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NATURE OF THE CASE

A Schuyler County jury found petitioner guilty of two counts of purchasing timber without a license, in violation of the Timber Buyers Licensing Act and its regulations. Exhs. H, Y & Z.¹ Before he was sentenced, petitioner sought, among other things, leave to file a petition for an order² of prohibition from this Court to prevent respondent, circuit court judge Michael L. Atterberry, from imposing a sentence on the guilty verdicts. This Court granted leave to file a prohibition petition and stayed the criminal proceedings.

ISSUES PRESENTED

- 1) Whether prohibition is inappropriate because petitioner has an adequate remedy in the ordinary appellate process, and he fails to show that his case is important to the administration of justice.
- 2) Whether petitioner is not entitled to relief on his claim that he was prosecuted for violating a regulation because he in fact violated a statute.
- 3) Whether the rules-enabling statute of the Timber Buyers Licensing Act does not violate the separation of powers clause.

¹ Citations to the exhibits to petitioner's motion for leave to file a petition for an order of prohibition appear as "Exh. ___;" to his motion for leave to file as "Mot. ___;" to his petition as "Pet. ___;" and to his opening brief as "Pet. Br. ___."

² Because Illinois has abolished writs, *see* 735 ILCS 5/2-1501, this is an action for an order of prohibition.

STATUTES AND RULES INVOLVED

§ 10. Rules and Regulations.

The Department [of Natural Resources] may make such rules and regulations as may be necessary to carry out the provisions of this Act.

225 ILCS 735/10 (2016)

§ 11. Penalties.

(a) Except as otherwise provided in this Section any person in violation of any of the provisions of this Act, or administrative rules thereunder, shall be guilty of a Class A misdemeanor.

225 ILCS 735/11 (2016)

1535.1 Timber Buyer's License

* * *

b) Only persons listed with the Department as authorized buyers may represent the licensee. Authorized buyers shall designate in all contractual arrangements that the licensee is the timber buyer. Failure to comply with this provision shall constitute "buying timber without a timber buyer's license". Authorized buyers may only be listed on one license. To be eligible to hold a timber buyer's license, the applicant must be at least 18 years of age.

17 Ill. Admin. Code § 1535.1 (2016).

1535.60 Penalty

a) Any person violating the provisions of this Part shall, upon finding of guilt by a court of law, be subject to statutory penalties as prescribed by the Timber Buyers Licensing Act [225 ILCS 735] and to revocation of license and suspension of privileges, as set out in the Timber Buyers Licensing Act.

17 Ill. Admin. Code § 1535.60 (2016).

STATEMENT OF FACTS

In 1969, finding existing civil and criminal remedies inadequate to protect property owners from theft of their trees and harmful business practices of those trying to cut their trees, the General Assembly enacted the Timber Buyers Licensing Act, 225 ILCS 735/1, *et seq.* The Act creates three primary tools to protect these property owners, called “timber growers.” First, it requires all “timber buyers,” defined as “any person licensed or unlicensed, who is engaged in the business of buying timber from . . . timber growers,” to qualify for and obtain a license. 225 ILCS 735/2, 3. Second, it requires licensed timber buyers to be bonded. 225 ILCS 735/4. Third, it prohibits timber buyers from using certain harmful business practices, such as failing to pay for timber or cutting timber without the grower’s consent. 225 ILCS 735/5.

The Act also authorizes the Department of Natural Resources to make regulations to implement the Act, 225 ILCS 735/10, and makes violating those regulations a Class A misdemeanor. 225 ILCS 735/11(a). Exercising its authority under the Act, the Department promulgated 17 Ill. Admin. Code § 1535.1(b), which regulates unlicensed timber buyers who act as agents for licensed timber buyers. Under that section, (1) only persons listed with the Department as authorized buyers may represent a licensed timber buyer; (2) only the licensed timber buyer may be designated as the timber buyer in contracts; and (3) authorized buyers may be listed on only one license. *Id.*

