UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

ISABEL FLORES, Plaintiff - Appellant, v. MICHELLE LEON, DAVID JAMESON, Defendants - Appellees.	No. 18-4455

ORDER AND JUDGMENT

Before **SOLOWEY**, **SALCEDO**, and **HLAWEK**, Circuit Judges.

SALCEDO, Circuit Judge:

In this excessive-force case, Isabel Flores appeals from a district-court order granting the Defendants' Amended Motion for Summary Judgment on the basis of qualified immunity. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

BACKGROUND

Early in the morning on June 21, 2014, officers from the New Franklin State Police went to an apartment complex in Green City to arrest a woman, Melissa Freitag, who was involved with an organized crime ring. The officers saw two individuals standing in front of the woman's apartment next to a Dodge Challenger. The Challenger was backed into a parking spot with cars parked on both sides of it. The officers, who were wearing tactical vests with police markings, decided to make contact with the two individuals in case one was the subject of their arrest warrant.

As the officers approached the Challenger, one of the individuals ran into the apartment while the other individual, Flores, got inside the Challenger and started the engine. At the time, Flores was "tripping out from using meth for a couple of days."

Officer David Jameson approached the Challenger's closed driver-side window and told Flores several times, "Show me your hands," as he perceived Flores was making furtive movements that he could not see because of the Challenger's tinted windows. Officer Michelle Leon took up a position near the Challenger's driver-side front tire. She could not see who the driver was, but she perceived the driver was making aggressive movements inside the vehicle.

According to Flores, she did not know that Jameson and Leon were police officers, and she could not hear anything they said. But when she "heard the flicker of the car door handle," she "freaked out and put the car into drive," thinking she was being carjacked.

When Flores put the car in drive, Officer Jameson brandished his firearm. At some point, Officer Leon drew her firearm as well. Flores testified that she "stepped on the gas to get away," and the officers "shot as soon as the Challenger creeped a little inch or two." Officer Leon testified that the Challenger drove toward her and that she fired at the driver through the windshield to stop the driver from running her over. Officer Jameson testified that he shot at the driver because he feared being crushed between the Challenger and the neighboring car, and that he wanted to stop the Challenger from going towards Officer Leon.

The officers continued firing as Flores drove away, ultimately firing 13 rounds. Two bullets struck Flores in the back. She continued forward nonetheless, driving over a curb, through some landscaping, and onto a street. After colliding with another vehicle, Flores stopped in a parking lot, exited the Challenger, laid down on the ground, and attempted to "surrender" to the "carjackers" (who she believed might be in pursuit).

Flores "was still tripping out bad." She asked a bystander to call the police, but she did not want to wait around because she had an outstanding arrest warrant. So, she stole a Volkswagen Passat that was left running while its driver loaded material into the trunk. Flores drove

approximately 70 miles to Starkville and went to a local hospital, where she identified herself as "Jennifer Blair." She was airlifted to a hospital back in Green City, properly identified, and arrested by police on June 22, 2014. Flores ultimately pled no contest to, and was convicted of, three crimes: (1) aggravated fleeing from a law enforcement officer (Officer Jameson); (2) assault upon a police officer (Officer Leon); and (3) unlawfully taking a motor vehicle.

In September 2016, Flores filed a civil-rights complaint in federal court against Officers Jameson and Leon. She asserted one excessive-force claim against each officer, alleging that the "intentional discharge of a firearm exceeded the degree of force which a reasonable, prudent law enforcement officer would have applied." She also asserted a claim against each officer for conspiracy to engage in excessive force, alleging that the officers had "formed a single plan through non-verbal communication to use excessive force."

The district court construed Flores's complaint as asserting her excessive-force claims under the Fourth Amendment, and concluded that the officers were entitled to qualified immunity. The court reasoned that the officers had not seized Flores at the time of the shooting,and that, without a seizure, there could be no Fourth Amendment violation. The district court also agreed with Defendants that Flores's claims were barred under the *Heck* doctrine. It then granted Defendants' Amended Motion for Summary Judgment on both independent grounds.

