

Antonio Gordon 259798
ECI SNU A 227
610 HWY 9 West
Bennettsville, SC 29512

RE: The State v. Antonio Gordon; 1998-65-46-2847-2852

Dear Ms. Kitchings:

Enclosed please find the original motion requesting leave to file motion to vacate Judgment in the Circuit Court along with Attachment. I am requesting that this motion be filed with the court. BY COPY of this letter I am serving OPPOSING counsel with same.

Date: 8-29-2013

Antonio Gordon

RECEIVED
SEP 03 2013
SC Court of Appeals

RECEIVED
SEP 02 2013
SC Court of Appeals

State of South Carolina
In The Court of Appeals

Appeal from York County
John C. Hayes, III, Circuit Court Judge

Appellate Case No. 2013-000975
Indictment Nos. 1998-65-46-2849; 2849; 2850; 2851; 2852

The State,

Respondent,

v.

Antonio Gordon

RECEIVED
Appellant SEP 02 2013

Motion requesting leave to file motion to vacate
Judgment in the Circuit Court

SC Court of Appeals

The Appellant, hereby makes a motion requesting leave to file a motion to vacate judgment in the circuit court based upon lack of jurisdiction and subject matter jurisdiction under SCR. Civ. P Rule 60(b)(4) and S.C. Code Ann § 15-27-130 for the following reasons set forth below:

(1) Appellant filed a Rule 29(b), SC Crim motion on November 15, 2012, and on March 4, 2013, and March 8, 2013, a hearing was held before Honorable John C. Hayes, III, and on April 22, 2013, the lower court filed an order denying the motion and on April 30, 2013, Appellant's Counsel filed a notice of Appeal with this Court pertaining the same underlying criminal indictment numbers Appellant wish to file before the lower court. SEE Attachment A

(2) SCR. Civ. P Rule 60(b)(4) Provides, leave to make the motion need not be obtained from any appellate court "except during such time as an Appeal from the Judgment is actually before the Appellate Court". This Permits the motion to be filed before the trial court. The United States Supreme Court approved a similar result in Standard Oil Co v. U.S., 429 U.S. 17 (1976). Rule 60(b)(4) is substantially the same as S.C. Code Ann § 15-27-130 and can be file after the one year limitation when the court's Judgment are void.

Appellant asserts that the Court of General Sessions Jurisdiction are void for the following reasons:

(a) During all times relevant to the underlying criminal Proceeding Appellant was under the "Exclusive Original Jurisdiction of Family Court" Pursuant to S.C. Code Ann § 20-7-400(A)(3) (1998, SUPP), and the "solicitor" should have requested in writing that Appellant be transferred to General Sessions Court Pursuant to S.C. Code Ann § 20-7-7605(1)(4)(6)(10) (1998, SUPP). FN ① See Attachment A for more detail.

(b) The Appellant asserts that the Children Code of Laws section 20-7-6605(1) (1998, SUPP), titled define a "Ic]child", statute requiring that "child" sixteen years of age charge with a Class A, B, C, or D felony under section 16-1-201 or a felony that provides for fifteen years or more may be remanded to the family court for disposition of the charge at the discretion of the "solicitor" is unconstitutional under the 14th Amendment U.S. Constitution and S.C. Constitution Art. I § 8, as of much section 20-7-6605(1):

- (1) Violates the separation of power doctrine;
- (2) Violates the Due Process and equal protection clauses;
- (3) Conflict with United States Supreme Court decision in Kent v. U.S., 386 U.S. 541 (1966);
- (4) Conflict with sections 20-7-400(A)(3) and 20-7-7605(1)(4)(6)(10) (1998, SUPP). See Attachment A for more detail argument.

Therefore, Appellant should be permitted to file his motion to vacate Judgment in the circuit court.

Date: 8-29-2013

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FN ① Appellant was sixteen years of age with an I.Q of 68 when charged and indicted for the underlying criminal offenses in July of 1998.

State of South Carolina
In the Court of Appeals

Appeal from York County
Court of General Sessions
John C. Hayes, III, Circuit Court Judge

Appellate case No. 2013-000975

The state,

Respondent,

v.