The People charged petitioner in Schuyler County with two Class A misdemeanors for “unlawfully acting as a timber buying agent for multiple licensed timber buyers, in violation of [225 ILCS 735/10] . . . and administrative rule [17 Ill. Admin. Code § 1535.1(b)], pursuant to [17 Ill. Admin. Code § 1535.60(a)].” Exh. H (capitalization altered). The first count alleged that petitioner “knowingly acted as an authorized agent for multiple licensed timber buyers, being listed as an agent for timber buyer Trent Copelen and acted as agent for timber buyer Jonathan Luckett and represented himself as a timber buyer when attempting to enter into an agreement with Donald Cook.” *Id.* The second count alleged that petitioner “knowingly acted as an authorized agent for multiple licensed timber buyers, being listed as an agent for timber buyer Trent Copelen and acted as agent for timber buyer Jonathan Luckett in selling timber to” five people. *Id.*

A jury found petitioner guilty of both counts. Exh. AA. Petitioner then filed a post-trial motion, alleging the issues he raises here, among others. Exh. AC. Before the circuit court could rule on that motion or impose a sentence, petitioner moved for leave to file a prohibition petition in this Court to restrain respondent Hon. Michael L. Atterberry from taking any further action in the case. Although the caption includes Hon. Scott J. Butler, who handled pretrial motions before the case was transferred to Judge Atterberry, petitioner does not seek any relief from Judge Butler. Pet. at 4. This Court

granted leave to file the prohibition petition and stayed proceedings in the circuit court.

ARGUMENT

I. Introduction

Prohibition is unwarranted here because it is not a substitute for the ordinary appellate process, which could adequately address all of petitioner's arguments. Nor does this case present an issue of sufficient importance to excuse compliance with this general rule. Petitioner's arguments hinge on the assumption that only regulations, not statutes, criminalized his conduct. That assumption is wrong. Section 11(a) of the Act makes it a Class A misdemeanor to "violat[e]. . . any of the provisions of this Act, *or administrative rules thereunder[.]*" 225 ILCS 735/11(a) (emphasis added). Nor does the separation of powers argument petitioner raises primarily in a footnote to his statement of facts warrant an order of prohibition. This Court should therefore deny the petition.

II. Prohibition Is Procedurally Inappropriate.

A. Petitioner seeks to circumvent the ordinary appeals process.

Prohibition is unwarranted because petitioner seeks to circumvent the ordinary appellate process. To obtain an order of prohibition, petitioner must prove (1) that he seeks to prohibit a judicial action (2) of an inferior court (3) that acted either without jurisdiction or beyond its legitimate authority, and (4) that he lacks any other adequate remedy. *Zaabel v. Konetski*, 209 Ill. 2d

127, 131-32 (2004). As a corollary of the fourth element, “[o]riginal actions for a writ of prohibition may not be used to circumvent the normal appellate process.” *Id.* at 132 (citing *People ex rel. Foreman v. Nash*, 118 Ill. 2d 90, 97 (1987)). Petitioner cannot satisfy this fourth element because he can “press his claim . . . within the normal appellate process.” *Zaabel*, 209 Ill. 2d at 132. Indeed, without this Court’s intervention, petitioner could obtain relief on his post-trial motion or, barring that, on appeal.

Petitioner asserts that the appellate remedy is inadequate because he would have to be sentenced before taking an appeal and might face collateral consequences of his conviction while awaiting an appellate ruling. Pet. Br. 27. But this is true of every criminal case, and petitioner’s reasoning, if accepted, would swallow the general rule. *See Hughes v. Kiley*, 67 Ill. 2d 261, 267-68 (1977) (denying prohibition to criminal defendants who were not yet convicted because they could await conviction and appeal). Moreover, petitioner has not shown that the ordinary appellate process cannot address his concerns. He suggests that he could lose his timber buyer’s license³ because of the guilty verdicts but does not explain why that recommends resolving his claims in this Court instead of the appellate court. Pet. Br. 27. Petitioner also worries that imprisonment would hamper his business, but he will not necessarily be sentenced (his post-trial motion could succeed), let

³ Though not of record here, petitioner appears to have obtained a license after the transactions at issue below.

alone imprisoned. 730 ILCS 5/5-4.5-55(d) (Class A misdemeanor probationable). Finally, if convicted, he may seek a stay of his sentence on appeal. Sup. Ct. R. 609. Accordingly, petitioner fails to show that the ordinary appellate process is inadequate to resolve his claims.

