argued and Submitted May 11, 2020
San Francisco, California

Before: R. NELSON and BRESS, Circuit Judges, and GWIN,** District Judge.

Sheena Shaw was arrested by deputies from the Sacramento County Sheriff's Department on April 5, 2014, detained overnight, and released the next day. Two years and one day after the arrest, she filed a complaint under 42 U.S.C.

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

** The Honorable James S. Gwin, United States District Judge for the Northern District of Ohio, sitting by designation.

§ 1983 against the Sheriff's Department, as well several deputies, based on the events surrounding the arrest. The district court granted a motion to dismiss the complaint as time barred, a decision we review de novo. *Gregg v. Haw., Dep't of Pub. Safety*, 870 F.3d 883, 886–87 (9th Cir. 2017). We have jurisdiction under 28 U.S.C. § 1291 and affirm in part and reverse in part.[1]

1. The district court correctly held that tolling was not available under California Code of Civil Procedure section 352.1, which tolls the statute of limitations during the time "a person" is "imprisoned on a criminal charge." Under the California Court of Appeal's decision in *Austin v. Medicis*—which we are "obligated to follow" in the absence of evidence that the California Supreme Court would rule to the contrary, *Ryman v. Sears, Roebuck & Co.*, 505 F.3d 993, 995 (9th Cir. 2007) (internal quotation marks omitted)—the phrase "imprisoned on a criminal charge" means "serving a term of imprisonment in the state prison." 230 Cal. Rptr. 3d 528, 542 (Ct. App. 2018), *review denied* (June 13, 2018). Shaw has not alleged that she was serving a term of imprisonment, nor that she was detained in a state prison. So the district court was correct to hold that her one-day detention in a county jail did not entitle her to tolling under California Code of Civil Procedure section 352.1. *Id.* at 543; *see also Bd. of Regents of Univ. of N.Y.*

[1] We deny as moot Shaw's Motion to Stay Setting Case for Oral Argument. That motion was premised upon Shaw's filing of a supplemental opening brief, which she did before oral argument.

v. Tomanio, 446 U.S. 478, 484 (1980) (explaining that "a state statute of limitations and the coordinate tolling rules" are "binding rules of law" in a § 1983 case).[2]

2. Shaw also argues she is entitled to tolling of the statute of limitations under California Government Code section 945.3, which tolls the statute of limitations in certain cases for the period during which "charges are pending before a superior court." But she did not raise this argument in her opposition to the County's motion to dismiss. Instead, she raised it for the first time in a motion for reconsideration of a magistrate judge order staying discovery pending a ruling on the motion to dismiss. The issue was therefore waived, and we decline to exercise our discretion to consider it for the first time on appeal. *See Janes v. Wal-Mart Stores Inc.*, 279 F.3d 883, 888 n.4 (9th Cir. 2002).

3. Having decided Shaw is not entitled to tolling, we now decide whether her claims are barred by the two-year statute of limitations. *Jones v. Blanas*, 393 F.3d 918, 927 (9th Cir. 2004); Cal. Code Civ. Proc. § 335.1. All but one of Shaw's claims accrued on April 5, 2014, because that was the day she knew or had "reason to know of the injury which is the basis" for her claims. *Kimes v.*

---

[2] Shaw argued in a supplemental brief that the *Medicis* decision should not be applied retroactively. We decline to consider this argument because it was not raised in Shaw's opening brief. *See Brown v. Rawson-Neal Psychiatric Hosp.*, 840 F.3d 1146, 1148–49 (9th Cir. 2016).

Stone, 84 F.3d 1121, 1128 (9th Cir. 1996) (internal quotation marks omitted). Those claims—brought in the April 6, 2016 complaint—were therefore asserted one day late and are barred by the two-year statute of limitations. Shaw's false arrest claim, however, did not accrue until "the alleged false imprisonment end[ed]" on April 6, 2014. *Wallace v. Kato*, 549 U.S. 384, 389 (2007). Thus, that claim is not barred by the two-year statute of limitations. We therefore affirm the district court's dismissal of all causes of action other than Shaw's claim for false arrest. As to that claim, we reverse and remand with instructions to consider, in the first instance, whether the false arrest claim is adequately pled or barred by Shaw's nolo contendere plea. Each party will bear its own costs.

AFFIRMED IN PART; REVERSED IN PART.

FILED

AUG 18 2020

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SHEENA SHAW, Plaintiff-Appellant, v. SACRAMENTO COUNTY SHERIFF'S DEPARTMENT; et al., Defendants-Appellees.	No. 18-17184 D.C. No. 2:16-cv-00729-TLN-CKD Eastern District of California, Sacramento ORDER

Before: R. NELSON and BRESS, Circuit Judges, and GWIN,* District Judge.

Plaintiff-Appellant filed a petition for rehearing and rehearing en banc on July 24, 2020 (Dkt. Entry 63). The panel has voted to deny the petition for rehearing. Judges R. Nelson and Bress have voted to deny the petition for rehearing en banc, and Judge Gwin so recommends.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and rehearing en banc is **DENIED**.

* The Honorable James S. Gwin, United States District Judge for the Northern District of Ohio, sitting by designation.

No. 18-17184

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SHEENA SHAW,

Plaintiff and Appellant,

v.

SACRAMENTO COUNTY SHERIFF'S DEPARTMENT ET AL.,

Defendants and Appellees.

On Appeal from the United States District Court for the Eastern District of California
Troy L. Nunley, District Judge, Presiding

Petition for Panel Rehearing and Rehearing En Banc

Jeff Dominic Price SBN 165534
2500 Broadway, Suite 125
Santa Monica, California 90404
Tel 310 451-2222

Attorney for Plaintiff-Appellant

Table of Contents

Table of Authorities

Page

Cases

Federal Statutes

Federal Rules

California Statutes

Other Authorities

Fed. R. App. P. 35 Statement

If not corrected the unpublished memorandum disposition the panel issued in this case, *Shaw v. Sacramento County Sheriff's Dept.*, 810 Fed.Appx. 553, 2020 WL 3428856 (June 23, 2020), will continue to wreak havoc on the district courts and litigants in civil rights cases in the State of California for years to come.