DISCUSSION

I. Standards of Review

"We review the district court's summary judgment decision *de novo*, applying the same standards as the district court." *Punt v. Kelly Servs.*, 862 F.3d 1040, 1046 (10th Cir. 2017). Summary judgment is required when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

Ordinarily, once the moving party meets its initial burden of demonstrating the absence of a genuine issue of material fact, the burden shifts to the nonmoving party to set forth specific facts showing that there is a genuine triable issue. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). But where, as here, a defendant seeks summary judgment on the basis of qualified immunity, the review is somewhat different.

As explained below, we adopt the Tenth Circuit's approach to reviewing qualified-immunity issues. Under that approach, "[w]hen a defendant asserts qualified immunity at summary judgment, the burden shifts to the plaintiff, who must clear two hurdles in order to defeat the defendant's motion." *Riggins v. Goodman*, 572 F.3d 1101, 1107 (10th Cir. 2009). First, "[t]he plaintiff must demonstrate on the facts alleged . . . that the defendant violated [her] constitutional or statutory rights." *Id.* While "we ordinarily accept the plaintiff's version of the facts," we do not do so if that version "is blatantly contradicted by the record, so that no reasonable jury could believe it." *Halley v. Huckaby*, 902 F.3d 1136, 1144 (10th Cir. 2018) (internal quotation marks omitted), *cert. denied*, 139 S.Ct. 1347 (2019). Second, the plaintiff must show "that the [constitutional or statutory] right was clearly established at the time of the alleged unlawful activity." *Riggins*, 572 F.3d at 1107. "If, and only if, the plaintiff meets this two-part test does a defendant then bear the traditional burden of the movant for summary judgment—showing that there are no genuine issues of material fact and that he or she is entitled to judgment as a matter of law." *Nelson v. McMullen*, 207 F.3d 1202, 1206 (10th Cir. 2000) (internal quotation marks omitted).

As for the *Heck* doctrine, we review the district court's ruling *de novo*, since it poses a pure question of law. *See Butler v. Compton*, 482 F.3d 1277, 1278 (10th Cir. 2007) ("The dispute

between the parties involves a question of law: whether *Heck* applies to bar [the plaintiff's] § 1983 action.").

II. Excessive Force

Until now, this Court has not had occasion to decide what a plaintiff must show in order to prevail on an excessive-force claim. The parties have briefed this issue extensively, each side presenting its own approach. We find the approach used in the Tenth Circuit to be the most sensible, and therefore adopt it.

Having adopted that approach, we treat excessive-force claims "as seizures subject to the Fourth Amendment's objective requirement for reasonableness." *Lindsey v. Hyler*, 918 F.3d 1109, 1113 (10th Cir. 2019) (internal quotation marks omitted). Thus, to establish her claim, Flores must show "both that a seizure occurred and that the seizure was unreasonable." *Farrell v. Montoya*, 878 F.3d 933, 937 (10th Cir. 2017) (internal quotation marks omitted). Consequently, "[w]ithout a seizure, there can be no claim for excessive use of force" under the Fourth Amendment. *Id.* (internal quotation marks omitted).

We agree with the district court that Flores failed to show she was seized by the officers' use of force. Specifically, the officers fired their guns in response to Flores's movement of her vehicle. Despite being shot, Flores did not stop or otherwise submit to the officers' authority. Although she exited her vehicle in a parking lot some distance away and attempted to surrender, her intent was to give herself up to "carjackers." Indeed, she testified that she did not want to wait around for police to arrive because she had an outstanding warrant for her arrest. She then stole a car and resumed her flight. She was not taken into custody until after she was airlifted back to a hospital in Green City and identified by police.

These circumstances are on all fours with *Brooks v. Gaenzle*, 614 F.3d 1213, 1223-24 (10th Cir. 2010), *cert. denied*, 562 U.S. 1200 (2011), in which the Tenth Circuit held that a suspect's continued flight after being shot by police negates a Fourth Amendment excessive-force claim. This is so because "a seizure requires restraint of one's freedom of movement." *Id.* at 1219 (internal quotation marks omitted). Thus, an officer's intentional shooting of a suspect does not effect a seizure unless the "gunshot . . . terminate[s] [the suspect's] movement or otherwise cause[s] the government to have physical control over [her]." *Id.* at 1224.

