

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

FILED BY CLERK
AUG 17 2007
COURT OF APPEALS
DIVISION TWO

KENNETH S. MACHADO,)	
)	
Plaintiff/Appellant,)	2 CA-CV 2006-0156
)	DEPARTMENT B
v.)	
)	<u>MEMORANDUM DECISION</u>
JENNIFER WHITFIELD, ROBERT)	Not for Publication
GAMEZ,)	Rule 28, Rules of Civil
)	Appellate Procedure
Defendants/Appellees.)	
_____)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C20056560

Honorable Leslie Miller, Judge

AFFIRMED IN PART
REVERSED IN PART AND REMANDED

Kenneth S. Machado

Buckeye
In Propria Persona

Michael G. Rankin, Tucson City Attorney
By Michael E. Owen

Tucson
Attorneys for Defendants/Appellees

V Á S Q U E Z, Judge.

¶1 Appellant Kenneth S. Machado appeals from the trial court’s dismissal of his claims against appellees Robert Gamez and Jennifer Whitfield, City of Tucson police detectives, for alleged civil rights violations under 42 U.S.C. § 1983. His claims arose from a criminal investigation and trial for his alleged sexual assault and attempted murder of his wife. Gamez and Whitfield successfully moved for dismissal of the civil action on the ground that all of Machado’s claims are barred under *Heck v. Humphrey*, 512 U.S. 477, 486, 114 S. Ct. 2364, 2372 (1994), which precludes collateral attacks on standing criminal convictions through § 1983 lawsuits. Machado contends on appeal that the trial court erred in applying *Heck* and in dismissing his claims without explaining the deficiencies in his complaint and affording him an opportunity to amend. We affirm in part, reverse in part, and remand for further proceedings.

Facts and Procedural History

¶2 “In reviewing a trial court’s ruling on a motion to dismiss for failure to state a claim, we will assume all the facts alleged in the complaint are true.” *Republic Nat’l Bank of New York v. Pima County*, 200 Ariz. 199, ¶ 2, 25 P.3d 1, 3 (App. 2001).¹ On December 14, 2003, officers allegedly detained Machado in his house for more than twelve hours while they searched the residence pursuant to a search warrant. They were

¹For purposes of clarity, we have also drawn some facts from our previous memorandum decision in Machado’s direct criminal appeal. *State v. Machado*, No. 2 CA-CR 2004-0362 (memorandum decision filed May 10, 2006); see *Kaufman v. Pima Junior College*, 16 Ariz. App. 152, 155, 492 P.2d 32, 35 (1971).

investigating Machado for the sexual assault of his estranged wife, which she alleged had occurred at the house. In February 2004, detectives reopened their investigation after they received information that Machado allegedly had also asked his cousin to help him kill his wife. Machado was subsequently indicted for sexual assault, administering intoxicating liquor or a dangerous drug, attempted first-degree murder, solicitation of a class one felony, and interfering with judicial proceedings. The trial court granted his motion for judgment of acquittal, pursuant to Rule 20, Ariz. R. Crim. P., 17 A.R.S., on the charge of administering intoxicating liquor or a dangerous drug. The jury found Machado guilty of sexual assault, solicitation of a class one felony, and interfering with judicial proceedings. It acquitted him of attempted murder. We affirmed his convictions on appeal. *State v. Machado*, No. 2 CA-CR 2004-0362 (memorandum decision filed May 10, 2006).

¶3 While his criminal appeal was pending, Machado filed a lawsuit² in Pima County Superior Court in which he claimed Gamez and Whitfield, who had been involved in the criminal investigations, had violated his civil rights under 42 U.S.C. § 1983. Gamez and Whitfield moved to dismiss Machado’s claims pursuant to Rule 12(b)(6), Ariz. R. Civ. P., 16 A.R.S., Pt. 1. Citing *Heck*, they argued that Machado’s claims were barred because his convictions had not been reversed, expunged, or set aside. The trial court granted the motion to dismiss without comment. This appeal followed.

²Machado titled this pleading a “Motion for Declaratory Relief.”