B. This case is not important to the administration of justice.

Because petitioner has an adequate appellate remedy, this Court will address the merits of his petition only if the case presents questions “important to the administration of justice.” *Zaabel*, 209 Ill. 2d at 132. It does not. This Court granted leave to file based on petitioner’s representation that he was found guilty of violating only a regulation, and not a statute. *See, e.g.*, Mot. ¶ 1 (“[C]ounsel . . . has not found any reported decision allowing a jury verdict . . . based solely on conduct supposedly constituting an alleged violation of an administrative rule, in the history of Illinois criminal law.”). That representation is incorrect: the General Assembly made it a Class A misdemeanor to violate “any provisions of [the Timber Buyers Licensing] Act, or administrative rules thereunder[.]” 225 ILCS 735/11(a). A statute, not a regulation, created the Class A misdemeanors with which petitioner was charged and of which he was found guilty. Thus, petitioner’s claims are not important to the administration of justice.

III. Petitioner's Claims Lack Merit.

A. Petitioner's arguments rest on a faulty premise.

Even were this Court to address the merits of petitioner's claims, those claims rest on a faulty premise. Petitioner argues that the circuit court exceeded both its jurisdiction and its legal authority because purely regulatory violations cannot be punished as crimes. Pet. Br. 18-35. He concedes, however, that a statute may impose criminal liability for violating a regulation and that the People could prosecute him under such a statute. Pet. Br. at 18-20. Rightly so — statutes that criminalize regulatory violations are both common and constitutional. *See, e.g.*, 205 ILCS 685/10 (crime to violate regulations under Currency Reporting Act); 35 ILCS 115/15 (same under Service Occupation Tax Act); 35 ILCS 120/13(a) (same under Retailers' Occupation Tax Act); *United States v. Grimaud*, 220 U.S. 506, 519 (1911) (upholding constitutionality of statute criminalizing violations of Department of Agriculture regulations); *People v. Gurell*, 98 Ill. 2d 194, 211 (1983) (upholding statute criminalizing failure to correct regulatory violations); *People v. Fearon*, 85 Ill. App. 3d 1087, 1089 (1st Dist. 1980) (“It has long been established that it is constitutionally permissible for the legislature to provide a criminal sanction for the violation of rules or regulations which it has validly empowered an administrative agency to promulgate.”).

All of petitioner's arguments thus hinge on his assertion that no statute criminalizes regulatory violations under the Act. *E.g.*, Pet. Br. 20

(“Without a statute, there can be no crime.”); *id.* (“[No] conduct constitutes an offense unless it is described as an offense *in this Code or in another statute of this State.*” (citing 720 ILCS 5/1-3)); *id.* at 25 (“[A] violation of the provisions of Part 1535 would not constitute an ‘offense’ . . . because Part 1535 is not a ‘statute.’”); *id.* at 26 (“Although prosecutions of statutory crimes are ‘justiciable matters,’ administrative rule violations as non-crimes are not ‘justiciable matters[.]’”); *id.* at 27 (“[T]he criminal proceedings before the Circuit Court . . . involve no penal statute[.]”).

But there is such a statute. Section 11(a) of the Act provides that “any person in violation of any of the provisions of this Act, *or administrative rules thereunder*, shall be guilty of a Class A misdemeanor.” 225 ILCS 735/11(a) (emphasis added). The People charged (and the jury found) that petitioner violated 17 Ill. Admin. Code. § 1535.1(b). Exhs. H, AA. The General Assembly criminalized that conduct as a Class A misdemeanor. 225 ILCS 735/11(a). Because a statute criminalizes petitioner’s regulatory violations, his jurisdictional and statutory arguments fail.

B. The rules-enabling provision does not violate the separation of powers clause.

Petitioner also argues that section 10, the rules-enabling provision of the Act, is so broad that it violates the separation of powers clause. Pet. Br. 10-11 n.4, 33 (citing *Stofer v. Motor Vehicle Cas. Co.*, 68 Ill. 2d 361 (1977) (rejecting similar claim)). The bulk of this argument appears in a footnote to petitioner’s statement of facts, which by rule must be “without argument.”