This court in *Elliott v. City of Union City,* 25 F.3d 800 (9th Cir. 1994), unanimously held in an opinion by Judge Reinhardt that the tolling period provided in California Code of Civil Procedure ("CCP") section 352.1 tolls the limitations period of a claim while a person is an arrestee or a pretrial detainee in county jail. *Id.* at 802 n. 4 and 803 ("[P]re-trial detainees clearly are 'imprisoned' within the meaning of the California statute . . . ."; "[T]he statute of limitations applicable to Elliott's § 1983 action was tolled commencing at the time of his arrest and continuing through his custody."). But in violation of Circuit Rule 36-2, and in conflict with *Hart v Massanari*, 266 F.3d 1155 (9th Cir. 2001), the panel cast *Elliott* aside, holding in the unpublished memorandum disposition:

> "Under the California Court of Appeal's decision in *Austin v. Medicis* – which we are 'obligated to follow' in the absence of evidence that the California Supreme Court would rule to the contrary, *Ryman v. Sears, Robuck & Co.,* 505 F.3d 993, 995 (9th Cir. 2007) (internal quotation marks omitted) – the phrase 'imprisoned on a criminal charge' means 'serving a term of imprisonment in the state prison.' 21 Cal.App.5th 577, 230 Cal. Rptr. 3d 528, 542 (2018), *rev. denied* (June 13, 2018)."

Shaw, 810 Fed.Appx. at 554. The panel did not even so much as mention *Elliott*, a precedential opinion of this court, which was cited by the Appellant in the district court and in the briefs filed in this court.

Thus, en banc review is necessary to secure or maintain uniformity of the court's decisions because the panel implicitly overruled *Elliott*, which "must be followed unless and until overruled by a body competent to do so." *Hart,* 266 F.3d at 1170; *see* Fed. R. App. P. 35(a).

En banc review is also necessary because this case involves a question of exceptional importance. Since review was denied in *Austin v. Medicis,* 21 Cal.App.5th 577 (2018), on June 13, 2018, 32 district court cases have cited Austin, resulting in a chaotic landscape of conflicting opinions. In 9 cases (including this case) the district courts have applied *Austin*, but in only two of those cases is *Elliott* mentioned. In 5 cases the district courts have declined to follow *Austin* and have instead correctly followed *Elliott.* In 13 other cases the district courts have cited *Austin* with approval in circumstances where the application of section 352.1 tolling was not dispositive. In the majority of these cases the plaintiffs are *pro se* litigants without counsel.

Finally, the panel's decision is exceptionally inequitable. *Austin* did not even exist when Plaintiff-Appellant Sheena Shaw ("Appellant") was arrested or when she filed her complaint. In fact, *Austin* did not even exist when the Defendants

filed the motion to dismiss. *Austin* did not exist until 9 months after the Defendants filed the motion to dismiss.

Background

Defendant Sacramento County Sheriff's Department deputies descended on and entered Sheena Shaw's home by breaking down the front door on April 5, 2014. The Defendants used excessive force in arresting her without probable cause and imprisoned her in county jail. She was released the next day, April 6, 2014.

Two years after her release, on April 6, 2016, Appellant filed a handwritten complaint against Defendants-Appellees Sacramento County Sheriff's Department and individual defendants ("Defendants") under 42 U.S.C. § 1983 in the United States District Court for the Eastern District of California. After counsel was appointed the First Amended Complaint was filed and the Defendants filed a motion to dismiss on June 23, 2017, arguing, *inter alia*, that the entire action was time-barred. Appellant filed a timely response to the motion to dismiss, asserting that the limitations period was tolled for one day under § 352.1 and *Elliott*. The Defendants filed a reply. The district court vacated the hearing, set for August 10, 2017. After Appellant commenced discovery the Defendants successfully moved to stay discovery. On October 25, 2018, more than 14 months after the hearing date on the motion to dismiss, the district court issued its Order granting the

Defendants' motion to dismiss and dismissing the case in its entirety. Appellant appealed.

On February 4, 2020, while the case was being considered for oral argument, Appellant filed a motion for leave to file a supplemental opening brief addressing the retroactivity of *Austin*. Defendants filed an opposition and Appellant filed a reply. On February 26, 2020, the court granted the motion and filed Appellant's Supplemental Opening Brief. On March 18, 2020, Defendants filed a Supplemental Answering Brief, and on March 31, 2020, Appellant filed a Supplemental Reply Brief. The case was argued and submitted on May 11, 2020. In an unpublished memorandum disposition the panel affirmed in part and reversed in part. The panel affirmed the dismissal of all causes of action other than Appellant's claim for false arrest, which "did not accrue until . . . April 6, 2014." 810 Fed.Appx. at 554.

