No. 21-1071

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Marcus Mitchell,

Plaintiff – Appellant

v.

Morton County Sheriff Kyle Kirchmeier, Morton County, City of Bismarck, Morton County Sheriff's Deputy George Piehl, Bismarck Police Officer Tyler Welk, North Dakota Highway Patrol Sergeant Benjamin Kennelly, John Does 1-2,

Defendants - Appellees.

RESPONSE BRIEF OF DEFENDANT-APPELLEE BENJAMIN KENNELLY

Wayne Stenehjem
Attorney General
State of North Dakota

By: James E. Nicolai
Deputy Solicitor General
State Bar ID No. 04789
Office of Attorney General
500 North 9th Street
Bismarck, ND 58501-4509
Telephone (701) 328-3640
Facsimile (701) 328-4300
Email jnicolai@nd.gov

Attorneys for Appellee Benjamin Kennelly.

SUMMARY OF THE CASE

Marcus Mitchell brought this action under 42 U.S.C. § 1983 claiming he suffered injuries when he was hit by a "less-than-lethal" munition during the Dakota Access Pipeline (DAPL) protest. Mitchell sued state defendant Kennelly for allegedly failing to intervene to keep other officers from harming him. He also sued Kennelly and other defendants for conspiracy and intentional infliction of emotional distress (IIED).

The district court determined the failure to intervene claim failed as a matter of law because Mitchell did not establish that any officers used unconstitutional force against him. The district court also dismissed the claim because Mitchell's conclusory allegations failed to show Kennelly had reason to know of any alleged excessive force or had the opportunity to prevent the alleged harm even if other officers used excessive force. Mitchell has abandoned his conspiracy and IIED claims on appeal except for the unsupported argument that those claims should have been dismissed without prejudice rather than with prejudice.

This case has an issue of first impression about application of the Heck-bar to a pretrial diversion agreement in a Section 1983 action, and thus oral argument would be helpful. Although Kennelly is entitled to the dismissal of the claims against him for reasons independent of whether or how this Court decides the Heck-bar issue, he suggests twenty minutes of argument would be appropriate to permit the separately represented appellees to respond to Mitchell's arguments.

CORPORATE DISCLOSURE STATEMENT

Appellee Benjamin Kennelly is sued in his capacity as an employee of the North Dakota Highway Patrol. He is an individual and a state employee, not a corporation, and therefore no corporate disclosure statement is required pursuant to Fed. R. App. P. 26.1 or 8th Cir. R. 26.1A.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes and Rules

STATEMENT OF ISSUES

I. Whether Mitchell has abandoned the claims against Kennelly for conspiracy, racially motivated conspiracy, and intentional infliction of emotional distress (IIED).

Most apposite authority:

Jasperson v. Purolator Courier Corp., 765 F.2d 736 (8th Cir.1985)

Ahmed v. United States, 147 F.3d 791 (8th Cir. 1998)

II. Whether the district court correctly determined the conclusory allegations against Kennelly for failure to intervene were insufficient to state a claim for relief.

Most apposite authority:

Ashcroft v. Iqbal, 556 U.S. 662 (2009)

Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007)

Jennings v. Davis, 476 F.2d 1271 (8th Cir. 1973)

Krout v. Goemmer, 583 F.3d 557 (8th Cir. 2009)

III. Whether the district court correctly determined the officers directly involved in Mitchell's arrest did not violate his Fourth Amendment rights and were entitled to qualified immunity.

Most apposite authority:

Bernini v. St. Paul, 665 F.3d 997 (8th Cir. 2012)

IV. Whether the derivative failure to intervene claim against Kennelly necessarily fails because of the lack of an underlying Fourth Amendment violation.

Most apposite authority:

Zubrod v. Hoch, 907 F.3d 568 (8th Cir. 2018)

STATEMENT OF THE CASE

Marcus Mitchell brought this action under 42 U.S.C. § 1983 against Morton County and the City of Bismarck, as well as six individual officers. One of the individually named defendants was North Dakota Highway Patrol Sergeant Benjamin Kennelly. Mitchell alleges that a Morton County deputy sheriff (George Piehl), a Bismarck municipal police officer (Tyler Welk), and two John Doe law enforcement officers (one other Morton County deputy sheriff and one other Bismarck municipal police officer) deployed less-than-lethal bean bag rounds at him during the DAPL protest in January 2017. Appellant's App. at AA21, ¶¶ 54-55. Mitchell further alleges that a bean bag round deployed by one of those four officers entered his left eye socket and caused injuries. Id. at ¶ 57.

Kennelly is not alleged to have been one of the four municipal or county officers who deployed bean bag rounds at him, but Mitchell included Kennelly as a defendant in this action. Mitchell sued Kennelly for conspiracy, racially motivated conspiracy, failing to intervene, and a state law claim alleging IIED. Id. at AA34-35, AA36-37, AA37, AA39-40.