Sup. Ct. R. 341(h)(6). Thus, this Court should consider only the argument properly presented at page 33 of petitioner's brief.

Petitioner's argument lacks merit. The General Assembly may authorize executive agencies to enforce legislation so long as it identifies "(1) the persons and activities potentially subject to regulation; (2) the harm sought to be prevented; and (3) the general means intended to be available to the [agency] to prevent the identified harm." *Stofer*, 68 Ill. 2d at 372. This standard applies with equal force when violating the regulations may result in criminal penalties. *See Gurell*, 98 Ill. 2d at 211 (applying *Stofer* to delegation with criminal liability for regulatory violations).

The delegation under the Timber Buyers Licensing Act meets all three criteria. The persons to be regulated are "timber buyers," whom the Act defines by their regulated activity: "engag[ing] in the business of buying timber from . . . timber growers," with limited exemptions. 225 ILCS 735/2. The Act protects timber growers from market harms by requiring timber buyers to obtain a license and bond and by prohibiting certain harmful business practices. 225 ILCS 735/3, 4, 5. To prevent those harms, the Department may "make such rules and regulations as may be necessary to carry out the provisions of [the] Act." 225 ILCS 735/10. Petitioner protests that section 10 itself does not contain all this information, but it need not. *See, e.g., Gurell*, 98 Ill. 2d at 211 (canvassing entire act to uphold rules-enabling section under *Stofer*). Petitioner also argues that the delegation

must have been too broad because the Department regulated agents of licensed timber buyers. Pet. Br. 11 n.4, 33. But agents of licensed timber buyers are themselves timber buyers under the Act — they are “unlicensed” people “engaged in the business of buying timber[.]” 225 ILCS 735/2. Thus, the rules-enabling statute does not violate the separation of powers clause.

C. The information’s citation to section 10, rather than section 11, does not warrant prohibition.

Although the information cited section 10 of the Act (the rules-enabling provision) instead of section 11(a), Exh. H, petitioner does not argue in his motion, petition, or opening brief that the mistaken citation deprived the circuit court of jurisdiction. Rather, as discussed above, he makes the distinct argument that the administrative violations could not be charged as crimes because no statute criminalized them, which he accomplishes by not acknowledging section 11(a). Without explaining that section 11(a) criminalizes regulatory violations, petitioner cites it on a single page in both his motion and opening brief, mentioning that it did not appear in the information, then noting that the Administrative Office of the Illinois Courts lists section 11(a) as an “inactive” crime.⁴ Mot. ¶ 7 & n.1; Pet. Br. 24 & n.9. Accordingly, any argument about mistaken statutory citation is forfeited. Sup. Ct. R. 341(h)(7) (points not raised in opening brief are forfeited).

⁴ Though it is unclear what it means for the AOIC to consider a crime inactive, this observation is irrelevant, as section 11(a) imposes criminal liability regardless of how the AOIC classifies it.

Petitioner's forfeiture aside, the information's mistaken citation to section 10, rather than section 11, does not warrant prohibition. First, it is not a jurisdictional defect. With exceptions not relevant here, the 1970 Constitution provides that "Circuit Courts shall have original jurisdiction of all justiciable matters," Ill. Const. 1970 art. VI, § 9. "Generally speaking, a 'justiciable matter' is 'a controversy appropriate for review by the court, in that it is definite and concrete, as opposed to hypothetical or moot, touching upon the legal relations of parties having adverse legal interests.'" *In re Luis R.*, 239 Ill. 2d 295, 301 (2010) (quoting *Belleville Toyota, Inc. v. Toyota Motor Sales, U.S.A., Inc.*, 199 Ill. 2d 325, 335 (2002)).