Argument

A. The panel's unpublished memorandum disposition conflicts with *Elliott*, a precedential opinion, and violates Circuit Rule 36-2

1. *Elliott v. City of Union City* is the law in this Circuit

Elliott v. City of Union City, 25 F.3d 800 (9th Cir. 1994) is the law in this Circuit. This court held in *Elliott* that tolling is available to plaintiffs held in both county jails and state prisons because there is no practical distinction between the two forms of confinement. 25 F.3d at 803. In *Elliott*, the plaintiff was arrested, charged, and held in continuous pretrial custody in the county jail until he was

convicted and sent to prison. *Id.* at 801. Elliott filed a § 1983 action in federal district court alleging that the defendant police officers used excessive force during his arrest. *Id.* This court considered CCP section 352, the predecessor to section 352.1, and held that "actual, uninterrupted incarceration is the touchstone for assessing tolling" because, *inter alia*, "[a] person held in police custody prior to arraignment is faced with the same limitations as someone in custody after arraignment." *Id.* at 803. Therefore, this court held that the statute of limitations applicable to Elliott's § 1983 action "was tolled commencing at the time of his arrest and continuing through his custody." *Id.*

Ninth Circuit caselaw is binding authority that "must be followed unless and until overruled by a body competent to do so." *Hart*, 266 F.3d at 1170. Although *Elliott* analyzed CCP section 352, the predecessor to section 352.1, the only difference between the prior and current versions of the statute is the length of the tolling period, which does not affect *Elliott*'s reasoning. This court has made clear that "[o]nce a panel resolves an issue in a precedential opinion, the matter is deemed resolved, unless overruled by the court itself sitting en banc, or by the Supreme Court." *Hart*, 266 F.3d at 1171.

Elliott explained why "charge" refers to pretrial detention:

> Although the words "imprisoned" might appear to refer to an actual prison, this reading of the statute would make it self-contradictory, since it refers to being held "on a criminal charge," i.e., prior to conviction. It is the second phrase, "in execution under sentence of a criminal court," that covers post-

> conviction incarceration. i.e., confinement in an actual prison. *See Mitchell v. Greenough,* 100 F.2d 184, 187 (9th Cir. 1938) ("the phrase 'imprisonment on a criminal charge' refers to one who is . . . not yet convicted"), *cert. denied*, 306 U.S. 659, 83 L.Ed. 1056, 59 S.Ct. 788 (1939).

25 F.3d at 802 n. 2; *see also Wallace v. Kato,* 549 U.S. 384 (2007) (defining imprisonment beyond imprisonment in a prison).

Thus, *Elliott* is the law and en banc review is necessary to secure and maintain uniformity in the law in this Circuit.

2. The panel disrupted the uniformity of this court's decisions by violating Circuit Rule 36-2

Circuit Rule 36-1 defines opinions, memoranda and orders. Circuit Rule 36-2 states that a written, reasoned disposition "shall be designated as an OPINION if it:

(a) Establishes, alters, modifies or clarifies a rule of federal law, or

(b) Calls attention to a rule of law that appears to have been generally overlooked, or

(c) Criticizes existing law, or

(d) Involves a legal or factual issue of unique interest or substantial public importance, or

(e) Is a disposition of a case in which there is a published opinion by a lower court or administrative agency, unless the panel determines that publication is unnecessary for clarifying the panel's disposition of the case, or

(f) Is a disposition of a case following a reversal or remand by the United States Supreme Court, or

(g) Is accompanied by a separate concurring or dissenting expression, and the author of such separate expression requests publication of the disposition of the Court and the separate expression.

The panel issued the unpublished memorandum opinion in this case despite the fact that it:

- Alters and modifies a rule of federal law by failing to follow *Elliott;*
- Criticizes existing law by failing to follow *Elliott;*
- Involves a legal or factual issue of unique interest or substantial public importance because it involves the access of persons who are incarcerated in jail and who have limited ability to investigate their claims, to contact lawyers and to avail themselves of the protections afforded by 42 U.S.C. § 1983; and
- Is a disposition of a case in which there is a published opinion by a lower court.

Unable to assail the sound reasoning of *Elliott*, the panel failed to mention *Elliott* and failed to publish its disposition. But the panel failed to follow *Elliott*. A Ninth Circuit panel should not be permitted to cast aside a precedential opinion by ignoring the law and filing an unpublished memorandum disposition which is "not precedent." Circuit Rule 36-3. The panel's unpublished memorandum disposition has already been cited as support for *Austin* in a district court case, but the district court correctly followed *Elliott*. *See Ruiz v. Ahern*, No. 20-cv-01089-DMR, 2020 WL 4001465 (N.D. Cal. Jul. 15, 2020).

En banc review is necessary to secure and maintain the uniformity of this court's decisions and to put an end to attempts to undermine the law in unpublished memorandum dispositions.

B. The California Supreme Court would not adopt the reasoning of *Austin v. Medicis*, 21 Cal.App.5th 577 (2018)

There is convincing evidence that the California Supreme Court would not adopt the reasoning of *Austin v. Medicis*. That the California Supreme Court denied review of *Austin* does not in any way support *Austin*. *Trope v. Katz,* 11 Cal.4th 274, 45 Cal.Rptr.2d 241, 902 P.2d 259, 268 n. 1 (1995) (refusal to grant a hearing is "to be given *no* weight insofar as it might be deemed that we have acquiesced in the law as enunciated in a published opinion of a Court of Appeal . . . .").

1. *Austin* is not the only California appellate court decision that has addressed section 352.1

The California Supreme Court has not addressed the precise 352.1 issue presented in this case and in the numerous other cases in the district courts. Had *Elliott* not resolved the issue, Ninth Circuit precedent would require courts to follow the decisions of the intermediate appellate court of the state "unless there is convincing evidence that the highest court of the state would decide differently." *Briceno v. Scribner,* 555 F.3d 1069, 1080 (9th Cir. 2009).

Even if this court were to undertake this analysis, *Austin* is not the only

California appellate court that has addressed the issue. Another California appellate court interpreted section 352 to apply to a prisoner in a federal halfway house, which contradicts *Austin*'s conclusion that section 352.1 applies only to state prisoners. *See Bledstein v. Superior Court*, 162 Cal.App.3d 152, 169 (1984). *Bledstein* determined that "allowing tolling while prisoners are in halfway houses is apt to have only a minimal impact on the values statutes of limitations are expected to serve" because "concerns about faded memories, stale evidence, discomfited defendants . . . subside when we consider the relatively short duration of the average stay in halfway houses." *Id. Austin* does not cite *Bledstein* or reconcile it with its conclusion that the successor section 352.1 applies solely to state prisoners.