Here, the officers' use of deadly force against Flores failed to "control [her] ability to evade capture or control." *Id.* at 1223 (internal quotation marks omitted). Because Flores managed to elude police for at least a full day after being shot, there is no genuine issue of material fact as to whether she was seized when Officers Jameson and Leon fired their weapons into her vehicle. *See id.* (rejecting plaintiff's contention that "his shooting alone constitute[d] a seizure," given that "he continued to flee without the deputies' acquisition of physical control" and "remained at large for days"); *see also Farrell*, 878 F.3d at 936, 939 (concluding that plaintiffs were not seized when an officer fired his gun at them, because they continued fleeing for several minutes). Without a seizure, Flores's excessive-force claims (and the derivative conspiracy claims) fail as a matter of law.

We, therefore, determine that the district court properly entered summary judgment in favor of Officers Jameson and Leon on the basis of qualified immunity.

III. The *Heck* Doctrine

In *Heck v. Humphrey*, 512 U.S. 477 (1994), the Supreme Court found that an excessive-force claim under § 1983 is barred if the claim's success would necessarily imply that the plaintiff's

criminal conviction was invalid. *Id.* at 486-87. If the § 1983 claim's success would not impugn the conviction, the action may proceed absent some other bar to the suit. *Id.* at 487.

As with the excessive-force issue, we have not had occasion to apply the *Heck* doctrine when, as here, a § 1983 plaintiff has been convicted after entering a no-contest plea. The Tenth Circuit's decision in *Havens v. Johnson*—a decision cited by both sides—is instructive. 783 F.3d 776 (10th Cir. 2015). In *Havens*, a police officer (Johnson) opened fire when he believed that Havens, whom he was directing to stop, was about to run him over. *Id.* at 780. Havens was charged with a assaulting a police officer, entered an *Alford* plea,[1] and was convicted. *Id.* at 780, 784. Thereafter, Havens sued Johnson under § 1983 for using excessive force. He alleged in his complaint that he was not in control of the vehicle during the incident in question, and that the car "lurched" at Johnson on its own. *Id.* at 781. The Tenth Circuit held that the plaintiff's claim was incompatible with his conviction, and was therefore barred under the *Heck* doctrine:

> [Havens's] complaint did not allege, and his opening brief does not argue, that Johnson used excessive force in response to an attempted assault by Havens. Rather, he contends that Johnson's use of force was unreasonable because Havens did not have control of the car, he did not try to escape, he never saw Johnson, he did not drive toward Johnson, and he was hit by police vehicles and shot almost instantly after arriving on the scene. In other words, he did nothing wrong and did not intend or attempt to injure Johnson. *This version of events could not sustain the elements of attempted first-degree assault under Colorado law and the factual basis for Havens's plea*. . . . Because Havens's only theory of relief is based on his innocence, and this theory is barred by *Heck,* we affirm the district court's grant of summary judgment to Johnson.

Id. at 783-84 (emphasis added); *accord DeLeon v. City of Corpus Christi*, 488 F.3d 649, 656 (5th Cir. 2007).

[1] *See North Carolina v. Alford*, 400 U.S. 25 (1970). An *Alford* plea has been described as "a guilty plea accompanied by protestations of innocence." *U.S. v. Buonocore*, 416 F.3d 1124, 1129-30 (10th Cir. 2005). When a criminal defendant enters such a plea, the proper procedure is to treat it as a plea of *nolo contendere*. *Id.* (citing Fed. R. Crim. P. 11 advisory committee's note (1974)).

The same rationale applies here. Flores pleaded no contest to three crimes and was convicted accordingly. Among these offenses was aggravated fleeing from Officer Jameson. Under the New Franklin Criminal Code, this conviction entailed findings that Flores "willfully and carelessly [drove her] vehicle in a manner that endanger[ed] the life of another person after being given a visual or audible signal to stop . . . by a uniformed law enforcement officer." N.F. Crim. Code § 15(a). Flores's § 1983 claim is directly at odds with these findings. She now asserts that she did not know that Officers Jameson and Leon were police officers; that she could not hear anything the officers said; and that she thought she was being carjacked. This is irreconcilable with the criminal court's determination that she acted "willfully and carelessly" after receiving a "visual or audible signal to stop" from "a uniformed law enforcement officer." If Flores were to prevail on her present allegations, it would necessarily imply that her conviction for aggravated fleeing is invalid. The *Heck* doctrine thus bars Flores's excessive-force claim.