Standard of Review

¶4 We review the dismissal of a § 1983 complaint de novo. *See Burk v. State*, 215 Ariz. 6, ¶ 6, 156 P.3d 423, 426 (App. 2007) (dismissal based on Rule 12(b)(6) reviewed de novo); *see also Widolf v. Wiens*, 202 Ariz. 383, ¶ 8, 45 P.3d 1232, 1235-36 (App. 2002) (existence of judicial immunity based on allegations in complaint reviewed de novo). Section 1983 complaints do not have heightened pleading requirements and, therefore, must only comply with the “liberal system of notice pleading.” *Empress LLC v. City & County of San Francisco*, 419 F.3d 1052, 1055 (9th Cir. 2005). We will affirm the dismissal only if, assuming the truth of the facts alleged in the complaint, Machado “would not be entitled to relief under any interpretation of the facts susceptible of proof.” *Fid. Sec. Life Ins. Co. v. State Dep’t of Ins.*, 191 Ariz. 222, ¶ 4, 954 P.2d 580, 582 (1998).

Discussion

¶5 As a preliminary matter, we note that both parties presented matters outside the pleadings. Ordinarily this transforms a motion to dismiss into a motion for summary judgment. *See Ariz. R. Civ. P. 12(b)*; *Smith v. CIGNA HealthPlan of Ariz.*, 203 Ariz. 173, ¶ 8, 52 P.3d 205, 208 (App. 2002); *Blanchard v. Show Low Planning & Zoning Comm’n*, 196 Ariz. 114, ¶ 11, 993 P.2d 1078, 1081 (App. 1999). However, the extrinsic matters “neither add to nor subtract from the [alleged] deficiency of the pleading” and do not provide additional information concerning the merits of Machado’s claims or their ultimate

survival under *Heck*. See *Brosie v. Stockton*, 105 Ariz. 574, 576, 468 P.2d 933, 935 (1970).

¶6 Furthermore, there is no indication the trial court relied on, or even considered, the additional material in granting the motion to dismiss. Machado’s “right under Rule 12(b)(6) to “reasonable opportunity to present all material made pertinent to such a motion by Rule 56[, Ariz. R. Civ. P., 16 A.R.S., Pt. 1,]” includes the right to some indication from the court that it is treating the Rule 12(b)(6) motion as one for summary judgment.” *Gatecliff v. Great Republic Life Ins. Co.*, 154 Ariz. 502, 508, 744 P.2d 29, 35 (App. 1987), quoting *Dale v. Hahn*, 440 F.2d 633, 638 (2d Cir. 1971), quoting Fed. R. Civ. P. 12(b). We therefore treat it as a motion to dismiss under Rule 12(b)(6).

¶7 Machado first argues the trial court abused its discretion in failing to state the grounds on which it dismissed his claims. He relies on *Noll v. Carlson*, 809 F.2d 1446 (9th Cir. 1987),³ for the proposition that as a pro se litigant he was entitled to a statement of the deficiencies in his complaint and an opportunity to amend.⁴ “[N]o universal requirement exists in Arizona law that a trial court granting an opposed motion to dismiss make findings explaining its action.” *Wigglesworth v. Mauldin*, 195 Ariz. 432, ¶ 25, 990 P.2d 26, 33

³At least part of the holding in *Noll* relied upon by Machado has been superceded in pro se prison litigation cases by amendment to the Prison Litigation Reform Act. See 28 U.S.C. § 1915(e)(2)(B)(ii); see also *Lopez v. Smith*, 160 F.3d 567, 571 (9th Cir. 1998), withdrawn by 173 F.3d 749 (9th Cir. 1999).

⁴Here, the trial court’s ruling in its entirety states: “It is hereby ordered that the motion to dismiss is granted.”