I. Allegations against Kennelly in the complaint.

The complaint is 167 paragraphs. The allegations against Kennelly appear in six of those paragraphs as follows:

Paragraph 15 of the complaint alleges Kennelly was a duly appointed law enforcement officer acting under color of law, and that within the course and scope of his employment he was acting under the command of defendant Kirchmeier and the Morton County Sheriff's Office. Id. at AA12-13.

Paragraph 45 alleges Kennelly was dispatched to the Backwater Bridge on the evening of January 18, 2017/early morning hours of January 19, 2017 and was issued a 12-gauge shotgun that deployed bean bag rounds. Id. at AA19.

Paragraph 46 alleges Kennelly was the scene commander on the evening/morning in question, and that he "directed law enforcement officers during 'pushes' during which officers rushed, advanced toward and deployed munitions at the water protectors." Id.

Paragraph 47 alleges Kennelly was carrying out the policies of Defendant Kirchmeier and Morton County in directing law enforcement officers on the evening/morning in question. Id.

Paragraph 52 alleges all named defendants singled out Mitchell as an agitator and made a plan to shoot and arrest Mitchell at Backwater Bridge. Id. at AA20.

Finally, paragraph 58 alleges Kennelly "had the duty and opportunity to intervene on Mr. Mitchell's behalf, but did nothing to assist him, and in fact directed, encouraged, and/or facilitated the Defendant Officers' shooting of Mr. Mitchell." Id. at AA21.

Based on these limited allegations, Mitchell seeks to hold Kennelly personally liable for an alleged violation of Mitchell's constitutional rights. But Mitchell's complaint also acknowledged he interjected himself into an ongoing confrontation between law enforcement and other protestors that was already underway on the Backwater Bridge. See id. at AA20, ¶¶ 48, 50. He admitted law enforcement gave warnings to protestors regarding their presence on the Backwater Bridge. Id. at AA21, ¶ 54 (alleging protestors were warned with a "countdown" before law

enforcement used less-than-lethal munitions to clear them from the Bridge). And he admitted positioning himself between law enforcement and other protestors, id. at AA20, ¶ 50, conduct inconsistent with complying with law enforcement warnings to disperse.

II. Allegations that are not in the complaint.

The complaint does not contain specific factual assertions to support a claim that Kennelly's role as a scene commander was inherently unconstitutional, or that Kennelly intended to violate Mitchell's rights through his direction of other law enforcement officers. The complaint does not contain specific factual assertions to support an allegation that the defendants made a plan to shoot and arrest Mitchell or, even assuming there was such a plan, specific factual assertions to show Kennelly was personally aware of the alleged plan. Nor does the complaint explain how the alleged plan to arrest Mitchell could have been accomplished had he not chosen to interject himself into an ongoing confrontation at the Backwater Bridge.

The complaint does not contain specific factual assertions to show that Kennelly was personally aware that the four municipal and county officers were going to engage in an unconstitutional act against Mitchell. Nor does the complaint contain specific factual assertions to establish Kennelly's location in relation to the deployment of the bean bag rounds to support the allegation that he had an opportunity to intervene, or to support the allegation that Kennelly encouraged or facilitated an unconstitutional act against Mitchell.[1]

[1] The complaint also did not contain specific factual assertions to support the allegation that Kennelly conspired with others to engage in an unconstitutional act against Mitchell. Nor does the complaint contain specific factual assertions to

III. The motion to dismiss.

Kennelly filed a motion to dismiss as his initial responsive pleading to Mitchell's complaint. Kennelly argued the conclusory allegations against him lacked sufficient specificity and factual support to put him on notice of his personal involvement in an alleged violation of Mitchell's constitutional rights. With respect to the only claim against Kennelly preserved on appeal (failure to intervene), Kennelly argued Mitchell's allegations were nothing more than a formulaic recitation of that legal claim unsupported by any actual facts to demonstrate Kennelly had the opportunity to intervene. Kennelly further contended the failure to intervene claim him should be dismissed because Mitchell's complaint failed to establish an underlying Fourth Amendment violation upon which to base the derivative failure to intervene claim. Dist. Ct. Doc. 23 at 14-16.[2]

In addition, Kennelly argued he was entitled to qualified immunity in his role as a scene commander, citing Bernini v. St. Paul, 665 F.3d 997, 1006 (8th Cir. 2012) (among other cases), where this Court rejected the claim that a lead officer who authorized other officers to use non-lethal munitions to direct a crowd of protestors

---

support the allegation that Kennelly conspired with racial animus toward Mitchell. Mitchell admits he is not appealing the dismissal of the conspiracy claims "except insofar as the dismissal of those claims should not have been with prejudice." Appellant's Br. at 8 n.1.