By initiating a criminal proceeding, the information here alleged a justiciable matter, and a mistaken statutory citation in the charging instrument does not make a criminal prosecution non-justiciable. It is firmly established that "failure to charge an offense does not . . . deprive the circuit court of jurisdiction." *People v. Gilmore*, 63 Ill. 2d 23, 27 (1976). "[A] defectively stated claim is sufficient to invoke the court's subject matter jurisdiction," because "the *only* consideration is whether the alleged claim falls within the general class of cases that the court has the . . . power to hear and determine. If it does, then subject matter jurisdiction is present." *Luis R.*, 239 Ill. 2d at 301 (quoting *Belleville Toyota*, 199 Ill. 2d at 340); *see also People v. Castleberry*, 2015 IL 116916, ¶ 15 ("[T]he failure to comply with a statutory requirement or prerequisite does not negate the circuit court's

subject matter jurisdiction[.]” (quoting *LVNV Funding, LLC v. Trice*, 2015 IL 116129, ¶ 37). Accordingly, to the extent that the petition can be construed to allege that the information’s mistaken citation to section 10 deprived the circuit court of jurisdiction, that claim is meritless.

Second, convicting petitioner based on an information with a mistaken statutory citation would not exceed the circuit court’s authority. “The citation to an incorrect statutory provision [in the information] is not necessarily fatal[.]” *People v. Ryan*, 117 Ill. 2d 28, 37 (1987) (citations omitted). “Where the language of the [charging instrument] sufficiently informs a defendant of the charges against him, and defendant cannot demonstrate any prejudice resulting from an incorrect statutory citation, the defect is formal and does not warrant reversal.” *People v. Witt*, 227 Ill. App. 3d 936, 944 (1st Dist. 1992) (affirming conviction based on indictment that cited statute not in effect at time of crime); *People v. Edmonds*, 325 Ill. App. 3d 439, 444-45 (1st Dist. 2001) (affirming circuit court’s order allowing amendment to add statutory citation after trial).

Petitioner cannot show that the incorrect statutory citation in the information merits prohibition. To begin, determining whether the defect was prejudicial entails a factual analysis, but “[o]nly issues of law will be considered” in a prohibition action. Sup. Ct. R. 381(a). Even if this Court could review factual questions in this prohibition case, petitioner did not furnish the necessary record, such as trial transcripts, to show that he was

prejudiced. *See People v. Pujoue*, 61 Ill. 2d 335, 339-40 (1975) (finding defendant not prejudiced by defective information because defendant's trial strategy suggested that he had notice of true nature of charges); *cf. Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984) (in appeals, appellant bears burden to provide sufficient record to show entitlement to relief).

Even without the complete record, it is clear that the information here sufficiently alerted defendant that he was accused of violating section 11(a) by charging all the elements of a section 11(a) violation. Section 11(a) makes it a Class A misdemeanor to violate any regulation under the Act, 225 ILCS 735/11(a), and under the default rules, the violation must be at least reckless, 720 ILCS 5/4-3(b). One of the regulations under the Act is 17 Ill. Admin. Code § 1535.1(b), and the information charged petitioner with two Class A misdemeanors for knowingly violating it. The information even alleged particulars of the offenses, including for which timber buyers he simultaneously acted as an agent and in which transactions he represented himself as the timber buyer. *Id.* And although the information did not directly cite section 11(a), it referenced 17 Ill. Admin. Code § 1535.60, which provides that regulatory violations are "subject to statutory penalties as prescribed by the Timber Buyers Licensing Act." *Id.* The "penalties . . . prescribed by the . . . Act" are in section 11, titled "Penalties." 225 ILCS 735/11. Thus, although the information cited section 10 instead of section 11(a), it informed petitioner that he was accused of violating section 11(a) by

knowingly violating 17 Ill. Admin. Code § 1535.1(b). He was not prejudiced and is not entitled to prohibition relief.

CONCLUSION

This Court should deny prohibition relief.

June 28, 2018

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is fifteen pages.

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PROOF OF FILING AND SERVICE

Under penalties as provided by law pursuant to 735 ILCS 5/1-109, the undersigned certifies that the statements set forth in this instrument are true and correct. On June 28, 2018 the **Respondents' Brief** was electronically filed with the Clerk of the Supreme Court of Illinois and served upon the following by e-mail:

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Additionally, upon the brief's acceptance by the Court's electronic filing system, the undersigned will mail an original and thirteen copies of the brief to the Clerk of the Supreme Court of Illinois, 200 East Capitol Avenue, Springfield, Illinois, 62701.

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