(App. 1999). However, “state law cannot make bringing a § 1983 claim more burdensome than bringing it in federal court.” *Kerr v. Waddell*, 185 Ariz. 457, 463, 916 P.2d 1173, 1179 (App. 1996). “[Section] 1983 provides ‘a uniquely federal remedy against incursions . . . upon rights secured by the Constitution and laws of the Nation,’” *Felder v. Casey*, 487 U.S. 131, 139, 108 S. Ct. 2302, 2307 (1988), *quoting Mitchum v. Foster*, 407 U.S. 225, 239, 92 S. Ct. 2151, 2160 (1972) (second alteration in *Felder*), and therefore “is to be accorded ‘a sweep as broad as its language,’” *id.*, *quoting United States v. Price*, 383 U.S. 787, 801, 86 S. Ct. 1152, 1160 (1966). And, in the context of such claims, “a pro se complaint, ‘however inartfully pleaded,’ must be held to ‘less stringent standards than formal pleadings drafted by lawyers’”; it must be liberally construed. *Estelle v. Gamble*, 429 U.S. 97, 106, 97 S. Ct. 285, 292 (1976), *quoting Haines v. Kerner*, 404 U.S. 519, 520, 92 S. Ct. 594, 596 (1972).

¶8 “Before the trial court grants a Rule 12(b)(6) motion to dismiss, the non-moving party should be given an opportunity to amend the complaint if such an amendment cures its defects.” *Wigglesworth*, 195 Ariz. 432, ¶26, 990 P.2d at 33; *see also Sun World Corp. v. Pennysaver, Inc.*, 130 Ariz. 585, 589, 637 P.2d 1088, 1092 (App. 1981). However, a pro se litigant should not be granted leave to amend if “it is ‘absolutely clear that the deficiencies of the complaint could not be cured by amendment.’” *Noll*, 809 F.2d at 1448, *quoting Broughton v. Cutter Labs.*, 622 F.2d 458, 460 (9th Cir. 1980). We must, therefore, review each of Machado’s claims to determine whether he has stated a

colorable claim as alleged, and, if not, whether the trial court should have granted leave to amend.

¶9 Section 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress

To state a claim under § 1983, the complaint must allege “that [the plaintiff was] deprived of a right secured by the Constitution or laws of the United States, and that the alleged deprivation was committed under color of state law.” *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 49-50, 119 S. Ct. 977, 985 (1999); *Henke v. Superior Court*, 161 Ariz. 96, 100, 775 P.2d 1160, 1164 (App. 1989). Accordingly, we first must determine the specific constitutional rights Machado alleges were violated by Gamez and Whitfield. *See Albright v. Oliver*, 510 U.S. 266, 271, 114 S. Ct. 807, 811 (1994).

¶10 Machado claimed both detectives had illegally detained him, committed perjury at trial, and withheld exculpatory evidence, all in violation of his right to due process of law under the Fourteenth Amendment to the United States Constitution and had violated his Fourth Amendment rights under the United States Constitution by exceeding the bounds of the search warrant. Machado also claimed Gamez had individually violated his Fourth Amendment rights by “physically manipulating his work back pack that was not on his

person” and his rights to privacy and due process by “forc[ing] Mr. Machado to urinate in front of him.” He separately alleged Whitfield had “threaten[ed] a witness with arrest if she did not discuss issues of an evidentiary nature” but did not specify which of his constitutional rights that action infringed. Machado also alleged Whitfield had committed perjury before the grand jury in violation of his due process rights.

¶11 Having identified a number of constitutional rights implicated in Machado’s claims, we must then apply the standards applicable to those constitutional provisions to determine whether constitutional violations have actually occurred. *See Graham v. Connor*, 490 U.S. 386, 394, 109 S. Ct. 1865, 1871 (1989). Machado has the burden of establishing a causal connection between the detectives’ actions and the alleged deprivation of his constitutional right in order to state a claim upon which relief may be granted. *Zatler v. Wainwright*, 802 F.2d 397, 401 (11th Cir. 1986); *Williams v. Bennett*, 689 F.2d 1370, 1380 (11th Cir. 1982).