[2] Dist. Ct. Doc. 23 is a memorandum of law and not included by Kennelly in a separate appendix for that reason, but is nevertheless referenced pursuant to Fed. R. App. P. 30(a)(2).

away from a closed area violated clearly established rights. See Dist. Ct. Doc 23 at 19; Dist. Ct. Doc. 35 at 6.[3]

Finally, Kennelly argued along with the other defendants that Mitchell could not dispute his status as a trespasser on Backwater Bridge, or dispute that he was obstructing a government function at the time of his arrest, because Mitchell admitted he had been charged with those crimes and the charges had been resolved through a pretrial diversion agreement. See Appellant's App. at AA23, ¶¶ 68-70 ("Law enforcement officers charged Mr. Mitchell with criminal trespass and obstruction of a government function in connection with the abovementioned events . . . The charges were ultimately resolved through a pretrial diversion agreement that resulted in the dismissal of the charges."). Kennelly contended a pretrial diversion is not a favorable termination under Heck v. Humphrey, 512 U.S. 477 (1994), and thus Mitchell was barred from claiming in his subsequent civil rights action that he was not a criminal at the time of his arrest. [4]

[3] Dist. Ct. Doc. 38 is a memorandum of law and not included by Kennelly in a separate appendix for that reason, but is nevertheless referenced pursuant to Fed. R. App. P. 30(a)(2).

[4] Resolution of the Heck-bar issue is more relevant to Mitchell's First Amendment claims than his Fourth Amendment excessive force claim. But Mitchell also appears to argue the point as it relates to the latter. See Appellant's Br. at 36 (arguing, in part, that Mitchell stated a Fourth Amendment excessive force claim because "[a]though Mr. Mitchell was subsequently charged with two misdemeanors, those charges were dismissed, and at this preliminary stage, this Court must assume that no probable cause supported them"). Consequently, although no First Amendment claim was brought against Kennelly, he includes a discussion of the Heck-bar issue in his Statement of the Case and brief to the extent it may be relevant to the Fourth Amendment excessive force claim.

In response to the motion to dismiss, Mitchell did not amend his complaint without leave of court within 21 days to provide more specificity and factual support for his failure to intervene claim against Kennelly *as was his right*. See Fed. R. Civ. P. 15(a)(1)(B). Nor did Mitchell thereafter make a formal motion to amend his complaint, explain what additional facts would be set forth in an amended complaint to support the failure to intervene claim against Kennelly, or file a proposed amended complaint with the Court as required by the district court's local rules. See D.N.D. Civ. L.R. 5.1(C) ("A party filing a motion for leave of court to file pleadings must file the proffered pleading as an attachment.").

IV. The district court's order dismissing the claims against Kennelly.

The district court entered an order dismissing the claims against all defendants, including Kennelly. See Addendum at Add.1-Add.52. As to the failure to intervene claim against Kennelly, the district court determined "Mitchell's Complaint lacks sufficient facts to support a failure to intervene claim." Id. at Add.42. The district court determined the conclusory allegation at paragraph 58 of the complaint claiming Kennelly had the duty and opportunity to intervene was a legal conclusion, and the district court rejected it "because Mitchell's Complaint fails to provide facts to substantiate it." Id. at Add.43.

> Mitchell makes no mention, however, of Defendant Kennelly's location when the other officers were allegedly shooting him with bean bag rounds. . . . He does not allege a single fact to show Defendant Kennelly was in close proximity to the officers to observe what was happening nor does he allege any facts to show Defendant Kennelly had reason to know the officers were allegedly using the bean bag rounds improperly. Merely alleging he was the scene commander and he and the officers were legally issued weapons that deploy bean bag rounds does not mean he had a reason to believe the officers were deploying them in an inappropriate manner. Additionally, Mitchell fails to allege a single

> fact to support the notion that Defendant Kennelly was in such a position that he had the opportunity and means to intervene.

Id.

The district court also determined Mitchell's failure to intervene claim against Kennelly failed "[b]ecause the Court has found the Complaint insufficiently alleges an excessive force claim [and thus] Mitchell's claim for failure to intervene necessarily fails." Id. at Add.42. In determining that Mitchell failed to state an underlying claim for excessive force, the district court emphasized Mitchell's admission that "he witnessed law enforcement officers deploying munitions before he positioned himself in the exact line of fire." Id. at Add.14. Citing Bernini, the district court held that "law enforcement officers routinely and lawfully use less-lethal munitions to control crowds, even when individuals are peacefully protesting and are unlawfully in areas they are commanded to leave." Id.

In addition, the district court conducted a thorough qualified immunity analysis, ultimately concluding "the law was clear at the time of the incident that using non-lethal munitions to direct crowds from closed areas was constitutional." Id. at Add.16. "By his own admission, Mitchell states he placed himself in the line of fire rather than leaving the area. So, Mitchell was the cause of his own injury, not officers performing a legal duty. On these facts, an officer utilizing less-lethal force was appropriate, and the law at the time clearly established the same." Id.

Moreover, to whatever extent Mitchell's status – as either one protestor among a crowd in a closed area, or as a misdemeanant being arrested – bears on the resolution of his Section 1983 claims, the district court determined Mitchell could not challenge his status as a misdemeanant. The district court based this

determination on the fact that Mitchell admitted being charged with criminal trespass and obstruction of a government function at the time of the incident, that the criminal charges were resolved through a pretrial diversion agreement, and that a pretrial diversion agreement is not a favorable termination under Heck. Id. at Add.18-Add.25 (citing and discussing Gilles v. Davis, 427 F.3d 197 (3d Cir. 2005) and Roesch v. Otarola, 980 F.2d 850 (2d Cir. 1992)).

