IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

STEVEN GREEN,

OPINION AND ORDER

Plaintiff,

v.

12-cv-761-wmc

STEVEN T. CHVALA, JUSTIN L. GARCIS,
BROOKE A. LOMAS, BRADLEY SCHROEDER,
CITY OF MADISON POLICE DEPARTMENT
and DANE COUNTY SHERIFF'S DEPARTMENT,

Defendants.

Steven Green brings this action under 42 U.S.C. § 1983 against an officer employed by the Dane County Sheriff's Department and three City of Madison police officers, claiming that excessive force was used to effect his arrest in violation of the Fourth Amendment. Green has been granted leave to proceed *in forma pauperis*, and he has made an initial, partial payment of the full filing fee as required by the Prison Litigation Reform Act (the "PLRA"), 28 U.S.C. § 1915(b)(1). Because Green was incarcerated when he filed this civil action, the PLRA also requires the court to screen the proposed complaint and dismiss any portion that is frivolous, malicious, fails to state a claim upon which relief may be granted or seeks money damages from a defendant who by law is immune from such relief. *See* 28 U.S.C. § 1915A. After considering all of Green's allegations, the court will deny leave to proceed and dismiss the complaint for reasons outlined below.

ALLEGATIONS OF FACT

In addressing any pro se litigant's complaint, the court must read the allegations generously, holding the complaint "to less stringent standards than formal pleadings drafted by lawyers." *Haines v. Kerner*, 404 U.S. 519, 521 (1972). Green alleges, and the court assumes for purposes of this screening order only, the following facts.

On September 4, 2010, plaintiff Steven Green was driving in his car in the direction of Dane County Deputy Sheriff Bradley Schroeder. Defendant Schroeder ordered Green to pull over, but instead Green drove past Schroeder. Green insists that he did not attempt to hit Schroeder and that he "posed no threat to [Schroeder] or anyone else." Nevertheless, Schroeder responded by firing two shots from his handgun at Green. After Green pulled over, defendants Chvala, Garcia and Lomas, all officers of the City of Madison Police Department, approached the car and arrested Green. Although Green claims that he did not resist in any way, the officers "man-handle[d]" him in the course of taking him into custody. One of the officers -- Green cannot remember which one -- kneed him in the ribs while handcuffing him.

Green maintains that Schroeder's use of deadly force was unjustified on this occasion because neither Schroeder nor the public was ever in immediate danger. In addition, Green contends that the city police officers had "no cause" to inflict bodily harm by kneeing him in the ribs while effecting his arrest. Green alleges that he suffered bruised ribs as the result of the officers' conduct. Green alleges further that he has suffered a variety of psychological ailments, including nightmares, flashbacks, blackouts, a heightened startle response, paranoia and insomnia, all of which he attributes to

"PTSD" from the arrest. Green also attributes bouts of diarrhea, depression, upset stomach and other physical ailments to the trauma he experienced. Green seeks compensatory damages for his "pain and suffering," punitive damages, and injunctive relief that would require officers to be properly trained in the use of force.

OPINION

Claims of excessive force in the course of an arrest are analyzed under the Fourth Amendment and its "reasonableness" standard. *Graham v. Connor*, 490 U.S. 386, 396 (1989). This reasonableness inquiry is an objective one, requiring a determination of "whether the officers' actions [were] 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Id.* at 397. In other words, "[a]n officer's use of force is unreasonable from a constitutional point of view only if, 'judging from the totality of circumstances at the time of the arrest, the officer used greater force than was reasonably necessary to make the arrest.'" *Gonzalez v. City of Elgin*, 578 F.3d 526, 539 (7th Cir. 2009) (quoting *Lester v. City of Chicago*, 830 F.2d 706, 713 (7th Cir. 1987)). The Supreme Court has explained that this analysis requires "careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Graham*, 490 U.S. at 396. In that regard, an officer generally has a right "to use some degree of physical coercion or threat" to make an arrest. *Id.*

Green is currently incarcerated as the result of the incident that forms the basis of his proposed Fourth Amendment claims. Court records reflect that Green was charged with the following offenses that occurred on September 4, 2010: (1) second-degree recklessly endangering the safety of another; and (2) fleeing or attempting to elude police. *See State of Wisconsin v. Steven Green*, Dane County Case No. 2010CF1545. On May 16, 2011, Green entered a plea of "no contest" to the reckless-endangerment charges; the charges of fleeing or attempting to elude police were dismissed on that same day as multiplicitous. On July 15, 2011, Green was sentenced to four years' imprisonment as the result of his conviction for second-degree reckless endangerment, followed by a three-year term of extended supervision.[1] Green did not pursue an appeal.