¶12 As we have noted, the trial court granted the motion to dismiss without specifying any basis for its dismissal. We, therefore, have no way of knowing if the trial court even considered whether Machado stated cognizable claims. We can only presume the trial court’s ruling was based solely on the ground asserted in the motion to dismiss. *See Brown v. Superior Court*, 137 Ariz. 327, 331, 670 P.2d 725, 729 (1983) (in absence of specific findings appellate court presumes trial court ruling based on grounds asserted in motion).

¶13 Gamez and Whitfield argue now, as they did below, that Machado’s claims are barred under *Heck* in which the Supreme Court held that

in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court’s issuance of a writ of habeas corpus.

512 U.S. at 486-87, 114 S. Ct. at 2372. Gamez and Whitfield contend Machado’s claims “necessarily go to elements of the convictions for which he is imprisoned” and, therefore, “[u]ntil such time as those convictions are reversed, expunged, or set aside, [Machado] may not bring a claim for violation of his civil rights.”

¶14 Machado counters the trial court erred in concluding *Heck* applies to and, thus, bars his claims. He asserts that his civil claims only relate to the charges for which he was acquitted and, therefore, are not precluded under *Heck*. Machado contends that by limiting his “arguments in this § 1983 action [to] only the acquittals,” his claims do not necessarily challenge the validity of his standing convictions.⁵

⁵Machado argued below that actions for declaratory relief are not subject to *Heck v. Humphrey*, 512 U.S. 477, 114 S. Ct. 2364 (1994). However, he appears to have abandoned this argument on appeal. In any event, we note that in *Edwards v. Balisok*, 520 U.S. 641, 643-48, 117 S. Ct. 1584, 1586-89 (1997), the Supreme Court specifically applied *Heck*’s holding to an action seeking damages and declaratory relief, without distinguishing between the two types of relief.

¶15 In *Heck*, the Supreme Court examined § 1983 claims in the context of the common law of torts and concluded that “the hoary principle that civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments applies to § 1983 damages actions that necessarily require the plaintiff to prove the unlawfulness of his conviction or confinement.” 512 U.S. at 486, 114 S. Ct. at 2372. However, it also noted, “if the [trial] court determines that the plaintiff’s action, even if successful, will *not* demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed.” *Id.* at 487, 114 S. Ct. at 2372. The Court provided an example of this in footnote seven, which suggests:

[A] suit for damages attributable to an allegedly unreasonable search may lie even if the challenged search produced evidence that was introduced in a state criminal trial resulting in the § 1983 plaintiff’s still outstanding conviction. Because of doctrines like independent source and inevitable discovery, and especially harmless error, such a § 1983 action, even if successful, would not *necessarily* imply that the plaintiff’s conviction was unlawful.

Id. at 487 n.7, 114 S. Ct. at 2372 n.7 (citations omitted).

¶16 Nevertheless, Machado’s assertion that his claims are limited to the charges that resulted in acquittals does not automatically mean they fall outside *Heck*’s reach. Machado’s acquittals arose from the same nucleus of facts as his convictions. Therefore, it is possible that even limiting the scope of his claims to include only the acquittals, as Machado suggests, would nonetheless undermine the convictions. *Heck* requires the dismissal of Machado’s claims if, as stated, they necessarily would cast the validity of his

convictions into doubt. *See id.* We also note Machado’s limitation of his claims to the acquitted charges affects whether he has stated cognizable claims of sufficient constitutional magnitude under § 1983.

¶17 Therefore, we are still left with the task of determining whether Machado has stated cognizable claims under § 1983, and whether, if successful, any of his individual claims would necessarily cast doubt on any of his convictions. Because this assessment and the application of *Heck* depend on the particular nature of each claim, we consider them individually as follows.

1. Perjury

¶18 First, Machado claims that Gamez and Whitfield deprived him of due process of law by committing perjury at his criminal trial and that Whitfield did so by committing perjury before the grand jury. Machado relies on *Phillips v. Woodford*, 267 F.3d 966, 984-85 (9th Cir. 2001), for the proposition that the state’s knowing use of perjury constitutes a due process violation. In *Phillips*, a prisoner appealed the district court’s denial of an evidentiary hearing on his habeas corpus petition. In that petition he argued, inter alia, that the state used testimony it knew to be false. *Id.* at 983. The district court found that the state trial court had already “‘considered and rejected’” this claim, but did so without reaching the factual merits of the claim. *Id.* at 984.