Ultimately, the district court granted Kennelly's motion to dismiss and dismissed all claims against him with prejudice. Id. at Add.52. On December 10, 2020, final judgment was entered in favor of all defendants, including Kennelly. Id. at Add.53. On January 8, 2021, Mitchell filed a timely appeal. See Appellant's App. at AA96.

SUMMARY OF ARGUMENT

By not challenging on appeal the district court's reasons for dismissing the claims against Kennelly for conspiracy, racially motivated conspiracy, and IIED, Mitchell has abandoned those claims. To the limited extent Mitchell argues those three claims should have been dismissed without prejudice rather than with prejudice, Mitchell waived that contention on appeal by not raising it in his statement of the issues and by failing to support it with any pertinent legal authority.

Even if the without-prejudice issue was not waived on appeal, Mitchell's contention is without merit. A dismissal under Fed. R. Civ. P. 12(b)(6) is a dismissal with prejudice because it is an adjudication on the merits. The process for preventing a dismissal with prejudice in response to a Rule 12(b)(6) motion is to amend the complaint as matter of right within 21 days, or by consent or leave of court thereafter.

Mitchell failed to avail himself of those options in the district court, and further fails to explain on appeal how an amended complaint would have cured his deficient claims. Thus, there is no legal basis for his unsupported contention that this Court must now allow him to amend his complaint, or that the dismissal of the conspiracy and IIED claims against Kennelly should have been without prejudice.

The sole remaining claim against Kennelly for allegedly failing to intervene does not satisfy Iqbal and Twombly pleading standards, and the district court correctly dismissed it under Rule 12(b)(6). Mitchell's complaint merely contains a formulaic recitation of that legal claim, but without any accompanying factual matter to make the claim plausible. The complaint does not allege facts to establish Kennelly's location when the other officers allegedly deployed the bean bag rounds, or that Kennelly could observe what was happening, or that Kennelly had reason to know the officers would use the less-lethal munitions improperly. Merely alleging Kennelly was the scene commander does not establish he authorized other officers to use force in an unconstitutional manner. Finally, the complaint does not allege facts to show Kennelly had the opportunity and means to intervene in the split second it takes to deploy a bean bag round, even assuming it was deployed in an unconstitutional manner.

The failure to intervene claim was correctly dismissed even if it had alleged sufficient facts to make the claim plausible, because Mitchell failed to show an underlying constitutional violation of his Fourth Amendment rights by the officers who allegedly deployed the less-lethal munitions. The district court correctly determined that it was lawful for officers to use less-lethal munitions to direct crowds

away from closed areas. Mitchell admitted interjecting himself into an ongoing confrontation between law enforcement and other protestors that was already underway on the Backwater Bridge. He admitted law enforcement gave warnings to protestors regarding their presence on the Backwater Bridge. As the district court determined, the complaint establishes that Mitchell placed himself in the line of fire rather than leaving the area.

Based on this Court's decision in Bernini, the district court further determined that the officers involved in deploying less-lethal munitions were entitled to qualified immunity. Bernini also recognizes Kennelly is entitled to qualified immunity for his role as scene commander. Moreover, to whatever extent Mitchell's status as a misdemeanant may play a role in analyzing the Fourth Amendment excessive force claim, he cannot challenge that status in this Section 1983 action. He admitted in the complaint that charges brought against him for trespass and obstruction were resolved through a pretrial diversion agreement, which is not a favorable termination for purposes of the Heck-bar.

ARGUMENT

I. Mitchell has abandoned his claims against Kennelly for conspiracy, racially motivated conspiracy, and IIED.

On appeal, Mitchell does not address the merits of the district court's dismissal of his claims against Kennelly for conspiracy, racially motivated conspiracy, or IIED, admitting '[t]hose claims are not at issue on this appeal except insofar as the dismissal of those claims should not have been with prejudice." Appellant's Br. at 8 n.1. Mitchell's argument in support of the latter contention consists of a single paragraph, in which he says "this Court must allow [him] to

amend his complaint" without citing any authority in support of that contention. Id. at 64.

The failure to brief the merits of the district court's dismissal of the two conspiracy claims and the IIED claim constitutes an abandonment of those claims on appeal. See Jasperson v. Purolator Courier Corp., 765 F.2d 736, 740 (8th Cir.1985) ("A party's failure to raise or discuss an issue in his brief is to be deemed an abandonment of that issue."); see also Fed. R. App. P. 28(a)(8)(A) (requiring an "appellant's contentions" to be supported by "citations to . . . authorities").

