

NOTICE
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2019 IL App (5th) 160054-U

NO. 5-16-0054

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Franklin County.
)	
v.)	No. 13-CF-264
)	
ALLEN L. GERVAIS,)	Honorable
)	Thomas J. Tedeschi,
Defendant-Appellant.)	Judge, presiding.

JUSTICE BARBERIS delivered the judgment of the court.
Presiding Justice Overstreet and Justice Welch concurred in the judgment.

ORDER

¶ 1 *Held*: Where the defendant failed to make a substantial showing of a constitutional violation, the circuit court did not err in granting the State's motion to dismiss his petition for postconviction relief.

¶ 2 Pursuant to a fully negotiated plea agreement, the defendant, Allen L. Gervais, pleaded guilty to five counts of burglary (720 ILCS 5/19-1(a) (West 2012)) and was sentenced to imprisonment. He did not take a direct appeal, that is, he did not appeal from the judgment of conviction. However, he did file a timely *pro se* petition for relief under the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2014)). The State moved to dismiss the defendant's postconviction petition. See *id.* § 122-5. The

circuit court granted the State's motion and dismissed the defendant's petition. The defendant now appeals from that judgment. Representing himself on appeal, the defendant has filed a *pro se* appellant's brief. This court has examined the defendant's brief, the State's brief, and the entire record on appeal, and has concluded that the circuit court did not err in dismissing the postconviction petition.

¶ 3

BACKGROUND

¶ 4 In August 2013, the defendant was charged by information with five counts of burglary (count I through V), six counts of theft over \$500 but not more than \$10,000 (counts VI through XI), and one count of deceptive practices (count XII). Each of the five burglary counts alleged, *inter alia*, that the defendant, "without authority, knowingly entered a building of [a retailer] *** with the intent to commit therein a theft," in violation of section 19-1(a) of the Criminal Code of 2012 (720 ILCS 5/19-1(a) (West 2012)).

¶ 5 On February 13, 2014, the defendant, his attorney, and an assistant state's attorney appeared before the circuit court and stated the terms of a plea agreement. Under the agreement, the defendant would plead guilty to all five counts of burglary (counts I through V), while all other counts of the information (counts VI through XII) would be dismissed. On each of the five burglary counts, the defendant would be sentenced as a Class X offender (see 730 ILCS 5/5-4.5-95(b) (West 2012)) to imprisonment for 10 years, with the sentences concurrent with one another and with any sentence that might be imposed in any criminal case pending in any other county. The defendant would be

ordered to pay restitution to each of seven different businesses, most of them in Franklin County.

¶ 6 After hearing the terms of the parties' agreement, the court admonished the defendant as to the nature of the burglary charges in counts I through V. The court's admonishment as to count I is representative of those admonishments:

"Okay. In Count I you are charged as follows: On or about June 27, 2013, in Franklin County, Illinois, the offense of Burglary [*sic*], in that said defendant without authority knowingly entered a building of Zeigler Outdoor located at 305 Christopher Road, Zeigler, Franklin County, Illinois, with the intent to commit therein a theft, and the defendant had previously been convicted of two or more offenses that contain the same elements as an offense classified in Illinois as a Class 2 or greater felony, as defined by Illinois Compiled Statutes Act 5, Section 5-4.5-95(b)."

The defendant indicated his understanding of the charges.

¶ 7 The court continued with its admonishments, explaining that burglary is a Class 2 felony but that the defendant, due to his criminal history, would be sentenced as a Class X felon, requiring a sentence of imprisonment for each burglary count, with a minimum term of 6 years and a maximum term of 30 years, to be followed by 3 years of mandatory supervised release. The defendant indicated his understanding of the possible penalties.

¶ 8 The court also admonished the defendant about his right to plead guilty or not guilty, his right to a trial by jury, his rights at trial (to confront and cross-examine witnesses, to call witnesses on his own behalf, to testify or to remain silent, etc.), the

burden of proof at trial, and the consequences of pleading guilty (waiver of the right to a trial and of the rights at trial), and the defendant indicated that he understood all of these matters. The defendant also indicated that he wished to plead guilty, that he was pleading freely and voluntarily, and that he was not taking any kind of medicine that impaired his ability to think clearly. The State presented a detailed factual basis for the five guilty pleas, essentially stating that the defendant entered five different retail stores in Franklin County and acquired merchandise with checks he wrote on an account that had been closed, and none of the stores had given him permission to enter for the purpose of unlawfully taking merchandise. The State also listed the defendant's prior convictions, and the defendant agreed that it included two prior convictions for Class 2 felonies in the 2000s. The parties waived the preparation of a presentence investigation report.