Flores argues that the *Heck* doctrine does not apply here because she pled no contest to the charges, and thus they were not "fully litigated." This argument is not persuasive. The *Heck* doctrine derives from the existence of a valid *conviction*, not from the mechanism by which the conviction was obtained. *See Havens*, 783 F.3d at 784; *see also Ballard v. Burton*, 444 F.3d 391, 400-01 (5th Cir. 2006). It is therefore immaterial that Flores's no-contest plea did not entail any admissions of liability; the same was true of the plaintiff's *Alford* plea in *Havens*.

We therefore determine that the district court properly entered summary judgment in the Defendants' favor for two independent reasons: (1) no § 1983 claim exists because no seizure occurred, and (2) the *Heck* doctrine would bar Flores's claim in any event.

The judgment of the district court is **AFFIRMED**.

SOLOWEY, Circuit Judge, dissenting:

I respectfully dissent. Both of the majority's grounds are flawed.

I. The Officers Effected a Seizure When Their Gunshots Struck Flores

The majority concludes today that when police officers intentionally shot an unarmed woman twice in the back at close range, leaving her partly paralyzed, bleeding profusely, and temporarily blinded, causing her to lie down a few blocks away to surrender, they did not effect a "seizure" under the Fourth Amendment as a matter of law. This conclusion flies in the face of the Fourth Amendment, Supreme Court precedent, and common sense. I dissent.

Our Constitution's Fourth Amendment protects "[t]he right of the people to be secure in their persons . . . against unreasonable . . . seizures." U.S. Const. amend IV. "A person is seized by the police and thus entitled to challenge the government's action under the Fourth Amendment when the officer, 'by means of physical force or show of authority,' terminates or restrains [her] freedom of movement." *Brendlin v. California*, 551 U.S. 249, 254 (2007) (quoting *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968)). Here, the officers applied physical force—with the admitted intent to restrict Flores's movement—when they fired a blizzard of shots at her, two of which entered her back. I would hold that, the moment that these shots struck Flores's body, a seizure occurred under the Fourth Amendment.

The seizure occurred when Flores was shot, regardless of what happened *after* she was shot. But the majority, relying on Tenth Circuit jurisprudence, holds that the bullets lodged in Flores's back did not effect a seizure because they did not immediately halt her flight. The majority reaches this conclusion even though it is undisputed that the bullets left Flores bleeding profusely, temporarily blinded, and partly paralyzed. The majority also acknowledges that, just a few blocks from the shooting, Flores "stopped in a parking lot, exited the Challenger, [and] laid down on the

ground." Having laid down to surrender, she asked a passerby to call the police. When assistance was not forthcoming, Flores sought necessary treatment for the gunshot wounds in her back and was arrested after doing so. Yet the majority holds that, because Flores was able to continue her flight while grievously wounded—however briefly and haltingly—the police officers' gunshots were not a seizure as a matter of law.

This conclusion flies in the face of the Fourth Amendment and Supreme Court precedent, not to mention common sense. The Supreme Court has held that the Fourth Amendment encompasses the common-law definition of arrest. The Court has held that "[t]he word 'seizure' readily bears the meaning of . . . application of physical force to restrain movement, *even when it is ultimately unsuccessful*." *California v. Hodari D.*, 499 U.S. 621, 626 (1991) (emphasis added). Likewise, an intentional application of physical force constitutes a seizure "even though the subject does not yield." *Id.* In other words, "the quintessential 'seizure of the person' under our Fourth Amendment jurisprudence . . . [is] the mere grasping or application of physical force with lawful authority, *whether or not it succeed[s]* in subduing the arrestee." *Id.* at 624 (emphasis added).