¶19 In determining the ultimate issue of whether Phillips was entitled to an evidentiary hearing, the Ninth Circuit stated that “[i]t is well settled that the presentation of

false evidence violates due process.” *Id.* at 984-85. However, it also noted that the perjury must be material before the criminal defendant may be entitled to relief. *Id.*; *see also United States v. LaPage*, 231 F.3d 488, 491 (9th Cir. 2000).

¶20 Perjury is material if it is “reasonably likely to have affected the judgment of the jury.” *Phillips*, 267 F.3d at 985. After examining the facts alleged by Phillips, the Ninth Circuit concluded that a question of fact existed about whether the allegedly perjured testimony affected the jury’s judgment and remanded the case for an evidentiary hearing. *Id.* at 985.

¶21 In this case, however, there is no factual dispute about whether the allegedly perjured testimony was material. Machado has chosen to limit his § 1983 claims to his acquittals. Because he was not convicted of any offense under consideration here, the alleged perjury could not be said to have been “reasonably likely to have affected the judgment of the jury.” *Id.* Accordingly, he cannot demonstrate that the alleged perjury affected the jury’s judgment in such a way as to violate his right to due process. *See id.*; *LaPage*, 231 F.3d at 491 (“The due process clause entitles defendants in criminal cases to fundamentally fair procedures.”). Any alleged perjury related to the charges for which Machado was acquitted did not deprive him of a fair trial. Therefore, as a matter of law, he cannot state a claim, and amending the complaint will not cure the defect. The trial court properly dismissed this claim. *See Espil Sheep Co. v. Black Bill & Doney Parks Water*

Users Ass'n, 16 Ariz. App. 201, 203-04, 492 P.2d 450, 452-53 (1972) (we may affirm if trial court's granting of motion to dismiss correct, although for wrong reasons).

2. Failure to Produce Evidence

¶22 Second, Machado alleges Gamez and Whitfield violated his due process rights under the Fourteenth Amendment by failing to produce and/or tampering with material evidence. However, there can be no due process violation for failure to disclose evidence unless the evidence is material to guilt or punishment. *See Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196-97 (1963). Furthermore, withholding of evidence does not violate due process “unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict.” *Strickler v. Greene*, 527 U.S. 263, 281, 119 S. Ct. 1936, 1948 (1999).

¶23 Again, Machado has limited his claims to the charges resulting in acquittals. He therefore cannot prove that had the allegedly suppressed/tampered evidence been disclosed he would have received a different, more favorable verdict on these charges. Thus, Machado has failed to state a claim that would entitle to him to relief, and the trial court properly dismissed this claim.

3. Exceeding Authority of Search Warrant

¶24 Machado next alleges Gamez and Whitfield subjected him to an unreasonable search. Specifically, he contends the search exceeded the scope of the search warrant because it continued “beyond the time restraints in the warrant of ‘in the daytime[’] . . . past

10:00 [p.m.] until after 11:00 [p.m.] without further authorization.” Under A.R.S. § 13-3917, warrants must be executed during the daytime unless a magistrate expressly authorizes a nighttime execution. The statute defines night as between 10:00 p.m. and 6:30 a.m. *Id.*

¶25 However, searches extending beyond 10:00 p.m. are not “invalidly executed” if the search warrant is served prior to 10:00 p.m and the search is part of “one continuous transaction.” *People v. Zepeda*, 162 Cal. Rptr. 143, 147 (App. 1980); *see also State v. Jackson*, 117 Ariz. 120, 122, 571 P.2d 266, 268 (1977) (noting that because Arizona search warrant statute based on California statute, California decisions persuasive). Machado does not allege the warrant was first served on him after 10:00 p.m., nor does he contend the search was unreasonable on any other basis. He argues only that the search improperly continued “beyond” 10:00 p.m. This is not a violation of § 13-3917, and he has therefore not stated a claim which could entitle him to relief. Dismissal of this claim was proper.

