

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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APPEAL FROM YORK COUNTY

COURT OF COMMON PLEAS

JOHN C. HAYES, III, PRESIDING JUDGE

S.C. SUPREME COURT

APPELLATE CASE NO.: 2015-001014

ANTONIO GORDON,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

MOTION TO VACATE VOID CONVICTION AND SENTENCES

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STATEMENT OF THE GROUND PRESENTED

WHETHER PETITIONER'S GUILTY PLEA JUDGMENT VOID AB INITIO?

STATEMENT OF THE FACTS

At approx 9:30am-10:30am, July 23, 1998, the Rock Hill City Police in York County made a warrantless arrest and took Petitioner into custody based upon probable cause at which time he was a "[c]hild" sixteen years of age. See Appendix page 44 line 19-pg 45 line 10 (Captain Charles Cabiness testimony)- with appendix page 274 line 13-pg 277 line 16 (Detective John Thickens testimony). Gordon appeared before a magistrate judge approx 7 to 8 hours after being taken into custody and was given an arrest warrant for murder. See Appendix page 294 line 18-pg 295 line 25 (Detective John Thickens testimony). See Fnl

Prior to Gordon being indicted October 15, 1998, in general sessions, he was a person under family court exclusive jurisdiction as a matter of statutory law. The State did not file a juvenile petition on Gordon or serve notice. Neither was Petitioner provided with the statutory and constitutional right to a hearing, full investigation, counsel, access to materials considered by the court and a statement of reason in family court as those similarly situated less than seventeen years of age found violating a criminal law and taken into custody, before being allowed to plead guilty in general sessions on July 16, 1999. On July 19, 1999, the Honorable John C. Hayes, III, committed Petitioner to Respondent custody for a term of imprisonment of forty years.

Fnl On July 27, 1998, Gordon was served arrest warrants for two (2) counts of attempted armed robbery, possession of a weapon during the commission of a violent crime, possession of a pistol by a person under twenty-one and criminal conspiracy.

ARGUMENT

Petitioner ask this court to take judicial notice that jurisdiction over the subject matter can be raised any time, including for the first time in this court. Carter v. State, 495 S.E.2d 773 (1998). Lack of subject matter jurisdiction cannot be waived, even by consent of the parties, and should be taken notice of by the court. Anderson v. Anderson, 382 S.E.2d 897, 900 (1989).

Petitioner asserts although the trial court had subject matter jurisdiction over the felony indictments before it, the court lacked authority to exercise its subject matter jurisdiction over those offenses because proceedings under the Children code of laws had not been instituted.

It is argued by Petitioner when he was "[s]ixteen" years of age taken into custody at approx 9:30am-10:30am, July 23, 1998, he was not "[c]harged" with a class A, B, C, or D felony as defined in section 16-1-20 or a felony which provide for a maximum term of imprisonment of fifteen years or more under S.C. Code Ann §20-7-6605(1) (supp.1998) Title Define "[C]hild" statutory and that family court exclusive jurisdiction therefore attached over the subject matter and his person upon being found violating a criminal law and taken into custody as a matter of statutory law. See S.C. Code Ann §20-7-7205(a) (supp.1998) Title "Taken into Custody". Section 20-7-7205(a) provide in relevant part:

When a "child" is found violating a criminal law or ordinance is taken into custody, the taking into custody is not an arrest. The "jurisdiction" of the "[c]ourt" attaches from the time of the taking into custody". See Fnl

However, because §20-7-7205(a), supra, has not been addressed in our State Courts concerning the time family court acquires exclusive jurisdiction, Gordon are relying on case law from other jurisdiction holding that in a juvenile

Fnl Pursuant to S.C. Code Ann §20-7-6605(2)(supp.1998) Title Define "Child" court means the "[F]amily Court".

content, the juvenile court acquires jurisdiction at the moment the juvenile is taken into custody. See Gerrick v. State, 451 N.E.2d 327 (July 27, 1983) where Indiana Supreme Court held "Reading the juvenile statute in its entirety, it is clear the juvenile court jurisdiction over the child attaches as soon as the child has been taken into custody by law enforcement officer who is acting with probable cause to believe the child has committed an act that would be a felony if committed by an adult". D.C.W. v. State, 445 So.2d 333 (Fla. 1984) where Florida Supreme Court held "jurisdiction of the court attaches from the time child is taken into custody". Although there is no South Carolina case directly on point, this court should find Indiana and Florida Supreme Court and §20-7-7205(a), supra, directly support Gordon's position that family court acquired exclusive jurisdiction over the subject matter and his person "[f]irst" upon him being found violating a criminal law and taken into custody 9:30am-10:30am, July 23, 1998.