Mitchell's unsupported suggestion that the district court erred by dismissing those claims with prejudice is wrong. The defendants moved for dismissal under Rule 12(b)(6) of the Federal Rules of Civil Procedure.[5] "[A] dismissal for failure to state a claim upon which relief can be granted [under Rule 12(b)(6)] is an adjudication on the merits," and thus a dismissal with prejudice was warranted. Ahmed v. United States, 147 F.3d 791, 797 (8th Cir. 1998); see also Fed. R. Civ. P. 41(b) ("[A]ny dismissal not under this rule [listing exceptions other than Rule 12(b)(6)] operates as an adjudication on the merits.").

If Mitchell wanted to avoid dismissal of his claims with prejudice, his remedy was to amend his complaint as a matter of right within 21 days in response to the Rule 12(b)(6) motion to dismiss, see Fed. R. Civ. P. 15(a)(1)(B), or to amend it by consent or leave of court thereafter, id. at 15(a)(2). Dismissal with prejudice was appropriate after Mitchell failed to exercise any of those options. See, e.g., Murphy

[5] Kennelly also moved for dismissal of the IIED claim under Rule 12(b)(1) of the Federal Rules of Civil Procedure. The district court dismissed the IIED claim as to all defendants under Rule 12(b)(6). See Addendum at Add.51.

v. Aurora Loan Servs., LLC, 699 F.3d 1027, 1034 (8th Cir. 2012) (holding that a dismissal with prejudice under Rule 12(b)(6) is appropriate where the party never submits a proposed amended complaint or clarifies what one might have contained).

In addition, Mitchell did not include the without-prejudice claim in his statement of the issues as required by Fed. R. App. P. 28(a)(5). The claim is merely mentioned in passing in a single paragraph of his brief, see Appellant's Br. at 63-64, but without supporting it with pertinent legal authority and thus should be deemed waived. See Milligan v. Red Oak, Iowa, 230 F.3d 355, 360 (8th Cir. 2000) (generally indicating that this Court will consider issues on appeal to be waived when they are merely "mention[ed] in passing" in the brief if the appellant "does not support his assertion with any legal argument or legal authority").

The only case Mitchell cites is Bergstrom v. Frascone, 744 F.3d 571 (8th Cir. 2014). See Appellant's Br. at 63. But Bergstrom has nothing to do with a dismissal for failure to state a claim under Rule 12(b)(6). Bergstrom involved a dismissal with prejudice used as a *sanction*. See Bergstrom, 744 F.3d at 574 ("The district court dismissed the case with prejudice for failure to prosecute, failure to follow the Federal Rules of Civil Procedure, and failure to comply with the final amended scheduling order.").

Dismissal with prejudice under Rule 12(b)(6) is appropriate when a plaintiff makes no attempt to amend the complaint as a matter of right under Rule 15(a)(1) of the Federal Rules of Civil Procedure, or by leave of court under Rule 15(a)(2), which required compliance with D.N.D. Civ. L R. 5.1(C) (directing a party to file a proposed amended complaint with a motion for leave to amend). See United States

ex rel. Raynor v. Nat'l Rural Utils. Co-op. Fin., Corp., 690 F.3d 951, 957 (8th Cir. 2012) ("A district court does not abuse its discretion in denying leave to amend when a plaintiff has not submitted a proposed amended pleading in accord with a local procedural rule.").

Finally, Mitchell's unsupported claim that "this Court must allow [him] to amend his complaint," Appellant's Br. at 64, notwithstanding his failure to attempt to amend in the district court, or explain on appeal how he could have saved his conspiracy and IIED claims, is equally misguided. See Batra v. Bd. of Regents of Univ. of Nebraska, 79 F.3d 717, 722 (8th Cir. 1996) (rejecting the argument that a district court should have allowed plaintiffs to file an amended complaint to avoid a dismissal with prejudice where the plaintiffs did not "explain *on appeal* how they would amend the complaint to save this claim") (emphasis added).

The defendants were not required to specify that their Rule 12(b)(6) motions asked for dismissal with prejudice because dismissal with prejudice is inherent in an adjudication on the merits under Rule 12(b)(6). The district court correctly dismissed the conspiracy and IIED claims *with* prejudice.

II. The district court correctly determined the conclusory allegations against Kennelly for an alleged failure to intervene were insufficient to state a claim for relief.

The only claim against Kennelly that Mitchell preserved for appellate review is the failure to intervene claim. This Court reviews de novo the district court's dismissal of that claim. Reynolds v. Dormire, 636 F.3d 976, 979 (8th Cir. 2011).

A Rule 12(b)(6) motion tests the legal sufficiency of a complaint so as to eliminate those actions "which are fatally flawed in their legal premises and deigned

to fail, thereby sparing litigants the burden of unnecessary pretrial and trial activity." Young v. St. Charles, Mo., 244 F.3d 623, 627 (8th Cir. 2001). Although a court must accept the complaint's allegations as true, Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555-56 (2007), and view them in the light most favorable to the nonmoving party, Braden v. Wal-Mart Stores, Inc., 588 F.3d 585, 595 (8th Cir. 2009), the complaint must still "contain sufficient factual matter . . . to state a claim to relief that is plausible on its face. Thus . . . a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Zutz v. Nelson, 601 F.3d 842, 848 (8th Cir. 2010) (internal quotation marks and citation omitted).