To the extent that Green's proposed complaint stems from an incident that resulted in a state conviction, the court must consider whether his allegations, if true, would impugn the validity of that conviction. If so, his Fourth Amendment claims are barred by the rule in *Heck v. Humphrey*, 512 U.S. 477 (1997). Under *Heck*, a "district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated." 512 U.S. at 487; *see McCann v. Neilsen*, 466 F.3d 619, 621 (7th Cir. 2006).

[1] The circuit court ordered that the sentence be served concurrently with a one-year term of imprisonment imposed on the same day in Dane County Circuit Case No. 2010CF1536, in which Green pled no contest to charges for failing to comply with sex offender registry requirements, but consecutive to sentences imposed previously in Dane County Case Nos. 2003CF1834 and 2003CF1658, which stemmed from drug possession charges.

A Fourth Amendment claim based on allegations of unlawful search and seizure does not necessarily imply the invalidity of a conviction. *See Copus v. City of Edgerton*, 151 F.3d 646, 648 (7th Cir. 1998). As a result, *Heck* does not generally bar such claims. *Id*. Claims of excessive force during an arrest do not bar a § 1983 action to the extent that the claims are compatible with a valid conviction. *See Evans v. Poskon*, 603 F.3d 362, 363-64 (7th Cir. 2010); *McCann*, 466 F.3d at 621. To determine whether Green may proceed on any of his claims, the court will address his allegations separately below, beginning with his contention that Schroeder's use of deadly force was unlawful.

I. Fourth Amendment Claims Against Schroeder

In Case No. 2010CF1545, Green was convicted of second-degree recklessly endangering safety in violation of Wis. Stat. § 941.30(2). This offense has two elements: (1) the defendant endangered the safety of another human being; and (2) the defendant endangered the safety of another by criminally reckless conduct. Wis. JI-Criminal 1347 at 1 (2003) (approved instruction for § 941.30(2)). The second element requires that the defendant's conduct created an unreasonable and substantial risk of death or great bodily harm to another person and that the defendant was aware that such conduct created that risk. *Id.*; *see also State v. Lechner*, 217 Wis. 2d 392, 418, 576 N.W.2d 912, 925 (Wis. 1998) (observing that proof of the defendant's reckless conduct alone is insufficient for a conviction under Wis. Stat. § 941.30(2); he must also be found to have endangered the safety of another person).

Schroeder's use of deadly force was justifiable, and therefore not unconstitutional, if he believed that Green's actions posed an imminent danger to himself or anyone in the immediate vicinity. *See Scott v. Edinburg*, 346 F.3d 752, 758 (7th Cir. 2003) (citing *Sherrod v. Berry*, 856 F.2d 802, 805 (7th Cir. 1988) (en banc) ("'[W]hen an officer believes that a suspect's actions [place] him, his partner, or those in the immediate vicinity in imminent danger of death or serious bodily injury, the officer can reasonably exercise the use of deadly force.'" (emphasis deleted)); *Ford v. Childers*, 855 F.2d 1271, 1275 (7th Cir. 1988) (en banc) (finding no Fourth Amendment violation when officer fired at a suspect "because he reasonably believed that the suspect had committed a felony involving the threat of deadly force, was armed with a deadly weapon, and was likely to pose a danger of serious harm to others if not immediately apprehended") (citations omitted)).

Here, Green alleges that he "never used the car [he] was driving as a lethal weapon" and that he did not intentionally try to hit Schroeder as he drove past him. Green maintains, therefore, that Schroeder's use of deadly force was unlawful because Green "posed no imminent threat to [Schroeder] or anyone else." This pleading simply cannot be reconciled with Green's conviction arising out of the same incident. Indeed, these allegations would not just undercut but directly contradict Green's conviction for engaging in criminally reckless conduct that created an unreasonable and substantial risk of death or great bodily harm to another person in violation of Wis. Stat. § 941.30(2). Under *Heck*, therefore, Green's conviction for second-degree reckless endangerment bars

his proposed civil claim for excessive force against Schroeder, nor is it cognizable under § 1983 unless his conviction for second-degree reckless endangerment is set aside.

II. Fourth Amendment Claims Against Chvala, Garcis and Lomas

Green's claim that one of the city police officers used excessive force by kneeing him in the ribs during his arrest presents both related and different questions. Green contends that the officers had no cause to treat him roughly because he posed no threat to anyone and did not resist arrest. This claim also seems inconsistent with his conviction for second-degree reckless endangerment, since it was this conduct that prompted defendants to effect his arrest. To the extent that Green's allegations contradict the circumstances leading up to his arrest and the grounds for his conviction, those claims appear to be barred by *Heck* as well.