¶ 9 The court found that the defendant's guilty pleas were knowing and voluntary, found a factual basis for the pleas, and pronounced the agreed-upon prison sentences and restitution. It subsequently entered a written judgment. The defendant did not take a direct appeal.

¶ 10 On July 13, 2015, the defendant filed a *pro se* petition for relief pursuant to the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2014)). In his postconviction petition, the defendant claimed that the burglary statute, as applied to him, (1) violated the equal-protection clauses of the United States Constitution and the Illinois Constitution, where he was prosecuted for burglary as a result of his entering retail stores during regular business hours with the intent to commit therein a theft, while other (unnamed) people performed the same act, under the same circumstances, and with the

same intent, thus completing the crime of burglary, but were not prosecuted, and for no reason other than that they, subsequent to entering the store, either changed their minds about committing the theft or "failed to attempt the actual taking", and (2) violated the separation-of-powers clause of the Illinois Constitution (Ill. Const. 1970, art. II, § 1), because the Illinois judiciary, by crafting the "limited authority" doctrine and applying it to the burglary statute, had effectively removed from the burglary statute the element that entry into a building must be "without authority," which amounted to an improper judicial rewriting of the statute. The defendant's postconviction petition lacked any sort of "relief requested" section. The defendant did state that he sought "relief" under the Post-Conviction Hearing Act, but he did not specify any particular type of relief.

¶ 11 On August 18, 2015, the State filed a motion to dismiss the postconviction petition on the ground that the defendant, by pleading guilty to the burglary charges, had "waived" his postconviction claims. On August 31, 2015, the defendant filed a *pro se* "answer" to the State's motion to dismiss, wherein he argued, *inter alia*, that he could challenge the constitutionality of a statute at any time. In support of this proposition, he cited *People v. Winningham*, 391 Ill. App. 3d 476, 480 (2009) ("the constitutionality of a criminal statute can generally be raised at any time").

¶ 12 On January 20, 2016, the court held a hearing on the State's motion to dismiss. The State and the defendant, along with his court-appointed standby counsel, presented brief arguments. At the close of the hearing, the court announced that the defendant's postconviction petition was dismissed, "precisely for the reasons stated in the [State's] motion to dismiss." The defendant filed a timely notice of appeal.

¶ 13

ANALYSIS

¶ 14 This appeal is from a judgment dismissing, on the State's motion, the defendant's *pro se* petition for postconviction relief. This court reviews such a judgment *de novo*. *People v. Sanders*, 2016 IL 118123, ¶ 31. In the circuit court, the defendant had the burden of making a substantial showing of a constitutional violation. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). All of his well-pleaded facts, unless positively rebutted by the record, were and are taken as true. *Id.*

¶ 15 The defendant represents himself in this appeal. In his *pro se* appellant's brief, the defendant states that he maintained in the circuit court that the burglary statute was unconstitutional as applied to him, but now, on appeal to this court, he is scrapping that position and instead presenting, for the first time, a "facial constitutional challenge" to the limited-authority doctrine and its application to the burglary statute. According to the defendant, the limited-authority doctrine violates two principles of statutory construction, *viz.*: (1) the principle that a court must not depart from a statute's plain language by reading into it exceptions, limitations, or conditions that the legislature did not express, and (2) the principle that a court must read a statute as a whole and construe it so that no part is rendered meaningless. Because the doctrine violates these two principles of statutory construction, the defendant asserts, it also violates the separation-of-powers clause of the Illinois Constitution. The defendant also argues that the Illinois courts' adoption of the limited-authority doctrine violates the separation-of-powers clause because it "render[s] meaningless" the "without authority" element of the burglary statute. According to the defendant, "the courts have infringed on the legislature's power

to determine what constitutes an offense." He asks this court to vacate his five burglary convictions, since they could not have been entered without application of the unconstitutional limited-authority doctrine to the burglary statute, and to remand this cause so that he may plead guilty to the theft and deceptive-practices counts in the information (*i.e.*, counts VI through XII) and be sentenced on those.

