

NOTICE
Decision filed 09/18/14. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2014 IL App (5th) 140014-U

NO. 5-14-0014

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).

JAMES L. GIBSON,)	Appeal from the
)	Circuit Court of
Petitioner-Appellant,)	St. Clair County.
)	
v.)	No. 13-MR-358
)	
MICHAEL J. BUETTNER, Director of the Probation)	
Department, St. Clair County, Illinois,)	Honorable
)	Stephen P. McGlynn,
Respondent-Appellee.)	Judge, presiding.

JUSTICE GOLDENHERSH delivered the judgment of the court.
Justices Chapman and Spomer concurred in the judgment.

ORDER

¶ 1 *Held:* Where petitioner is not in custody of respondent and where the circuit court had subject matter jurisdiction, the dismissal of petitioner's *habeas corpus* petition is affirmed.

¶ 2 Petitioner, James L. Gibson, appeals the circuit court's dismissal of his *habeas corpus* petition. Respondent is the St. Clair County Probation Department. Petitioner asks this court to reverse the circuit court's denial of his petition for writ of *habeas corpus* and reverse his conviction for cocaine possession. For the following reasons, we affirm.

¶ 3

BACKGROUND

¶ 4 Petitioner was charged with unlawful possession of less than 15 grams of cocaine found in a search incident to his arrest for possessing cannabis, the evidence of which was found during a traffic stop for failure to properly signal while turning. Petitioner filed a motion to suppress evidence. Following a hearing, the circuit court denied that motion. Subsequently, a jury found petitioner guilty. He was sentenced to three years' probation and was ordered to pay a \$100 fine. On direct appeal, this court ordered that petitioner's mittimus be corrected to reflect credit against the fine, but otherwise affirmed the judgment of the circuit court. *People v. Gibson*, No. 5-11-0009 (2012) (unpublished order pursuant to Illinois Supreme Court Rule 23). Petitioner then filed the instant *pro se* petition for *habeas corpus* pursuant to section 10-124 of the Code of Civil Procedure (Code) (735 ILCS 5/10-124 (West 2012)), in which he argued that the circuit court lacked subject matter jurisdiction to enter the order denying his motion to suppress evidence because he was never charged in the underlying traffic offense, failure to properly signal while turning, or with cannabis possession. Respondent filed a combined motion to dismiss pursuant to section 2-619.1 of the Code (735 ILCS 5/2-619.1 (West 2012)), arguing that the petition was insufficient in law because the circuit court had subject matter jurisdiction, and that the petition was affirmatively defeated because petitioner was not in custody or restrained of his liberty. Following a hearing, the court denied the petition for *habeas corpus*. This appeal followed.

¶ 5

ANALYSIS

¶ 6 A motion to dismiss pursuant to section 2-615 of the Code admits all well-pleaded facts and tests the legal sufficiency of the complaint, while a motion filed pursuant to section 2-619 of the Code admits the legal sufficiency of the complaint but raises a defect or defense that defeats the action. *Kean v. Wal-Mart Stores, Inc.*, 235 Ill. 2d 351, 361 (2009). We review a dismissal under either section of the Code *de novo*. *Id.* We construe the allegations of the complaint in the light most favorable to petitioner. *Beacham v. Walker*, 231 Ill. 2d 51, 57-58 (2008). However, petitioner must allege facts sufficient to bring a claim within a legally recognized cause of action. *Id.*

¶ 7 *Habeas corpus* relief is a narrow remedy that is available only in limited circumstances. *Faircloth v. Sternes*, 367 Ill. App. 3d 123, 125 (2006). "The sole remedy or relief authorized by a writ of *habeas corpus* is the prisoner's immediate release from custody." *Id.* The remedy is available only if (1) the circuit court lacked jurisdiction to enter judgment, or (2) some postconviction occurrence entitles the inmate to immediate release from custody. *People v. Gosier*, 205 Ill. 2d 198, 205 (2001). A *habeas* petition may not be used to review proceedings that do not allege one of the aforementioned defects, even if the alleged error involves a denial of a constitutional right. *Id.* Actual, physical restraint of a petitioner is necessary to allow him to have standing to petition for a writ of *habeas corpus*. *Creek v. Clark*, 88 Ill. 2d 54, 61 (1981). In *Creek*, the defendant had been released on bail, and thus was not in custody, or in physical possession or control, of the respondent. *Id.* at 56. The court held that it would be futile to order a

party to produce the "body" of a defendant who was not actually under their control. *Id.* at 61.

¶ 8 Here, petitioner is not in the physical custody of respondent, the St. Clair County Probation Department. Petitioner is not restricted in his ability to move, he is not restrained of his liberty, nor does the probation department have control over his body. If the sole remedy of *habeas corpus* is to produce the body of petitioner, it would be impossible to do so because the probation department does not have custody of petitioner.

¶ 9 Petitioner argues that the circuit court did not have subject matter jurisdiction to convict him because he was not charged with the underlying offenses that led to his eventual arrest for cocaine possession. Subject matter jurisdiction is conferred on the circuit courts by the Illinois Constitution. *People v. Gilmore*, 63 Ill. 2d 23, 26 (1976). The circuit court obtains subject matter jurisdiction when the State creates a justiciable controversy by leveling criminal charges against a defendant and filing them with the court. *People v. Woodall*, 333 Ill. App. 3d 1146, 1156 (2002). Jurisdiction is not conferred by information or indictment, but rather by constitutional provision. *People v. Benitez*, 169 Ill. 2d 245, 256 (1996). A charging instrument that fails to charge an offense does not divest the circuit court of jurisdiction. *Id.*

¶ 10 In this case, the indictment alleged that petitioner committed the offense of unlawful possession of less than 15 grams of cocaine. The State leveled this charge, thereby creating a justiciable matter which the circuit court was constitutionally permitted to hear and decide. Petitioner's attempt to argue that the circuit court did not have subject matter jurisdiction because he was not charged with the underlying offense that led to his

arrest is without merit. When the State leveled the charge against petitioner, the circuit court obtained subject matter jurisdiction.

¶ 11 Furthermore, the circuit court was not divested of subject matter jurisdiction when the State did not bring charges for the underlying traffic offense and cannabis possession. A defendant need not be charged with or convicted of the offense that gave the police probable cause to arrest him. *People v. Kolichman*, 218 Ill. App. 3d 132, 141 (1991). A search of a defendant is justified as incident to arrest for which there is probable cause. *Id.* In this case, the officer who arrested petitioner noted the smell of cannabis when approaching petitioner's car, which gave the officer probable cause to search petitioner and his vehicle. See *People v. Smith*, 2012 IL App (2d) 120307, ¶ 14. The State was not required to bring all three charges against petitioner, and failing to do so did not affect the circuit court's subject matter jurisdiction.

¶ 12 CONCLUSION

¶ 13 For the foregoing reasons, the judgment of the circuit court of St. Clair County is affirmed.

¶ 14 Affirmed.