4. Threatening of Witness

¶26 Machado claims Whitfield “threaten[ed] a witness with arrest if she did not discuss issues of an evidentiary nature.” Machado does not indicate how this resulted in a violation of his rights. He does not allege the witness was coerced into giving a false statement or even that her statements, if she made any, were used against him. Thus, Machado has not alleged sufficient facts to state a claim. However, he would not benefit by amending the complaint, given the limited scope of his claims to include only the charges of which he was acquitted. Any issues “of an evidentiary nature” that the witness may have

discussed with the detectives obviously had no material impact on Machado's acquittals. This claim was appropriately dismissed by the trial court.

5. Illegal Detention

¶27 Machado next alleges he was illegally detained by both Gamez and Whitfield for twelve and one-half hours. This essentially is a claim for false arrest.⁶ See *Wallace v. Kato*, ___ U.S. ___, ___, 127 S. Ct. 1091, 1095 (2007). In his complaint, Machado asserts he was subject to a "custodial detention without proper authority from 10:30 [a.m.] to 11:00 [p.m.]" on December 14, 2003. This is sufficient to state a claim because it puts Gamez and Whitfield on "notice of the basis for the claim and its general nature" and, if true, entitles Machado to relief. *Guerrero v. Copper Queen Hosp.*, 112 Ariz. 104, 106-07, 537 P.2d 1329, 1331-32 (1975); see also Ariz. R. Civ. P. 8(a), 16 A.R.S., Pt. 1.

¶28 Our determination that Machado has stated a cognizable claim does not mean he will ultimately prevail on the merits. In *State v. Carrasco*, 147 Ariz. 558, 560, 711 P.2d 1231, 1233 (App. 1985), Division One of this court recognized that the "traditional justification for detention is probable cause." However, the court further noted that

⁶In their answering brief Gamez and Whitfield suggest that Machado may not bring any Fourth Amendment search and seizure claims because they have not yet accrued. They rely on *Harvey v. Waldron*, 210 F.3d 1008 (9th Cir. 2000), for this proposition. In *Harvey*, the Ninth Circuit held that a criminal defendant's Fourth Amendment § 1983 claims do not accrue until the defendant is acquitted or exonerated of the underlying criminal action. *Id.* at 1015. However, *Harvey* was effectively overruled by the Supreme Court's decision in *Wallace v. Kato*, ___ U.S. ___, ___, 127 S. Ct. 1091, 1097-98 (2007), which held that § 1983 causes of action accrue at the time of injury, not exoneration.

in *Michigan v. Summers*, 452 U.S. 692, 101 S. Ct. 2587, 69 L.Ed.2d 340 (1981), the Supreme Court established a limited exception to the probable cause requirement and ruled that the *occupant* of premises being searched could be detained for the duration of the search. The Court relied upon a reasonableness standard balancing the severity of the individual intrusion against certain government interests. Unlike previous exceptions involving only brief detentions, *see Terry v. Ohio*[, 392 U.S. 1, 88 S. Ct. 1868 (1968)] (investigatory stops) and [*United States v.*] *Brignoni-Ponce*[, 422 U.S. 873, 95 S. Ct. 2574 (1975)] (stops at the Mexican border), *Summers* permits an extended detention.

Carrasco, 147 Ariz. at 560, 711 P.2d at 1233. But on the limited record available to us, we cannot determine whether the *Summers* exception applies and must leave that determination to the trial court on remand.⁷

¶29 We must also, however, consider whether this claim is barred by *Heck*. Under *Heck*, § 1983 false imprisonment claims are not barred unless there is an actual conviction that the “civil suit would impugn.” *Wallace*, ___ U.S. at ___, 127 S. Ct. at 1098. The existence of an unconstitutional detention will not impugn any of Machado’s convictions if no evidence derived from the detention was used to convict him. However, if evidence was derived from the detention and related to the charges of which Machado was convicted, successful pursuit of this claim could very well impugn his convictions. *See Heck*, 512 U.S. at 487, 114 S. Ct. at 2372. Therefore, whether successful resolution of this claim would

⁷Although, as noted in footnote one, we have included additional facts from the criminal trial, those additional facts are not part of the record in this case. Thus we cannot rely on them and remand for a proper determination.

undermine Machado's convictions is a factual matter for the trial court to determine after discovery. It is unclear at this point in the proceedings whether a finding of an illegal detention would impugn Machado's outstanding convictions. Under these circumstances the trial court erred in dismissing this claim.