Therefore, the state appellate court authority on this question is not settled and there is no indication that the California Supreme Court would follow *Austin* instead of *Bledstein*.

2. *Austin* misconstrued the legislative history of section 352.1

Austin based its analysis on the legislative history of section 352.1, which focused on state prisoners. *See Austin,* 21 Cal.App.5th at 596-97. However, it does not follow that the legislature therefore intended section 352.1 to apply only to claims brought by individuals sentenced to state prison and not to claims brought by persons incarcerated in county jail. Section 352 was amended solely to add a

two-year cap to the tolling mechanism in order to address the large increase of civil lawsuits being filed by prison inmates. *See* Stats. 1994, ch. 1083 § 1 ("Since 1988, the number of civil lawsuits filed against the state by inmates incarcerated with the Department of Corrections has outpaced the increase in California's prison population."). The statutory amendment embodied in section 352.1 did not make any changes to the definition of individuals who were entitled to tolling. It is therefore not surprising that the legislative history of section 352.1 focused on the concern addressed by the specific statutory amendment; namely, capping of the tolling period. Thus, the legislative history notes that some of the lawsuits that had been tolled pursuant to section 352 "concern[ed] events 10 to 15 years in the past," which bill proponents argued were "very difficult to defend since witnesses and evidence may have disappeared and memories may fade." Sen. Floor Analysis, Sen. Bill No. 1445 (1993-1994 Reg. Sess.) Aug. 9, 1994. The lack of legislative comment about individuals held in county jail might well reflect the absence of prolific or old claims brought by that demographic. Therefore, the legislative history's silence on individuals held in county jails is not indicative of the intent to exclude them from the scope of 352.1.

3. *Austin* found ambiguity where none existed to impose an untenable construction on section 352.1, violating a cardinal rule of statutory construction

Austin discarded common English and "found ambiguity in the word *imprisoned*." 21 Cal.App.5th at 591 (emphasis in original). As Justice Kavanaugh recently wrote: "The problem of difficult clarity versus ambiguity determinations would not be quite as significant if the issue affected cases only on the margins. But the outcome of many cases turns on the initial – and often incoherent – dichotomy between ambiguity and clarity." B. Kavanaugh, *Fixing Statutory Interpretation,* 129 Harv. L. Rev. 2118, 2139-40 (2016). Using the magic wand of ipse dixit *Austin* contradicted the California Penal Code. Penal Code Section 415, Disturbing the peace, provides, in part: "Any of the following persons shall be punished by imprisonment in the county jail for a period of not more than 90 days, a fine of not more than four hundred dollars ($400), or both such imprisonment and fine . . . ."; *see also* Penal Code § 17 (crimes punishable, in the discretion of the court, either "by imprisonment in the state prison or imprisonment in a county jail . . . .").

Thus *Austin* interpreted "imprisoned on a criminal charge" to have the same meaning as the second clause in section 352.1, which applies to individuals who are "imprisoned . . . in execution under the sentence of a criminal court." *Austin's* interpretation is unpersuasive because it is a "cardinal rule of statutory interpretation that no provision should be construed to be entirely redundant." *Kungys v. United States,* 485 U.S. 759, 778 (1988); *see also State of South Dakota*

v. Brown, 20 Cal. 3d 765, 776-77 (1978) ("A cardinal rule of construction is that . . . a construction making some words surplusage is to be avoided.").

C. It is of exceptional importance to stop the confusion and conflict existing in the district courts in California because of *Austin*, made worse by the panel's decision

Since June 13, 2018, when review was denied by the California Supreme Court in *Austin*, 32 district court cases have cited *Austin*, and there have been 14 decisions citing to *Austin* in 2020 alone. In the majority of these cases the plaintiffs are proceeding without counsel. The result is confusion and uncertainty. The panel worsened the confusion.

In the following cases the district courts have correctly followed *Elliott* and rejected *Austin*:

1. *Ruiz v. Ahern*, No. 20-cv-01089-DMR, 2020 WL 4001465 (N.D. Cal. Jul. 15, 2020);
2. *Kakowski v. County of Sacramento*, No. 19-cv-00656 KJN P, 2020 WL 1046564 (E.D. Cal. Mar. 4, 2020);
3. *Johnson v. County of Santa Clara*, No. 18-cv-06264, 2020 WL 870933 (N.D. Cal. Feb. 21, 2020);
4. *Miller v. Najera*, No. 19-cv-01077-AWI-BAM (PC), 2020 WL 731176 (E.D. Cal. Feb. 13, 2020); and
5. *Baros v. Ramirez*, No. 17-cv-00948-R (SHK), 2019 WL 3849171 (C.D. Cal. Jun. 5, 2019).

However, in the following cases, in addition to this case, the district courts have incorrectly failed to follow the law as set forth in *Elliott* in conflict with settled Ninth Circuit law:

1. *Luckett v. Subury*, No. 20-cv-00932-MMA-JLB, 2020 WL 3402251 (S.D. Cal. Jun. 18, 2020)*;
2. *Flores-Ramirez v. Three Unknown Federal Task Force Agents*, No. 17-cv-02360-VBF (PJW), 2020 WL 3038128 (C.D. Cal. Apr. 14, 2020)*;
3. *Smith v. Aubuchon*, No. 14-cv-00775-KJM-DMC-P, 2020 WL 1531947 (E.D. Cal. Mar. 31, 2020)*;
4. *Silverman v. Gagnon*, No. 18-cv-07621 BLF (PR), 2020 WL 1505711 (N.D. Cal. Mar. 30, 2020);
5. *Sekerke v. Hoodenpyle*, No. 19-cv-00035-WQH-JLB, 2020 WL 914885 (S.D. Cal. Feb. 26, 2020);
6. *Tafoya v. City of Hanford*, No. 1:20-cv-00010-LJO-SAB, 2020 WL 353227 (E.D. Cal. Jan 21, 2020)*;
7. *Alaniz v. Enterline*, No. 18-cv-05788-HSG, 2020 WL 230893 (N.D. Cal. Jan. 15, 2020);
8. *Bell v. Mahoney*, No. 18-cv-05280-PA-KES, 2019 WL 6792793 (C.D. Cal. Aug. 29, 2019)*;
9. *Shaw v. Sacramento County Sheriff's Department*, No. 16-cv-00729-TLN-CKD, 343 F.Supp.3d 919 (E.D. Cal. Oct. 25, 2018),

In five of these rulings the district courts fail to mention *Elliott.* In 13 other cases the district courts cite to *Austin* but section 352.1 tolling is not dispositive and in only three of these cases is *Elliott* cited. The result is confusion and uncertainty. There is no consensus or any way to distinguish the facts of a case that can provide reliability to litigants on the issue of tolling under section 352.1.

En banc review of this case is necessary to provide clarity and to stop the confusion that permeates the district courts in California as a result of *Austin* and that the panel's unpublished memorandum disposition did nothing to correct.

Conclusion

The petition should be granted.

Date: July 21, 2020

Respectfully submitted,

/s/ Jeff Dominic Price

JEFF DOMINIC PRICE
Attorney for Plaintiff-Appellant

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 11. Certificate of Compliance for Petitions for Rehearing or Answers

Instructions for this form:

9th Cir. Case Number(s) 18-17184

I am the attorney or self-represented party.

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached petition for panel rehearing/petition for rehearing en banc/answer to petition is (*select one*):

◉ Prepared in a format, typeface, and type style that complies with Fed. R. App. P. 32(a)(4)-(6) and **contains the following number of words**: 3,190.

(Petitions and answers must not exceed 4,200 words)

OR

○ In compliance with Fed. R. App. P. 32(a)(4)-(6) and does not exceed 15 pages.

Signature _____ 07/24/2020

(use "s/[typed name]" to sign electronically-filed documents)

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CASE NO. 18-17184

Sheena Shaw, *Plaintiff-Appellant*,

v.

Sacramento County Sheriff's Department et al., *Defendants-Appellees*,

---

CERTIFICATE OF SERVICE OF PETITION FOR PANEL REHEARING AND REHEARING EN BANC

I, Jeff Dominic Price, a member of the Bar of this Court, hereby certify that on this 24th day of July, 2020, one copy of the Petition for Panel Rehearing and Rehearing En Banc was served via the CM/ECF system to Wendy Motooka, Rivera, Hewitt Paul, LLP, 11341 Gold Express Drive, Suite 160, Gold River, California 95670, counsel for appellees herein.

Respectfully submitted,

/s/ Jeff Dominic Price

Jeff Dominic Price
Counsel for Plaintiff-Appellant
2500 Broadway, Suite 125
Santa Monica, California 90404

NOT FOR PUBLICATION

FILED

JUN 23 2020

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SHEENA SHAW, Plaintiff-Appellant, v. SACRAMENTO COUNTY SHERIFF'S DEPARTMENT; et al., Defendants-Appellees.	No. 18-17184 D.C. No. 2:16-cv-00729-TLN-CKD MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
Troy L. Nunley, District Judge, Presiding

Argued and Submitted May 11, 2020
San Francisco, California

Before: R. NELSON and BRESS, Circuit Judges, and GWIN,** District Judge.

Sheena Shaw was arrested by deputies from the Sacramento County Sheriff's Department on April 5, 2014, detained overnight, and released the next day. Two years and one day after the arrest, she filed a complaint under 42 U.S.C.

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

** The Honorable James S. Gwin, United States District Judge for the Northern District of Ohio, sitting by designation.

§ 1983 against the Sheriff's Department, as well several deputies, based on the events surrounding the arrest. The district court granted a motion to dismiss the complaint as time barred, a decision we review de novo. *Gregg v. Haw., Dep't of Pub. Safety*, 870 F.3d 883, 886–87 (9th Cir. 2017). We have jurisdiction under 28 U.S.C. § 1291 and affirm in part and reverse in part.[1]

1. The district court correctly held that tolling was not available under California Code of Civil Procedure section 352.1, which tolls the statute of limitations during the time "a person" is "imprisoned on a criminal charge." Under the California Court of Appeal's decision in *Austin v. Medicis*—which we are "obligated to follow" in the absence of evidence that the California Supreme Court would rule to the contrary, *Ryman v. Sears, Roebuck & Co.*, 505 F.3d 993, 995 (9th Cir. 2007) (internal quotation marks omitted)—the phrase "imprisoned on a criminal charge" means "serving a term of imprisonment in the state prison." 230 Cal. Rptr. 3d 528, 542 (Ct. App. 2018), *review denied* (June 13, 2018). Shaw has not alleged that she was serving a term of imprisonment, nor that she was detained in a state prison. So the district court was correct to hold that her one-day detention in a county jail did not entitle her to tolling under California Code of Civil Procedure section 352.1. *Id.* at 543; *see also Bd. of Regents of Univ. of N.Y.*

[1] We deny as moot Shaw's Motion to Stay Setting Case for Oral Argument. That motion was premised upon Shaw's filing of a supplemental opening brief, which she did before oral argument.

v. Tomanio, 446 U.S. 478, 484 (1980) (explaining that "a state statute of limitations and the coordinate tolling rules" are "binding rules of law" in a § 1983 case).[2]

2. Shaw also argues she is entitled to tolling of the statute of limitations under California Government Code section 945.3, which tolls the statute of limitations in certain cases for the period during which "charges are pending before a superior court." But she did not raise this argument in her opposition to the County's motion to dismiss. Instead, she raised it for the first time in a motion for reconsideration of a magistrate judge order staying discovery pending a ruling on the motion to dismiss. The issue was therefore waived, and we decline to exercise our discretion to consider it for the first time on appeal. *See Janes v. Wal-Mart Stores Inc.*, 279 F.3d 883, 888 n.4 (9th Cir. 2002).