Petitioner concedes because family court acquired exclusive jurisdiction over the subject matter and his person first upon him being found violating a criminal law and taken into custody, as a matter of law, before he could be indicted in General Sessions, family court had to first issue an order relinquishing its exclusive original jurisdiction pursuant to State v. McClure, 289 S.E.2d 138 (1982) where this court held "**no indictments may be true billed by the grand jury when the circuit court lacks jurisdiction**". However, Gerak v. State, 22 Ohio App.357, 153 N.E. 902, 5 Ohio Law Abs. 761 (Feb 13, 1920) directly support Gordon's position that in a juvenile content where Ohio Supreme Court held "If the juvenile court first acquired jurisdiction of him, and he has become a ward of such court, it may be that he cannot be **"[i]ndicted"** and tried in the Common Pleas Court unless the juvenile court relinquish its jurisdiction and bind him over to the Common Pleas Court". Here in the instant case family court had not bind Gordon over to General Sessions Court, therefore, his indictments that was true billed October 15, 1998 is a nullity void ab initio pursuant to McClure, supra; Gerak, supra.

Furthermore, it is argued by Petitioner because family court had not relinquished its exclusive jurisdiction prior to him pleading guilty in General Sessions, his guilty plea judgment is a nullity void ab initio and Judge Hayes, III, did not have the authority to exercise its subject matter jurisdiction to accept Gordon guilty plea and commit him to Respondent custody for a period of forty years. See S.C. Code Ann §20-7-400(a), (3) (supp. 1998) Title "Exclusive original jurisdiction of family court" which provide in relevant part:

(a) Except as otherwise provided herein, the 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.

State v. Egland, 245 S.E.2d 608 (S.C. 1978) where this Court held "Defendant was a person under family court exclusive jurisdiction and since family court had not relinquished its jurisdiction defendant should have been dealt with under the children code of law". State v. Mayfield, 241 Kan 555, 561, 738 P.2d 861 (1987) (same); State v. Wilson, 73 Ohio St.3d 40 (1995) (same).

Petitioner next contends because family court acquired jurisdiction over the subject matter and his person first upon him being found violating a criminal law and taken into custody, as a matter of law before he could lawfully plead guilty in general sessions, the Respondent must have first served Gordon with a juvenile "[p]etition" in family court. A juvenile petition serve essentially the same function as an indictment in a felony prosecution and is subject to the same requirement that it aver every element of a criminal offense, with sufficient specificity. In re S.R.S., 180 N.C.

App. 151,153,636 S.E.2d 277,280 (2006) quoting In re Griffin,162 N.C. App. 437,493,592 S.E.2d 12,16 (2004). "The purpose of a juvenile petition is to hyper technical scrutiny with respect to form".Id at 153-54,636 S.E.2d at 280.

The power to act as a court in an ordinary criminal case rests on jurisdiction of the person and of the subject matter and a court does not have jurisdiction to try anyone for a violation of law except on proper complaint duly filed.State v. Douglas,245 S.C. 83,138 S.E.2d 845 (1964) (Generally,jurisdiction of the subject matter is satisfied when appropriate charges are "[f]iled" in competent court);Evans v. Sacks,114 Ohio Law Abs. 498 (1935);see,also State v. Treon,91 Ohio Law Abs. 229,188 N.E.2d 308 (1963) (Prerequisite of court having subject matter jurisdiction is the filing of indictment). In the instant case there was no petition filed in family court prior to Gordon pleading guilty in general sessions court,therefore,general sessions lacked the authority to exercise its subject matter jurisdiction to convict Gordon,the guilty plea judgment is therefore a nullity void ab initio.

Clearly it is clear beyond dispute that the waiver of jurisdiction by a juvenile court is critically important action determining vitally important statutory rights of the juvenile.Kent v. United States,383 U.S. 541,86 S.ct 1045,1055 (1966) (Holding that critically important decision to try juvenile as adult entitles juvenile to certain procedures and benefits as a consequence of his statutory rights to the exclusive jurisdiction of the juvenile court).See Fn2

Notice,to comply with due process requirements,must be given sufficiently in advance of scheduled court proceedings so that reasonable opportunity

Fn2 As a matter of statutory and constitutional law Gordon was entitled to a hearing,full investigation,counsel,access to materials considered by the court and a statement of reason in family court.§20-7-7415(c); §20-7-7605(4),(6),(10)(supp.1998) Title "Transfer of Jurisdiction"-Kent v. United States,86 S.ct 1045 (1966),and because Gordon was not provided with such his guilty plea judgment is a nullity void ab initio because it was issued without due process of law.

to prepare will be afforded, and must "set forth the alleged misconduct with particularity". Due process of law requires notice of the sort Petitioner herein describe that is, notice which would be deemed constitutionally adequate in civil or criminal proceeding. It does not allow a hearing to be held in which a youth's freedom and his parents right to his custody are at stake without giving them timely notice, in advance of the hearing, of specific issues that they must meet". In re Gault, 387 U.S. 1, 33-34, 87 S.Ct 1428 (1967). Subsection (d) of §20-7-7415 specifying Gordon and his parents must receive notice are mandatory. Peyton v. French, 147 S.E.2d 739, 743 (1966) (Holding notice requirement of juvenile statute mandatory).