6. Forced Public Urination

¶30 Machado also claims that during his detention he was forced to urinate in front of Detective Gamez. He relies on *Herzog v. Village of Winnetka*, 309 F.3d 1041, 1044 (7th Cir. 2002), for the proposition that “[g]ratuitously forcing a person to urinate in the presence of another is an invasion of privacy in the most elementary sense, and . . . is . . . either an illegal search or a deprivation without due process of law of a form of liberty protected by the Constitution's due process clauses.” (Citations omitted.)

¶31 The Supreme Court has recognized that urination is “an excretory function traditionally shielded by great privacy” and stated that in instances of compelled urinalysis, “[t]he initial detention necessary to procure the evidence may be a seizure of the person if the detention amounts to a meaningful interference with his freedom of movement.” *Skinner v. Ry. Labor Executives Ass'n*, 489 U.S. 602, 616, 624, 108 S. Ct. 1402, 1412, 1418 (1989) (citations omitted). We do not know the circumstances involved in Gamez allegedly requiring Machado to urinate in his presence. But Machado has stated a cognizable claim that if proved constitutes a violation of his constitutional rights. *See id.* Therefore, Machado has stated a claim for which relief may be granted.

¶32 Nevertheless, if resolution of this claim in his favor would cast doubt on Machado's convictions, it was properly dismissed. *See Heck*, 512 U.S. at 486, 114 S. Ct. at 2372. It would only affect his convictions if evidence had been obtained unreasonably and was used to convict him. However, Machado claims only that Gamez unjustifiably watched him urinate; he does not also allege any evidence was obtained unconstitutionally. This claim does not implicate his convictions, and *Heck*, therefore, does not preclude it. The trial court improperly dismissed this claim.

7. Illegal Search of Backpack

¶33 Finally, Machado alleges his Fourth Amendment rights were violated when Detective Gamez "physically manipulated his work back pack that was not on his person." Machado relies on *Bond v. United States*, 529 U.S. 334, 338-39, 120 S. Ct. 1462, 1465 (2000), in which the Supreme Court held that a police officer's "physical manipulation" of a bus passenger's bag was unreasonable and a violation of the defendant's Fourth Amendment right to be secure in his personal effects.

¶34 Based solely on the allegations of the complaint, we cannot affirm the trial court's dismissal of this claim. *Republic Nat'l Bank of New York v. Pima County*, 200 Ariz. 199, ¶ 2, 25 P.3d 1, 3 (App. 2001) (we assume all facts alleged in complaint are true). We conclude he has alleged sufficient, albeit minimal, facts to enable this claim to survive. *See Pena v. Gardner*, 976 F.2d 469, 471 (9th Cir. 1992) (pro se complaint liberally construed and dismissed only if "plaintiff can prove no set of facts in support of his claim which

would entitle him to relief”), *quoting Estelle v. Gamble*, 429 U.S. 97, 106, 97 S. Ct. 285, 292 (1976).

¶35 It is not clear from the facts alleged whether any evidence was derived from this “manipulation” and what bearing such evidence might have had on Machado’s convictions. We, therefore, cannot say that *Heck* bars Machado’s claim, and the trial court erred in making that determination based merely on the allegations in the complaint.

Disposition

¶36 In summary, we affirm the trial court’s dismissal of Machado’s claims of perjury, withholding of exculpatory evidence, exceeding the scope of the warrant, and threatening of a witness. We reverse the court’s dismissal of the illegal detention, forced public urination, and illegal search claims and remand for further proceedings consistent with this decision.

GARYE L. VÁSQUEZ, Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

PHILIP G. ESPINOSA, Judge