Antonio Gordon

Appellant

Certificate of Service

The Appellant hereby certifies that one copy of the Motion requesting leave to file motion to vacate Judgment in the Circuit Court, in the above-entitled case has been served upon opposing counsel, Salley W. Elliott, Assistant Deputy Attorney General, office of the Attorney General, P.O. Box 11549, Columbia, SC 29211, by depositing in the U.S. mail with proper postage, this 29 day of August, 2013.

Antonio Gordon
Antonio Gordon

Sworn to before me this 29th day
of August, 2013.

Notary Public: Cui J. Hooper

EXP: Feb 9th 2020

Attachment A

State of South Carolina <u>County of York</u>	In The Court of General Sessions Sixteenth Judicial Circuit
State of South Carolina,	Criminal Case No.: 98-65-46-2847; 2849; 2851
v.	Memorandum of Law in support of Motion to vacate Judgment
<u>Antonio Gordon,</u> Defendant.	

Now comes the Defendant, Antonio Gordon, in the above captioned matter, respectfully moving this Honorable Court a motion vacating Judgment of the conviction and sentence, and submits this Memorandum of Law in support of the motion to vacate Judgment.

Procedural History

The Defendant was sixteen years of age charged with murder, two counts of attempted arm robbery, criminal conspiracy, possession of a pistol under the age of twenty-one, and three counts of possession of a weapon during the commission of a violent crime on July 23, 1998. On July 16, 1999, the Defendant pleaded guilty as charged. On July 19, 1999, the Honorable John C. Hayes, III, Presiding Circuit Court Judge, sentenced the Defendant to thirty years imprisonment for murder, five years imprisonment for the firearm charges, five years imprisonment for criminal conspiracy charge, and ten years imprisonment for each attempted arm robbery charges. The sentences were to each run currently, with the exception of one ten year attempted arm robbery sentence, which was to run consecutively to the remaining sentences.

Argument

Defendant move to vacate Judgment based upon Lack of Jurisdiction and subject matter Jurisdiction on the grounds that the children code of laws section 20-7-6605(1) (1998), title Defined a "[c]hild", statute requiring that "[child]" sixteen years of age charge with a class A, B, C, or D felony under section 16-1-20, or a felony that provides for a maximum of imprisonment of fifteen years or more may be remanded to the family court for disposition of the charge at the discretion of the "solicitor" is unconstitutional under the 14th Amendment U.S. Constitution and S.C. Constitution Art. I §8.

Pursuant to S.C. Code Ann § 15-27-130 and SCR. Civ. P Rule 60(b)(4), the Court may relieve a Party from final Judgment, order or proceeding for the following reasons; "the Judgment is void". If a Court Lacks Jurisdiction over a Party, then it Lacks "all Jurisdiction" to adjudicate that Party's rights, whether or not the subject matter is properly before it, Kulko v. Superior Court, 436 U.S. 84 (1978). No passage of time can render a "void Judgment valid", and a court may always take cognizance of a Judgment's void status whenever a motion for relief from Judgment is brought. The modern conception of Personal Jurisdiction generally refers to due Process. See International Shoe Co v. Washington, 326 U.S. 310 (1945). The act of a court with respect to a matter as to which it has "no Jurisdiction" are void, Guthrie, 527 S.E.2d at 312 (2002).

~~respect to matter as to which it has no jurisdiction are void. Guthrie, 352 S.C. at 107, 572 S.E.2d at 312 (4th App. 2002).~~

The Defendant asserts that because he were sixteen years of age charged with a Class A, B, C or D felony or charge that carry fifteen years or more, he was under the exclusive original jurisdiction of family court, and that, General Sessions jurisdiction are void. The gravamen of Defendant's conclusion rest upon the efficacy of Sections 20-7-400 and 20-7-7005 of the South Carolina Code Section 20-7-400, titled "Exclusive, Original Jurisdiction of family court", states:

- (A) Except as otherwise provided herein the Family Court shall have exclusive original jurisdiction and shall be the sole court for initiating action;
- (3) Concerning any child seventeen years of age or over, living or found within the geographical limits of the court's jurisdiction, alleged to have violated or attempted to violate any state or local law or municipal ordinance prior to having become seventeen years of age and such person shall be dealt with under the provisions of this chapter relating to children.