To survive dismissal, a plaintiff must "plead[] factual content that allows the court to draw the reasonable inference that [each] defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). Courts must undertake the "context-specific task" of determining whether the plaintiffs' allegations 'nudge' their claims against each defendant "across the line from conceivable to plausible." Twombly, 550 U.S. at 570 (citation omitted). A complaint must "give [each] defendant fair notice of what the . . . claim is and the grounds upon which it rests[.]" Id. at 555 (citation omitted).

Mitchell's failure to intervene claim against Kennelly is merely a formulaic recitation of the elements of a cause of action, without any accompanying factual matter to state a plausible claim or to give Kennelly fair notice of the grounds upon which his alleged unconstitutional conduct rests. The complaint contains "naked assertions" that are devoid of "further factual enhancement" and therefore does not

state valid claims for relief against Kennelly. Iqbal, 556 U.S. at 678 (quoting Twombly, 550 U.S. at 557).

A failure to intervene claim requires a plaintiff to set forth enough factual content to show that a particular defendant has the opportunity and ability to intervene in an alleged violation of constitutional rights. See Jennings v. Davis, 476 F.2d 1271, 1275 (8th Cir. 1973) (affirming the dismissal of Section1983 claims for failure to state a claim for relief against defendants who were not alleged "to have been present at this incident or to have had the duty, opportunity, or the ability to intervene"). Kennelly can only be liable for failing to intervene if he was aware of the constitutional violation "and the duration of the episode is sufficient to permit an inference of tacit collaboration." Krout v. Goemmer, 583 F.3d 557, 565 (8th Cir. 2009).

Mitchell's complaint contains no facts establishing Kennelly's proximity to the other officers who are alleged to have deployed the bean bag rounds that hit Mitchell, the duration of the incident, or Kennelly's awareness of the incident before it occurred. Merely alleging Kennelly was the scene commander on the night in question is insufficient to establish that he even saw the alleged use of excessive force, let alone that the act occurred under circumstances that would have given him an opportunity to prevent it.

The conclusory nature of the complaint's allegations is mirrored by the conclusory nature of Mitchell's briefing to this Court to oppose the dismissal of the failure to intervene claim. See Appellant's Br. at 55-56. On appeal, Mitchell relies only upon Kennelly's status as the scene commander to argue he had the means to

prevent the alleged harm from occurring. Id. at 56. But there is nothing inherently unconstitutional about being a scene commander of other officers who are attempting to disperse a crowd away from a closed area with less-than-lethal munitions. See Bernini, 665 F.3d at 1006 (stating that the scene commander's "use and authorization to use non-lethal munitions to direct the crowd away from the intersection and toward a park where the crowd could be controlled did not violate clearly established rights").

Merely alleging Kennelly was the scene commander does not establish sufficient factual content to demonstrate he knew individual officers would deploy munitions in an allegedly unconstitutional manner against specific individuals. Cf. id. (discussing the lack of evidence [here the lack of allegations] that the scene commander authorized officers to directly target specific individuals or use gratuitous unconstitutional force against specific individuals). Nor does alleging Kennelly was the scene commander establish the sufficient factual content unique to a failure to intervene claim, which requires an alleged episode of sufficient duration to permit the opportunity to intervene. Krout, 583 F.3d at 565. The deployment of a bean bag round occurs in a split second, making it impossible for another officer to intervene or have sufficient notice that the deployment will occur in an unconstitutional manner. See Mason v. Holladay, No. 4:16-CV-177-BD, 2017 WL 4411043, at *3 (E.D. Ark. Oct. 4, 2017) (applying Krout to dispose of a failure to intervene claim where "the incident that Mr. Mason complains of happened within a matter of seconds . . . [and thus] it would not have been feasible for Defendant Crockett to intervene."); see also Pineda v. Hamilton Cnty., Ohio, 977 F.3d 483, 493

(6th Cir. 2020) (generally indicating that "an excessive use of force lasting ten seconds or less does not give a defendant enough time to perceive the incident and intervene to stop such force.") (internal quotation marks and citation omitted).

The wholesale lack of factual content in Mitchell's complaint to show that it was feasible for Kennelly to prevent the alleged improper deployment of a bean bag round in the split second it takes to complete that act requires dismissal of the failure to intervene claim under Iqbal and Twombly pleading standards.

III. The district court correctly determined the individual officers who deployed the less-than-lethal munitions did not violate Mitchell's Fourth Amendment rights.

On appeal, Mitchell challenges the district court's determination that the four individual municipal and county officers who allegedly deployed bean bag rounds did not violate his Fourth Amendment rights and were entitled to qualified immunity. See Appellant's Br. at 35-46. Although Kennelly is entitled to dismissal of the derivative failure to intervene claim brought against him because that claim fails to satisfy Iqbal and Twombly pleading standards as discussed in Section II above, he briefly addresses the dismissal of the Fourth Amendment claims against other named defendants to support the alternative ground for dismissing the failure to intervene claim against him set forth in Section IV below. Kennelly also joins the arguments advanced by the municipal and county defendants-appellees on this point.