The fact that Flores did not immediately terminate her flight does not change the conclusion that she was seized when the officers' rounds struck her; regardless of whether the shots actually stopped Flores, they were the application of physical force. Unlike the majority's contrary view, this conclusion comports with the Supreme Court's recognition that the Fourth Amendment's primary concern is personal security. The Fourth Amendment "guarantees . . . [the] inviolability of the person." *Wong Sun v. U.S.*, 371 U.S. 471, 484 (1963). Gunshots fired into a person's body with the intent to restrain her are the quintessential violation of personal security.

The conclusion that the officers' act of shooting Flores to restrain her was a seizure is consistent with the well-reasoned holdings of the Eighth, Ninth and Eleventh Circuits. *See, e.g.*,

Ludwig v. Anderson, 54 F.3d 465, 471 (8th Cir. 1995); *Nelson v. City of Davis*, 685 F.3d 867, 875-76 (9th Cir. 2012); *Carr v. Tatangelo*, 338 F.3d 1259, 1268 (11th Cir. 2003). Each of these courts has determined that the intentional application of force by law enforcement is a seizure even if the subject does not immediately halt. The majority ignores this persuasive line of cases, and instead relies on the Tenth Circuit's decision in *Brooks v. Gaenzle*, 624 F.3d 1213 (10th Cir. 2010), *cert. denied*, 562 U.S. 1200 (2011), which held that no seizure occurred when officers shot a suspect who continued to flee for three days, reasoning that the shot did not "terminate his movement or otherwise cause the government to have physical control over him." *Id.* at 1224. For the reasons discussed above, the *Brooks* decision represents a minority viewpoint and is wrongly decided under Fourth Amendment principles and Supreme Court precedent.

Thus, I would hold that Flores has established a seizure under the Fourth Amendment.

II. The *Heck* Doctrine Does Not Apply

I also dissent from the majority's finding that *Heck v. Humphrey*, 512 U.S. 477 (1994), precludes Flores from bringing excessive-force claims under 42 U.S.C. § 1983. *Heck* bars excessive-force claims under § 1983 if the plaintiff was convicted under state law and success in her claim would necessarily imply that her conviction is invalid. *Heck*, 512 U.S. at 486-87. But such inconsistencies are not to be presumed: "Generally speaking, 'a claim of excessive force does not necessarily relate to the validity of the underlying conviction and therefore may be immediately cognizable.'" *Schreiber v. Moe*, 596 F.3d 323, 334 (6th Cir. 2010) (quoting *Swiecicki v. Delgado*, 463 F.3d 489, 493 (6th Cir. 2006)). Indeed, the Tenth Circuit—on whose jurisprudence the majority so heavily relies—has explained that "[a]n excessive-force claim against an officer is not necessarily inconsistent with a conviction for assaulting the officer." *Havens v. Johnson*, 783 F.3d 776, 782 (10th Cir. 2015).

Indeed, *Heck* bars plaintiffs from bringing excessive-force claims under § 1983 *only* when the facts make *clear* that success in that action would *necessarily* imply the invalidity of the plaintiff's state conviction. To conclude otherwise "would imply that once a person resists law enforcement, [she] has invited the police to inflict any reaction or retribution they choose, while forfeiting the right to sue for damages." *VanGilder v. Baker*, 435 F.3d 689, 692 (7th Cir. 2006). To properly decide whether the facts show clearly that a claim is necessarily inconsistent with conviction, the court must closely examine the specific factual underpinnings of the plaintiff's conviction. *Riddick v. Lott*, 202 F. App'x 615, 616 (4th Cir. 2006).

Here, the district court failed to engage in this close examination. The majority repeats that error, mainly because the record is insufficiently developed. Among other things, the district court should have examined *when* the relevant acts took place. A person is guilty of aggravated fleeing only if it endangers the life of another person. N.F. Crim. Code § 15(a). The officers were certainly in danger when they were beside Flores's vehicle and prone to being struck. But once the car pulled away, that danger dissipated. If the officers shot Flores *after* that point—that is, after she pulled out of the parking spot and sped away from the officers as the gunshot wounds in her back suggest—then her conviction for aggravated fleeing would remain intact even if she prevailed on her claim for excessive force. *See Havens*, 783 F.3d at 782; *see also Beets v. Cty. of Los Angeles*, 669 F.3d 1038, 1042 (9th Cir. 2012) (An "allegation of excessive force by a police officer would not be barred by *Heck* if it were distinct temporally or spatially from the factual basis for the person's conviction.").