S.C. Code Ann. § 20-7-400 (1985 SUPP. 1998) (emphasis added). Under the children's code, the general sessions court ordinary lacks jurisdiction over individuals under the age of seventeen, with certain exceptions. See S.C. Code Ann. § 20-7-7005 (SUPP 1998). Section 20-7-7005 reads in pertinent part:

- (1) If, during the Pendency of a criminal or Quasi-Criminal charge against a child in a circuit court of this State, it is ascertained that the child was under the age of seventeen years at the time of committing the alleged offense, it is the duty of the circuit court immediately to transfer the case, together with all the papers, documents, and testimony connected with it, to the family court of competent jurisdiction.
- (6) Within thirty days after the filing of a petition in the family court alleging the child has committed the offense of murder or criminal sexual conduct, the person executing the petition may request in writing that the case be transferred to the court of general sessions with a view to proceedings against the child as a criminal rather than a child coming within the purview of this article. The judge of the family court is authorized to determine this request.

Therefore, being that the Defendant was under the age of seventeen years and had alleged to violate or attempted to violate any state or local law he was under the exclusive original jurisdiction of family court, and it was the duty of the "circuit court" immediately to transfer the case, together with all the papers, documents, and testimony connected with it, to the family court of competent jurisdiction, and within thirty days after the filing of a petition in the family court alleging Defendant had committed the offense of murder, the person executing Defendant should have requested in writing that the case be transferred to the court of general sessions with a view to proceedings against the defendant as a criminal rather than a child coming within sections 20-7-400(A)(3) and 20-7-7605(1)(b)(10). The Defendant asserts that the family court judge is authorized to determine this request. See FN① Defendant's remaining

FN① Subsection (6) of the transfer of jurisdiction statute contain no age limitation and specifically apply to Defendant, "child" under seventeen years of age charge with murder, 20-7-7605 (1).

charges is controlled under section 20-7-7605(4)(10). Section 20-7-400 was not repealed at the time defendant Plead Guilty.

S.C. Code Ann § 20-7-7605 (SUPP. 1998) (emphasis added). Pursuant to the children's Code, "[C]hild" is defined in section 20-7-6605(1):

"child" means a person less than ~~sixteen~~^{seventeen} years of age.

"Child" does not mean a person sixteen years of age or older who is charged with a Class A, B, C or D felony as defined in section 16-1-20 or a felony which provides for a maximum term of imprisonment of fifteen years or more. However, a person sixteen years of age who is charged with a Class A, B, C, or D felony as defined in section 16-1-20 or a felony which provides for a maximum term of more may be remanded to the family court for disposition of the charge at the discretion of the "solicitor".

S.C. Code Ann § 20-7-6605(1) (SUPP. 1998). In Kent v. United States, 383 U.S. 541 (1966), the United States Supreme Court noted the following criteria for determining whether jurisdiction should be waived under the District of Columbia Juvenile Act:

- (1) The seriousness of the alleged offense to the community and whether protection of the community requires waiver.
- (2) Whether the alleged offense was committed in aggressive, violent, premeditated or willful manner.
- (3) Whether the alleged offense was against persons or against property, greater weight being given to offenses against persons especially if personal injury resulted.
- (4) The prosecutive merit of the complaint, i.e., whether there is evidence upon which a Grand Jury may be expected to return an indictment.
- (5) The desirability of trial and disposition of the entire offense in one court when the juvenile's associates in the alleged offense are adults who will be charged with a crime.
- (6) The sophistication and maturity of the juvenile as determined by consideration of his home environmental situation, emotional attitude and pattern of living.
- (7) The record and previous history of the juvenile, including previous contacts with the Youth Aid Division, other law enforcement agencies, juvenile courts and other jurisdiction, prior commitments to juvenile institutions.

- (8) The Prospects for adequate Protection of the Public and the likelihood of reasonable rehabilitation of the Juvenile (if he is found to have committed the alleged offense) by the use of Procedures, services and facilities currently available to the Juvenile Court. Id. at 566-67.

The South Carolina Supreme Court, in State v. Corey D., 529 S.E.2d 20 (2000), concluded that the family Court may properly consider the Kent factors when determining whether Jurisdiction over a Juvenile should be transferred. Id. at 117-18, 529 S.E.2d at 25-26.