The district court correctly determined that it was lawful for the officers to use less-than-lethal munitions to direct the protestors, including Mitchell, away from a closed area. See Bernini, 665 F.3d at 1006 (concluding the use of non-lethal force against a noncompliant crowd does not "violate clearly established rights."). For

largely the same reason, the four individual officers are entitled to qualified immunity for deploying bean bag rounds under the circumstances of this case, which included Mitchell's admission that he interjected himself into an ongoing confrontation between law enforcement and other protestors on the Backwater Bridge, and that law enforcement gave warnings to protestors regarding their presence on the Backwater Bridge and the need to leave. See id. (concluding "[i]t was reasonable for the officers to deploy non-lethal munitions" against a noncompliant crowd).[6] The fact that Mitchell happened to be struck in the eye by a bean bag round under the circumstances of this case would constitute, at most, negligence. A negligent act by any of the individual officers is not sufficient to advance Mitchell's claim. See, e.g., Daniels v. Williams, 474 U.S. 327, 335-36 (1986).

Mitchell's attempts to distinguish Bernini by alleging the officers specifically targeted him to arrest him are not plausible. Mitchell does not explain how such an alleged plan to target him could have ever been executed by the officers if he had stayed away from Backwater Bridge; instead, as the district court noted Mitchell admits he voluntarily "placed himself in the line of fire rather than leaving the area." Addendum at Add.16.

Moreover, to whatever extent Mitchell's status as a misdemeanant may play a role in analyzing the Fourth Amendment excessive force claim (as opposed to the

[6] As scene commander, Kennelly is also entitled to qualified immunity in this case under the reasoning of Bernini. See id. (concluding the scene commander was entitled to qualified immunity for implicitly authorizing other officers to use non-lethal munitions against a noncompliant crowd).

First Amendment retaliation claim), he cannot challenge that status in this Section 1983 action.[7] He admitted in the complaint that charges brought against him for trespass and obstruction were resolved through a pretrial diversion agreement, which is not a favorable termination for purposes of the Heck-bar.

In Heck the Supreme Court said:

> 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 487 (emphasis added). This is known as the favorable termination requirement. See, e.g., Marlowe v. Fabian, 676 F.3d 743, 746-47 (8th Cir. 2012); see also Entzi v. Redmann, 485 F.3d 998, 1003 (8th Cir. 2007) (concluding Heck's favorable termination requirement applies to Section 1983 plaintiffs outside the habeas context).

Several courts have held that a pretrial diversion agreement does ***not*** constitute a favorable termination under Heck. In Gilles, for example, the Third Circuit held that a plaintiff who agreed to a pretrial diversion on a disorderly conduct charge was barred from bringing a subsequent Section 1983 action alleging he was

[7] Kennelly submits it is not necessary for the Court to resolve the issue whether the pretrial diversion agreement constitutes a favorable termination under Heck to affirm the dismissal of the failure to intervene claim against him. That claim is deficient for all the reasons stated in Section II. In addition, Mitchell did not bring a First Amendment claim against Kennelly; the failure to intervene claim is derivative only of the Fourth Amendment excessive force claim, and the excessive force claim fails under Bernini's crowd control analysis regardless of Mitchell's status as a misdemeanant. Kennelly briefly addresses the Heck-bar issue only because Mitchell appears to argue the point with respect to both his First and Fourth Amendment claims. See Appellant's Br. at 36.

engaged in protected First Amendment activity. 427 F.3d at 211. This conclusion was driven, in part, by Heck's policy against the potential of having conflicting judicial resolutions arise from the same underlying events:

> [Plaintiff's] underlying disorderly conduct charge and his § 1983 First Amendment claim require answering the same question—whether [Plaintiff's] behavior constituted protected activity or disorderly conduct. If [pretrial diversion] does not constitute a favorable termination, success in the § 1983 claim would result in parallel litigation over whether [Plaintiff's] activity constituted disorderly conduct and could result in a conflicting resolution arising from the same conduct.

Id. at 209.

Similarly, here, Mitchell disputes his status as a trespasser to advance his Section1983 action. But his pretrial diversion bars him from doing so. Otherwise, success in the Section 1983 action – to the extent he claims he was not trespassing – will result in parallel litigation over whether his conduct on the Backwater Bridge constituted a trespass. See also DeLeon v. Corpus Christi, 488 F.3d 649, 656 (5th Cir. 2007) (concluding a deferred adjudication of an aggravated assault charge against an officer was the functional equivalent of a conviction under Heck, and thus barred a plaintiff from pursuing an excessive force claim against the same officer); Morris v. Mekdessie, 768 F. App'x 299, 301–02 (5th Cir. 2019), cert. denied, 140 S.Ct 870 (2020) ("Even though it is not a guilty plea, defendants entering diversion programs acknowledge responsibility for their actions. As such, entering a pre-trial diversion agreement does not terminate the criminal action in favor of the criminal defendant.") (internal citations and quotation marks omitted); Roesch, 980 F.2d at 852-53 (holding, pre-Heck, that a criminal case resolved under Connecticut's pretrial diversion program barred a plaintiff from bringing a subsequent Section 1983 action

based upon the same conduct); Miles v. Hartford, 445 F. App'x 379, 382 (2d. Cir. 2011) (applying Roesch post-Heck); Elphage v. Gautreaux, 969 F. Supp. 2d 493, 507-08 (M.D. La. 2013) ("[The plaintiff] entered into and completed a pretrial intervention program resulting in the dismissal of the charges brought against her. This resulted in a conviction for the purpose of Heck.").