3. Having decided Shaw is not entitled to tolling, we now decide whether her claims are barred by the two-year statute of limitations. *Jones v. Blanas*, 393 F.3d 918, 927 (9th Cir. 2004); Cal. Code Civ. Proc. § 335.1. All but one of Shaw's claims accrued on April 5, 2014, because that was the day she knew or had "reason to know of the injury which is the basis" for her claims. *Kimes v.*

---

[2] Shaw argued in a supplemental brief that the *Medicis* decision should not be applied retroactively. We decline to consider this argument because it was not raised in Shaw's opening brief. *See Brown v. Rawson-Neal Psychiatric Hosp.*, 840 F.3d 1146, 1148–49 (9th Cir. 2016).

Stone, 84 F.3d 1121, 1128 (9th Cir. 1996) (internal quotation marks omitted). Those claims—brought in the April 6, 2016 complaint—were therefore asserted one day late and are barred by the two-year statute of limitations. Shaw's false arrest claim, however, did not accrue until "the alleged false imprisonment end[ed]" on April 6, 2014. *Wallace v. Kato*, 549 U.S. 384, 389 (2007). Thus, that claim is not barred by the two-year statute of limitations. We therefore affirm the district court's dismissal of all causes of action other than Shaw's claim for false arrest. As to that claim, we reverse and remand with instructions to consider, in the first instance, whether the false arrest claim is adequately pled or barred by Shaw's nolo contendere plea. Each party will bear its own costs.

AFFIRMED IN PART; REVERSED IN PART.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

JUDGMENT IN A CIVIL CASE

SHEENA SHAW,

CASE NO: **2:16–CV–00729–TLN–CKD**

v.

SACRAMENTO COUNTY SHERIFF'S DEPARTMENT, ET AL.,

XX — Decision by the Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

THAT JUDGMENT IS HEREBY ENTERED IN ACCORDANCE WITH THE COURT'S ORDER FILED ON 10/25/2018

Marianne Matherly
Clerk of Court

ENTERED: **October 25, 2018**

by: /s/ M. York
Deputy Clerk

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

SHEENA SHAW, Plaintiff, v. SACRAMENTO COUNTY SHERIFF'S DEPARTMENT, *et al.*, Defendants.	No. 2:16-cv-00729-TLN-CKD **ORDER**

This matter is before the Court pursuant to Defendant Sacramento County Sheriff's Department, Sheriff Scott Jones, County of Sacramento, Sgt. M. Pai # 2055, Deputy Steven Forsyth # 874, Deputy Colin Mason # 461, Deputy Kenneth Shelton # 1021, Deputy Reid Harris # 238, Deputy S. Barry # 828, and Deputy C. Bartilson # 1470's (collectively, "Defendants") Motion to Dismiss. (ECF No. 32.) Plaintiff Sheena Shaw ("Plaintiff") opposes Defendants' Motion. (ECF No. 38.) Defendants filed a Reply. (ECF No. 41.)

After carefully considering the parties' briefing and for the reasons set forth below, the Court hereby GRANTS Defendants' Motion to Dismiss. (ECF No. 32.)

///

///

///

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff alleges that, on April 5, 2014, officers of the Sacramento County Sheriff's Department made a warrantless entry into her home and used excessive force against her while arresting her 18-year-old son in her home. (ECF No. 15 ¶¶ 23–59.) Plaintiff alleges she was arrested on April 5, 2014, and then released from the Sacramento County Jail the following day, April 6, 2014. (ECF No. 15 ¶¶ 23, 85.) On April 6, 2016, Plaintiff filed suit *pro se*. (*See* ECF No. 1.) The Court dismissed her suit with leave to amend, (ECF No. 3), and granted her motion to appoint counsel, (ECF No. 11). Plaintiff, now represented by counsel, filed her First Amended Complaint, (ECF No. 15), asserting 11 claims for violations of her constitutional rights pursuant to 42 U.S.C. § 1983 ("§ 1983").

Defendants moved to dismiss. (ECF No. 32.) Defendants argue that ten of Plaintiff's 11 claims are time-barred because Plaintiff filed her original complaint one day after the two-year statute of limitations expired. (ECF No. 32-1 at 9.) Defendants alternatively argue that Plaintiff fails to state a claim for each of her 11 claims for other reasons. (ECF No. 32-1.) Plaintiff opposes Defendants' motion to dismiss as to claims 1–10, arguing the limitations period was tolled until her April 6, 2014 release from Sacramento County Jail. (ECF No. 38 at 5–6.) Plaintiff does not oppose dismissal of claim 11 for malicious prosecution. (ECF No. 38 at 1.)

Plaintiff then served discovery on Defendants, including a request for the county to disclose information related to a juvenile court arrest warrant for Plaintiff's son that has been sealed by the state superior court. (ECF No. 43 at 2, 4.) Defendants moved to stay discovery arguing that the requests for discovery "generate motions practice" by "raising difficult questions involving the Supremacy Clause, federalism, and comity" which "may be entirely mooted by [D]efendants' still pending motion to dismiss." (ECF No. 43 at 2.) Plaintiff opposed on the basis that Defendants' motion to dismiss will not dispose of the case entirely because (i) the motion likely will not be granted, (ii) if it were, Plaintiff would probably be given leave to amend, and (iii) Defendants' statute of limitation argument is frivolous. (ECF No. 43 at 3–4.)