The Defendant must address Section 20-7-6605(1) (SUPP. 1998), that defined a "Child". The Defendant asserts that Section 20-7-6605(1) is unconstitutionally ambiguous under the ~~14th~~ 14th Amendment right to due Process of Law and equal Protection clause, ~~Fourth Amendment~~ and S.C. Constitution Art. I, § 8, for the following reasons:

- (1) Section 20-7-6605(1), violates the Separation of Power doctrine, as of much, the legislature vested the discretion of transferring a "child" less than seventeen years of age, that have violated or attempted to violate, any state or local law prior to having become seventeen in the discretion of the family Court Judge. See Section 20-7-400(A) (3) (SUPP. 1998) 20-7-7605(6)(10) (SUPP. 1998).

The discretionary function exception is grounded in the separation of Power is "a doctrine to which the Courts must adhere even in the absence of an explicit statutory command". Canadian Transp. Co v. United States, 663 F.2d 1031 (1980). S.C. Constitution Art. I, § 8.

- (2) Section 20-7-6605(1) Provides two Constructions of a "child". One being less than seventeen years of age, and the second "Excluding sixteen Year olds who are charge with a Class A, B, C or D felony!"

When a statute fairly and reasonably is subjected to two constructions, one which would render an act criminal, the other

which would not, the statute must be construed strictly against the state and in favor of the accused. At 439, 499 S.E.2d 630. The Canon of Construction "expressio unius est exclusio alterius" "holds that, to express ~~unius~~ or include one thing implies the exclusion of another, or the alternative". Blacks Law Dictionary 602 (7th ed. 1999) Quoting Norman J. Singer, Sutherland Statutory Construction, § 47, 23 at 227 (5th ed. 1992) Hodges v. Rainey, 533 S.E.2d 578.

- (3) Section 20-7-6605(1), Conflict with United States Supreme Court 8 Factors outlined in Kent v. United, also conflict with Section 20-7-400(A)(3) and Section 20-7-7605(1)(b)(10), in violation of due Process under the 14th Amendment.

Therefore, under the Rule of lenity and due Process, Criminal statute must be in Defendant's favor. Bifulco v. U.S., 100 S.Ct 2247 (1980).

- (4) section 20-7-6605(1), is arbitrarily discriminatory toward sixteen year old Defendants charged with a class A, B, C or D felony. See FN② In the likelihood, the "solicitor" get to chose on a case by case basis which sixteen year old he deem fit for the Family Court Protection, violates the equal Protection clause because all persons sixteen years of age charged with a class A, B, C, or D felony are not similarly treated alike.

FN② Defendant asserts that there are no difference between 15 and 16 year old charge with a class A, B, C, or D felony, and being that the "solicitor" Pick which sixteen year old charged with a class A, B, C or D felony, he want to remand to family court without any guidelines violates the 5th and 14th Amendment U.S.

Jacobs v. Sonsi and Jacobs Co. v. City of Lawrence, 927 F.2d 1111 (10th Cir. 1991); City of Celeburne v. Celeburne Living Center, 473 U.S. 432, (1985) (1) The equal protection clause essentially requires that all persons similarly situated be treated alike. (2) Equal protection violation occurs when government treats someone differently than another who is similarly situated. Equal protection clause prohibits government officials from selectively applying law in discriminatory way. Central Airlines v. U.S., 138 F.3d 333 (8th Cir. 1982).

The equal protection clause applies to classification made by political branches of government, at the outset defendant argues a "classification". The court held that an equal protection claim requires "discrimination" because of membership in class. New Burnham Prairie Homes, 910 F.2d at ~~1481~~ 1481-82, Smith v. Town, 910 F.2d 1469 cert denied 111 S.Ct 1537.

The I.O. of 68 of defendant was a primary consideration for the due process requirement of a Kent v. U.S. supra waiver hearing based upon (8) bedrock principles set forth therein, thus, a transfer ~~to~~ of jurisdiction of defendant with an I.O. of 68 from family court to general sessions court without a Kent waiver hearing is AB Inite, without force of law, as issues of jurisdiction cannot be waived even by consent of parties. Wherefore, general sessions court jurisdiction is void. Guthrie, 572 S.E. 2d at 312.

Conclusion

Accordingly, the conviction and sentences of the defendant should be vacated for lack of jurisdiction.

Date:

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