Even if not barred outright by *Heck*, the claims against officers Chvala, Garcis and Lomas are rendered implausible in light of the conduct underlying Green's conviction for second-degree reckless endangerment *while fleeing the police*. While Green takes issue with being kneed in the ribs while handcuffs were applied, his allegations do not demonstrate that the degree of force used was unreasonable or greater than necessary under the circumstances. Since Green failed to stop his car on Deputy Sheriff Schroeder's command under circumstances Schroeder felt required shooting at his car (whether justified or not, the other defendants would have had to assume it was a matter of prudence at the time of arrest), the three arresting Madison Police Officers would certainly have been justified in anticipating some resistance from Green. Moreover, given

his conviction for reckless endangerment in violation of Wis. Stat. § 941.30(2), Green is not free to dispute that his conduct created an unreasonable and substantial risk of death or great bodily harm to others. Wis. JI-Criminal 1347 at 1. This made the officers' use of some force reasonable during Green's arrest. *See Graham*, 490 U.S. at 396.

While the additional charge of unlawful flight to avoid police was dismissed as the result of Green's plea to the related reckless-endangerment charge, the fact that Green took flight after endangering others adds to the reasonableness of the response by city police even if, as he now alleges, Green was giving himself up without resistence at the time the officers approached his vehicle to effect the arrest.

Finally, to the extent one of the officer's kneed Green in the ribs while getting him on the ground and in restraints, absent allegation of more severe conduct or long term physical injury, it is not enough to allow him to proceed on a claim of "excessive force." *E.g.*, *Sow v. Fortville Police Dep't*, 636 F.3d 293, 303-04 (7th Cir. 2011) (finding that plaintiff, who bumped his head following an arrest based upon probable cause, failed to demonstrate that excessive force was used in effecting the arrest); *see also Graham*, 490 U.S. at 396 ("'Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers' . . . violates the Fourth Amendment.") (internal quotation omitted); (finding that police officer did not use excessive force during an arrest based on probable cause where the arrestee sustained a bump on the head during his arrest).

Taking all of Green's allegations as true, he does not articulate facts showing that the officers' actions were objectively unreasonable in light of the totality of the facts and

circumstances confronting them. *See Graham*, 490 U.S. at 397. Therefore, he does not demonstrate a plausible excessive-force claim against officers Chvala, Garcis and Lomas.

III. Claims Against the City of Madison Police Department and the Dane County Sheriff's Department

To the extent that Green sues the City of Madison Police Department and Dane County Sheriff's Department, neither entity has the legal capacity to be sued. *See* Fed. R. Civ. P. 17(b)(3); *Buchanan v. City of Kenosha*, 57 F. Supp. 2d 675, 678 (E.D. Wis. 1999) (collecting cases); *see also Whiting v. Marathon County Sheriff's Dept.*, 382 F.3d 700, 704 (7th Cir. 2004) (a sheriff's department that forms a part of the county government that it serves is "not a separate suable entity"). Although Green presumably intended to sue the City of Madison and Dane County, respectively, the court cannot simply add these parties as defendants. *See Myles v. United States*, 416 F.3d 551, 552-53 (7th Cir. 2005) (It is "unacceptable for a court to add litigants on its own motion. Selecting defendants is a task for the plaintiff, not the judge."). In any event, Green may not proceed against either municipal entity because his conclusory allegation that his constitutional rights were violated as the result of an inadequate training policy is not sufficient to demonstrate municipal liability under § 1983. Accordingly, the claims against the City of Madison Police Department and the Dane County Sheriff's Department will be dismissed.

ORDER

IT IS ORDERED that:

1. Plaintiff Steven Green's request for leave to proceed against defendants Steven T. Chvala, Justin L. Garcis, Brooke A. Lomas, Bradley Schroeder, the City of Madison Police Department and the Dane County Sheriff's Department is DENIED.
2. The complaint against Schroeder is DISMISSED without prejudice for failure to state a claim upon which relief may be granted under 42 U.S.C. § 1983. The complaint against all of the other defendants (Chvala, Garcis, Lomas, the City of Madison Police Department and the Dane County Sheriff's Department) is DISMISSED with prejudice for failure to state a claim upon which relief may be granted for purposes of § 1983.
3. If he has not already done so, plaintiff must pay the unpaid balance of his filing fee in monthly payments as described in 28 U.S.C. § 1915(b)(2). This court will notify the warden at his institution of that institution's obligation to deduct payments until the filing fee has been paid in full.

Entered this 10th day of October, 2013.

BY THE COURT:

/s/

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WILLIAM M. CONLEY
District Judge