The Magistrate Judge granted Defendant's motion to stay, finding Defendants' motion to dismiss may result in all remaining claims being dismissed as time-barred and is therefore

"potentially dispositive" of the case. (ECF No. 48 at 3.) Plaintiff requests reconsideration of that order. (ECF No. 49.) Defendants oppose. (ECF No. 50.) For reasons set forth below, the Court grants Defendants' motion to dismiss and denies as moot Plaintiff's motion to reconsider.

II. STANDARD OF LAW

A motion to dismiss for failure to state a claim under Rule 12(b)(6) tests the legal sufficiency of a complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). Federal Rule of Civil Procedure 8(a) requires that a pleading contain "a short and plain statement of the claim showing that the pleader is entitled to relief." *See Ashcroft v. Iqbal*, 556 U.S. 662, 678–79 (2009). Under notice pleading in federal court, the complaint must "give the defendant fair notice of what the claim . . . is and the grounds upon which it rests." *Bell Atlantic v. Twombly*, 550 U.S. 544, 555 (2007) (internal quotations omitted). "This simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims." *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002).

On a motion to dismiss, the factual allegations of the complaint must be accepted as true. *Cruz v. Beto*, 405 U.S. 319, 322 (1972). A court is bound to give plaintiff the benefit of every reasonable inference to be drawn from the "well-pleaded" allegations of the complaint. *Retail Clerks Int'l Ass'n v. Schermerhorn*, 373 U.S. 746, 753 n.6 (1963). A plaintiff need not allege "'specific facts' beyond those necessary to state his claim and the grounds showing entitlement to relief." *Twombly*, 550 U.S. at 570. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. 544, 556 (2007)).

Nevertheless, a court "need not assume the truth of legal conclusions cast in the form of factual allegations." *United States ex rel. Chunie v. Ringrose*, 788 F.2d 638, 643 n.2 (9th Cir. 1986). While Rule 8(a) does not require detailed factual allegations, "it demands more than an unadorned, the defendant–unlawfully–harmed–me accusation." *Iqbal*, 556 U.S. at 678. A pleading is insufficient if it offers mere "labels and conclusions" or "a formulaic recitation of the elements of a cause of action." *Twombly*, 550 U.S. at 555; *see also Iqbal*, 556 U.S. at 678 ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory

statements, do not suffice."). Moreover, it is inappropriate to assume that the plaintiff "can prove facts that it has not alleged or that the defendants have violated the . . . laws in ways that have not been alleged[.]" *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 526 (1983).

Ultimately, a court may not dismiss a complaint in which the plaintiff has alleged "enough facts to state a claim to relief that is plausible on its face." *Iqbal*, 556 U.S. at 697 (quoting *Twombly*, 550 U.S. at 570). Only where a plaintiff has failed to "nudge[] [his or her] claims . . . across the line from conceivable to plausible[,]" is the complaint properly dismissed. *Id.* at 680. While the plausibility requirement is not akin to a probability requirement, it demands more than "a sheer possibility that a defendant has acted unlawfully." *Id.* at 678. This plausibility inquiry is "a context–specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 679.

If a complaint fails to state a plausible claim, "'[a] district court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts.'" *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000) (en banc) (quoting *Doe v. United States*, 58 F.3d 484, 497 (9th Cir. 1995)); *see also Gardner v. Marino*, 563 F.3d 981, 990 (9th Cir. 2009) (finding no abuse of discretion in denying leave to amend when amendment would be futile). Although a district court should freely give leave to amend when justice so requires under Rule 15(a)(2), "the court's discretion to deny such leave is 'particularly broad' where the plaintiff has previously amended its complaint[.]" *Ecological Rights Found. v. Pac. Gas & Elec. Co.*, 713 F.3d 502, 520 (9th Cir. 2013) (quoting *Miller v. Yokohama Tire Corp.*, 358 F.3d 616, 622 (9th Cir. 2004)).

III. ANALYSIS

Defendants argue that Plaintiff's claims 1–10 are time-barred because she filed her complaint on April 6, 2016. (ECF No. 32-1 at 9.) Defendants argue Plaintiff's injury, if any, accrued upon her arrest on April 5, 2014, and so the filing date was one day after the expiration of the two-year statute of limitations for her § 1983 claim. (ECF No. 32-1 at 9.) Plaintiff responds that her night in Sacramento County Jail tolled the statute of limitations pursuant to Cal. Civ.

Proc. Code § 352.1(a). (ECF No. 38 at 5–6.) According to Plaintiff, "the statute of limitations period did not commence until April 6, 2014 and the action is timely." (ECF No. 38 at 6.) The parties do not dispute that the statute of limitations period ended on April 5, 2016, unless Plaintiff's incarceration in Sacramento County Jail tolled the statute of limitations by one day. (ECF No. 32-1 at 9; *see also* ECF No. 38 at 6.)

"The applicable statute of limitations for actions brought pursuant to 42 U.S.C. § 1983 is the forum state's statute of limitations for personal injury actions." *Carpinteria Valley Farms, Ltd. v. Cty. of Santa Barbara*, 344 F.3d 822, 828 (9th Cir. 2003). Effective January 1, 2003, the statute of limitations for personal injury actions in California is two years. Cal. Code Civ. Proc. § 335.1. Moreover, when a federal court borrows the state statute of limitations, it also borrows the state's tolling rules. *Canatella v. Van De Kamp*, 486 F.3d 1128, 1132 (9th Cir. 2007). The relevant tolling statute is Cal. Code Civ. Proc. § 352.1(a), which provides that the statute of limitations is statutorily tolled for up to two years when a plaintiff is "imprisoned on a criminal charge . . . for a term less than for life" at the time a claim accrues. Cal. Civ. Proc. Code § 352.1(a).