¶ 16 In its own brief, the State argues that the circuit court rightly dismissed the defendant's postconviction petition because the claim presented therein had been forfeited. According to the State, the defendant forfeited his claim when he failed to raise it on direct appeal.

¶ 17 While it is true that a postconviction petitioner forfeits any claim that he could have raised, but did not raise, on direct appeal (see, *e.g.*, *People v. Blair*, 215 Ill. 2d 427, 443-44 (2005)), this forfeiture rule presupposes a direct appeal, and in this particular case the defendant did not take a direct appeal. The State's forfeiture argument is therefore inapposite. See, *e.g.*, *People v. Brooks*, 371 Ill. App. 3d 482, 486 (2007) (where no direct appeal was taken, the rule that a postconviction petitioner forfeits any claim that he could have raised, but did not raise, on direct appeal is "inapplicable"). Failure to take a direct appeal causes a forfeiture of claims based on mere error at trial or sentencing, but it does not cause a forfeiture of claims based on the alleged deprivation of constitutional rights, the type of claims that are the stuff of postconviction proceedings. *People v. Rose*, 43 Ill. 2d 273, 279 (1969).

¶ 18 Before addressing the issue raised by the defendant, this court notes that the circuit court accepted the defendant's guilty pleas only after it thoroughly admonished the

defendant, determined that his pleas were voluntary, and determined that factual bases for the pleas existed. The court's admonishments as to the nature of the five burglary charges reflected the key relevant terms of the burglary statute, *i.e.*, section 19-1(a) of the Criminal Code of 2012. See 720 ILCS 5/19-1(a) (West 2012) ("A person commits burglary when without authority he or she knowingly enters *** a building *** with intent to commit therein a *** theft."). The defendant knew exactly what he was charged with having done, and he pleaded guilty to doing it. Without doubt, the court substantially complied with Illinois Supreme Court Rule 402 (eff. July 1, 1997), the rule adopted to ensure that the record affirmatively discloses that guilty pleas were understandingly and voluntarily entered. See, *e.g.*, *People v. Wills*, 61 Ill. 2d 105, 111 (1975).

¶ 19 Setting aside any other possible problems with this appeal, this court considers the argument the defendant has presented to this court, to wit, that he made a substantial showing that the limited-authority doctrine violates the Illinois constitutional principle of separation of powers by effectively removing from the burglary statute the phrase "without authority."

¶ 20 The Illinois Constitution's separation-of-powers clause reads as follows: "The legislative, executive and judicial branches are separate. No branch shall exercise powers properly belonging to another." Ill. Const. 1970, art. II, § 1. When the defendant refers to the limited-authority doctrine, he is referring to the principle, oft stated by Illinois courts, that a person has authority to enter a building only if he enters with a purpose that is consistent with the reason the building is open. See *People v. Weaver*, 41 Ill. 2d 434,

439 (1968) ("authority to enter a business building ... extends only to those who enter with a purpose consistent with the reason the building is open"). Meanwhile, the burglary statute reads, in pertinent part, as follows: "A person commits burglary when without authority he or she knowingly enters *** a building *** with intent to commit therein a *** theft." 720 ILCS 5/19-1(a) (West 2012).

¶ 21 The defendant does not cite to any authority that supports, in any way, his proposition that the limited-authority doctrine represents a judicial usurpation of legislative power. Also, this court is unaware of any such authority. The limited-authority doctrine, as the defendant calls it, represents nothing more than a judicial construction or clarification of the burglary statute. "It is the function of the judiciary to determine what the law is and to apply statutes to cases." *Stern v. Norwest Mortgage, Inc.*, 179 Ill. 2d 160, 168 (1997). The doctrine, which has been invoked and applied by Illinois courts for decades in the burglary context (see *Weaver*), simply makes clear the meaning of the term "without authority" in the burglary statute. In this particular case, it makes clear that a person does not have authority to enter a business if he enters with an intent to commit theft, even at times when the business is open to customers.

¶ 22 CONCLUSION

¶ 23 The defendant failed to make a substantial showing of a constitutional violation, and the circuit court properly dismissed his postconviction petition.

¶ 24 Affirmed.