McFarland v. City and County of San Francisco C.A.9 (Cal.),2002.
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United States Court of Appeals,Ninth Circuit.

Latrice McFARLAND, Plaintiff-Appellant,
v.
CITY AND COUNTY OF SAN FRANCISCO, et al., Defendants-Appellees.

No. 01-16576.
D.C. No. CV-00-2878-MMC.

Argued and Submitted July 9, 2002.
Decided Aug. 5, 2002.

Appeal from the United States District Court for the Northern District of California, Maxine M. Chesney, District Judge, Presiding.

Before CANBY and RYMER, Circuit Judges, and BERTELSMAN,[FN*] District Judge.

FN* The Honorable William O. Bertelsman, Senior United States District Judge for the Eastern District of Kentucky, sitting by designation.

MEMORANDUM [FN**]

FN** This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

****1** Appellant **Latrice McFarland** appeals the district court's grant of partial judgment on the pleadings to the appellees under Rule 12(c) of the Federal Rules of Civil Procedure. **McFarland** filed a 42 U.S.C. § 1983 action in federal court based on allegations of constitutional violations under color of law for excessive force used during a body cavity search. The district court held that **McFarland's** federal claims were barred under *Heck v. Humphrey*, 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994), and her state law claims were dismissed without prejudice. We have jurisdiction under 28 U.S.C. § 1291 and we reverse.

In *Heck* the United States Supreme Court held that a 42 U.S.C. § 1983 action that would call into question the lawfulness of a plaintiff's conviction or confinement is not cognizable, and does not accrue unless the plaintiff can prove that her conviction has been reversed or otherwise overturned in appropriate proceedings directed toward that end. This Court followed *Heck* in *Harvey v. Waldron*, 210 F.3d 1008 (9th Cir.2000), and the district court relied heavily on *Harvey* to dismiss **McFarland's** claims.

We conclude that neither *Heck* nor *Harvey* are implicated in **McFarland's** case because her conviction was based on a guilty plea. Instead, we find that *Ove v. Gwinn*, 264 F.3d 817 (9th Cir.2001) controls our decision in this matter. In *Ove* this Court held that a conviction based on a guilty plea was not barred by *Heck.Ove*, 264 F.3d at 823.

Further, in *Ove*, 264 F.3d at 823, which involved blood evidence, this Court noted the issue in that case revolved around the *manner* in which the blood was drawn. Thereafter, this Court compared the facts in *Ove* to our decision in *Smithart v. Towery*, 70 F.3d 951, 952 (9th Cir.1996), wherein we allowed claims for excessive force used during an arrest to survive a *Heck* analysis. Relying on *Smithart*, we held that the district court erred in ruling that *Heck* barred the claims in *Ove*.

Likewise in the present case, **McFarland's** claims are based on the *manner* in which the evidence was seized during the search. Her § 1983 claims are based on excessive force being used during the body ***156** cavity search, not on the underlying validity of the search. Based on *Ove*, we hold that the present action does not have the possibility of undermining **McFarland's** conviction. Therefore, the district court erred in granting partial judgment on the pleadings to appellees.

REVERSED.

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44 Fed.Appx. 155, 2002 WL 1791515 (C.A.9 (Cal.))

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