Defendants challenge the statutory language of § 352.1(a), arguing, "[b]eing arrested . . . is not the equivalent of being imprisoned." (ECF No. 41 at 3.) Defendants, citing *Elliott v. City of Union City*, concede that courts in this circuit have applied tolling to claims that accrued prior to continuous imprisonment, but argue that those courts did not address the distinction between arrestees and prisoners within the meaning of § 352.1(a). (ECF No. 41 at 4; *Elliott v. City of Union City*, 25 F.3d 800 (9th Cir. 1994), (holding that that an arrestee's claims were tolled during an entire uninterrupted period of incarceration, and did not end until release following prison sentence).) Plaintiff also cites *Elliott*, but only to support the general proposition that federal law determines when a cause of action accrues, not to advance any specific argument as to tolling. (ECF No. 38 at 5 (citing *Elliott*, 25 F.3d at 801–02).)

In *Elliott*, the plaintiff brought a § 1983 claim for alleged excessive force used during arrest. *Elliott*, 25 F.3d at 801. After his arrest, the plaintiff remained in continuous police custody until his conviction for two felony counts of battery, upon which he was sent to state

prison. *Id.* The question before the court was "whether being continuously incarcerated prior to arraignment constitutes being 'imprisoned on a criminal charge' within the meaning of the California disability statute." *Id.* at 802. The court analyzed Cal. Civ. Proc. Code § 352(a)(3), the precursor to § 352.1(a).[1] *Id.* As part of its analysis, the court stated, "neither this court nor the California courts have considered" whether being "incarcerated prior to arraignment constitutes being 'imprisoned on a criminal charge.'" *Id.* The court determined that "[i]n the absence of controlling state precedent, we must decide this question as the California Supreme Court would decide it." *Id.* at 802, n.3 (citations omitted). The court then looked to a similar Washington statute and determined that "tolling was triggered by the individual's arrest and incarceration." *Id.* at 802.

Since *Elliott*, the California Court of Appeal held as a matter of first impression that "a would-be plaintiff is 'imprisoned on a criminal charge' within the meaning of section 352.1 if he or she is serving a term of imprisonment in the state prison." *Austin v. Medicis*, 21 Cal. App. 5th 577, 597 (Ct. App. 2018), *reh'g denied* (Apr. 11, 2018), *review denied* (June 13, 2018). The court found that pretrial custody in a county jail does not render an arrestee "imprisoned on a criminal charge" under § 352.1(a). *Id.* The court held that the statute's tolling provisions did not apply during the time that plaintiff spent in a county jail. *Id.* The California Supreme Court denied review of *Austin* on June 13, 2018. *Austin* provides persuasive state precedent. *See also McClain v. Brosowske*, No. EDCV 17–2377 MWF SS, 2018 WL 1918533, at *3–4 (C.D. Cal. Apr. 20, 2018) (discussing *Austin*'s holding and noting that plaintiff "was plainly not serving a prison sentence" upon his arrest and subsequent time in a local detention center).

Notably, in *Austin*, the court found that the *Elliott* decision was unpersuasive to its analysis because *Elliott* "predated the enactment of section 352.1" and "did not have the benefit of the legislative findings on this subject." *Austin*, 21 Cal. App. 5th at 590, n.4. The court

[1] The California Legislature enacted § 352(a)(3) in 1872, and later amended the tolling statute by enacting § 352.1(a), "a new, less generous tolling provision," in 1994. *Austin v. Medicis*, 21 Cal. App. 5th 577, 592–95 (Ct. App. 2018). Although the language from both versions of the statute are similar, the amended statute added a two-year limit to the tolling statute so that prisoners would "bring their actions against the state in a timely manner." *Id.* at 596 (citing Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Sen. Bill No. 1445 (1993–1994 Reg. Sess.) Apr. 6, 1994).

thoroughly analyzed § 352.1's legislative history, which revealed that the legislative discussions during the amendment process explicitly focused on "inmates incarcerated in California prisons." *Id.* at 596 (citing Stats. 1994, ch. 1083, § 1, pp. 6465–6466). Furthermore, *Elliott* is factually distinguishable from the instant case because Plaintiff spent one night in county jail while the plaintiff in *Elliott* remained in uninterrupted custody from the time of his arrest until he was convicted and sent to state prison. (ECF No. 15 ¶¶ 23, 85); *Elliott*, 25 F.3d at 801. As such, the *Elliott* court focused solely on the meaning of the statute within the context of continuous incarceration, which is not at issue in the instant case. *Id.* at 801–03. For these reasons, this Court agrees with the *Austin* court that *Elliott* is unpersuasive.

Here, Plaintiff asserts that her stay in Sacramento County Jail tolls the statute of limitations. (ECF No. 38 at 5–6.) However, as discussed in *Austin*, Plaintiff's overnight stay does not constitute a term of imprisonment in a state prison. *Austin v. Medicis*, 21 Cal. App. 5th at 597. Because the stay was not a term of imprisonment in a state prison, her claims were not tolled while she was in the Sacramento County Jail. Thus, the Court finds Plaintiff's § 1983 claims stemming from her arrest were not statutorily tolled under § 352.1(a). The statute of limitations for Plaintiff's § 1983 claims ended on April 5, 2016. Accordingly, the Court dismisses with prejudice Plaintiff's claims filed April 6, 2016 as untimely.

IV. CONCLUSION

For the foregoing reasons, the Court hereby GRANTS Defendants' Motion to Dismiss Plaintiff's claims 1–11, (ECF No. 32). Further, the Court DENIES as moot Plaintiff's pending Request for Reconsideration, (ECF No. 49). The Clerk of the Court is directed to close this case.

IT IS SO ORDERED.

Dated: October 24, 2018:

/s/ Troy L. Nunley

United States District Judge