The spotty record here does not allow for a finding that Flores's § 1983 claim would necessarily conflict with her conviction. Indeed, it does not even permit the *analysis* that the *Heck* doctrine requires. The indictment states only that Flores was charged with assaulting the officers

with a motor vehicle "on or about the 21st day of June, 2014." Similarly, the no-contest plea states only that Flores pleaded no contest to charges of assault on a peace office and aggravated fleeing "on or about the 21st day of June, 2014." Flores's complaint in *this* case is more granular: It alleges that the officers fired at Plaintiff's vehicle as she was attempting to exit the parking lot, at which time the officers were not in danger from Plaintiff. The record supports this version of events. It is undisputed that Flores was shot in the back, suggesting that she had already pulled away from the officers and that they were no longer in danger. On this record, it is at best unclear whether Flores's success under § 1983 would necessarily imply the invalidity of her conviction. For that reason alone, I would find that *Heck* does not bar Plaintiff from bringing her excessive-force claims under § 1983.

There is another reason why *Heck* does not stand in the way of Plaintiff's claims: She did not plead guilty, but no contest. The majority finds this distinction "immaterial" and cites *Havens*, 783 F.3d at 784, for the premise that the mechanism by which the conviction was obtained is irrelevant. But the distinction *is* material, and the mechanism by which the conviction was obtained is highly relevant.

The Supreme Court in *Heck* explained that its holding was aimed at preserving the "strong judicial policy against the creation of two conflicting resolutions arising out of the same or identical transaction." 512 U.S. at 486-87 (quoting 8 S. Speiser, C. Krause, & A. Gans, American Law of Torts § 28:5, p. 24 (1991)). Such "conflicting resolutions" may undoubtedly arise if a defendant first pleads guilty to a crime—thereby admitting fault for an action such as assaulting or fleeing from an officer—and later seeks to deny that fault in her allegations supporting her § 1983 claim. The law does not allow the defendant to take such contrary positions.

But a no-contest plea is fundamentally different from a guilty plea. In a no-contest plea, the defendant merely makes a decision not to contest charges while nevertheless accepting a sentence—but she makes *no admission of guilt*. *E.g.*, *U.S. v. Willis*, 106 F.3d 966, 969 (11th Cir. 1997) ("A nolo plea means 'no contest,' not 'I confess.' It simply means that the defendant, for whatever reason, chooses not to contest the charge. He does not plead either guilty or not guilty, and it does not function as such a plea.") (quoting *Garron v. State*, 528 So.2d 353, 360 (Fla. 1998)). A subsequent finding that the criminal defendant's unlawful actions arose from excessive force would not be inconsistent with her decision to take the punishment without admitting or denying culpability. Even under Tenth Circuit jurisprudence, a no-contest plea (unlike a guilty plea) does not preclude a defendant from denying fault in a subsequent civil action. *E.g.*, *Klen v. City of Loveland*, 661 F.3d 498, 516 (10th Cir. 2011). Likewise, a no-contest plea should not preclude a defendant from later claiming excessive force.[2]

In this case, Flores decided not to contest charges of assault on a peace officer and aggravated fleeing. Flores may have made that decision for any number of reasons. She may, for example, have simply wanted to avoid a public trial for personal reasons. Whatever Flores's reasons were, she never admitted to being at fault. Her mere decision to accept punishment should not preclude her from raising excessive-force claims under § 1983.

I would find that *Heck* does not bar Flores from bringing her excessive-force claims under § 1983. For this reason, and because I disagree with the majority's conclusion that no seizure occurred, I would reverse the summary judgment.

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[2] As the majority correctly states, *Havens* involved a plea under *North Carolina v. Alford*, 400 U.S. 25 (1970). Here, Flores pleaded no contest and did not enter into an *Alford* plea. I do not opine whether *Heck* would have precluded Flores from raising excessive-force claims under § 1983 if she had entered into an *Alford* plea, as that issue is not before this Court.