Courts that have declined to apply Heck's favorable termination requirement to a pretrial diversion program have done so because they do not apply Heck outside the habeas context. See, e.g., S.E. v. Grant Cnty. Bd. of Educ., 544 F.3d 633, 639 (6th Cir. 2008). But as the Sixth Circuit noted in S.E., the Eighth Circuit disagrees and "require[s] favorable termination of the criminal proceedings [even] for plaintiffs who [are] not eligible to make habeas petitions." Id. at 639; see also Entzi, 485 F.3d at 1003. Because Mitchell's pretrial diversion agreement was not (1) reversed on direct appeal, (2) expunged by executive order, (3) declared invalid by a state tribunal authorized to make such determination, or (4) called into question by a federal court's issuance of a writ of habeas corpus, it does not satisfy the favorable termination requirement and "resulted in a conviction [or sentence] for the purpose of Heck." Elphage, 969 F. Supp. 2d at 507.

Mitchell argues a pretrial diversion is not a "conviction or sentence" under Heck because that form of disposition lapses if Mitchell satisfies the conditions placed upon him. See Appellant's Br. at 26-31. But the conditions placed upon Mitchell (whether under N.D. R. Crim. P. 32.2(a)(1) or (a)(2)) are a form of sentence, in that a pretrial diversion is a post-charging disposition of a criminal proceeding. Mitchell cannot erase the fact that a criminal proceeding was brought against him

for trespass. Mitchell cannot erase the fact that there was a judicial resolution of that criminal proceeding. And the conditions Mitchell permitted a court to place upon him to resolve his criminal charges are inconsistent with a favorable termination of the criminal proceeding.

IV. The failure to intervene claim against Kennelly necessarily fails due to the lack of an underlying Fourth Amendment claim of excessive force.

For a failure to intervene claim to be viable, there first must be an underlying substantive violation of Mitchell's Fourth Amendment rights. See, e.g., Zubrod v. Hoch, 907 F.3d 568, 580 (8th Cir. 2018) ("[A] failure-to-intervene claim may not prevail in the absence of a showing of excessive force[.]"); Hicks v. Norwood, 640 F.3d 839, 843 (8th Cir. 2011) ("Thus, our holding that Captain Norwood did not use excessive force is fatal to Hicks's claims that the remaining defendants unconstitutionally failed to intervene.").

The district court's determination that Mitchell failed to state a claim for relief on the underlying Fourth Amendment excessive force claims against the individual officers involved in his arrest therefore compels the dismissal of the failure to intervene claim against Kennelly. But even if this Court determines the underlying excessive force claims survive dismissal against other officers, Kennelly is still entitled to dismissal of the failure to intervene claim against him because the conclusory nature of the allegations do not satisfy Iqbal and Twombly pleading standards.

CONCLUSION

Appellee Kennelly respectfully requests that the Court affirm the district court's judgment dismissing all claims against him.

Dated this 30th day of June, 2021.

Wayne Stenehjem
Attorney General
State of North Dakota

By: James E. Nicolai
Deputy Solicitor General
State Bar ID No. 04789
Office of Attorney General
500 North 9th Street
Bismarck, ND 58501-4509
Telephone (701) 328-3640
Facsimile (701) 328-4300
Email jnicolai@nd.gov

Attorneys for Appellee Benjamin Kennelly.

CERTIFICATE OF COMPLIANCE

Civil No. 21-1071

The undersigned certifies pursuant to Fed. R. App. P. 32(a)(7) and 8th Cir. R. 28(A) that the text of Response Brief of Defendant-Appellee Benjamin Kennelly (excluding the table of contents, table of authorities, and statement with respect to oral argument) contains 6472 words.

This brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 365-word processing software in Times New Roman 14 point font. The Response Brief of Defendant-Appellee Benjamin Kennelly has been scanned for viruses and is virus-free.

Dated this 30th day of June, 2021.

Wayne Stenehjem
Attorney General
State of North Dakota

By: James E. Nicolai
Deputy Solicitor General
State Bar ID No. 04789
Office of Attorney General
500 North 9th Street
Bismarck, ND 58501-4509
Telephone (701) 328-3640
Facsimile (701) 328-4300
Email jnicolai@nd.gov

Attorneys for Appellee Benjamin Kennelly.