Petitioner asserts because the State did not follow the mandatory notice requirement of §20-7-7415(d) (supp.1998) Title "Pre-hearing inquiry and investigation; notice", statutory and the right to be present at a hearing, along with the statutory requirement of counsel, the essentials of due process and fair treatment required by Kent and Gault are not satisfied. The failure of the State to provide adequate notice to Gordon and his parents was material not only because of the explicit notice requirement in the statute but because due process of law requires notice to be given sufficiently in advance of scheduled court proceedings so that reasonable opportunity to prepare will be afforded. In re Gault, supra; McGuire v. Warden, 229 N.W.2d 211 (N.D.1998).

Clearly the plea could not be voluntary in the sense that it constituted an intelligent admission that he committed the offenses unless the Petitioner received "real notice of the true nature of the charges against him in family court, the first and most universally recognized requirement of due process". Smith v. O'Grady, 372 U.S. 329, 334, 61 S.Ct 572, 574, 85 L.ed 859. Petitioner asserts because he did not receive real notice of the offenses in family court to which exclusive jurisdiction belonged upon him being found violating a criminal law and taken into custody, his plea is involuntary because the judgment of conviction was entered without due process. See Baker v. Commonwealth, 28 Va. App. 306, 504 S.E.2d 394 (1998) aff'd 258 Va. 1, 516 S.E.2d 219 (1999) (per curiam) (The trial court's judgement in Baker is

void because the notice of initiation of juvenile proceedings was not served on a required party, the juvenile's biological father. Id. Thus, although the trial court had subject matter jurisdiction over the felony indictments before it, the court lacked authority to exercise its subject matter jurisdiction over those offenses because the Commonwealth failed to comply with the mandatory notice requirements); Dennis v. Moore, 259 Va. at 409-10, 527 S.E.2d at 417-18 (The trial court had subject matter jurisdiction over the felony indictments before it, the court lacked authority to exercise its subject matter jurisdiction over those offenses because the Commonwealth failed to comply with mandatory notice requirement); Henderson v Morgan, 96 S.ct 2253, 2254; In re Gualt, supra.

Petitioner asserts that language in S.C. Code Ann §20-7-6605(1) (supp.1998) Title Define "[C]hild" statutory did not oust family court exclusive original jurisdiction once acquired. Section 20-7-6605(1), supra, provide in relevant part:

"[C]hild" means a person less than seventeen years of age". "Child" does not mean a person "sixteen" years of age or older who is "[c]harged" with a class A, B, C, or D felony as defined in section 16-1-20 or a felony which provide for a maximum term of imprisonment of fifteen years or more. See Fn3 However, a person "sixtee" 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 provide for a maximum term 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.

Petitioner contends the Respondent reliance on the language "child" does not mean a person sixteen years of age who is "charged" with a class A, B, C,

Fn3 Pursuant to the plain ordinary and unambiguous language in §20-7-6605(1) persons "[s]eventeen" years of age are ultimately "[e]xcluded" from the definition of a "[C]hild" and "family court exclusive jurisdiction", as the statute define a "[child]" as a person less than seventeen years of age".

or D felony as defined in section 16-1-20 or a felony which provide for a maximum term of imprisonment of fifteen years or more to oust family court first acquired exclusive jurisdiction and the failure to file a juvenile petition, serve notice and deprive Gordon of the statutory and constitutional right to a hearing, full investigation, counsel, access to material considered by the court and a statement of reason in family court as those "similarly situated" less than seventeen years of age found violating a criminal law and taken into custody is clearly contrary with the fundamental principle of law once family court acquired first jurisdiction over the subject matter and Gordon's person it could not be ousted by later subsequent events, this is true even when the events are of such a nature that they would have prevented jurisdiction from attaching in the first instance. Citing Butler v. Whitt, 95 S.E.2d 496 (S.C.1956); D.C.W. v. State, 445 So.2d 333 (Fla.1984) (Jurisdiction of the court attaches from the time the child is taken into custody, it is the time of apprehension that determines which court has jurisdiction, and once that jurisdiction attaches it is exclusive jurisdiction).

Therefore, because family court acquired first exclusive jurisdiction could not be ousted by York County Grand Jury subsequent event October 15, 1998, returning of true bill indictments charging Petitioner with class A, B, C, or D felonies as defined in section 16-1-20 or a felony which provide for a maximum term of imprisonment of fifteen years or more. See State v. Johnson, 510 S.E.2d 423 (1999) (Trial court acquires subject matter jurisdiction by way of a valid indictment), or when Gordon was "[b]ooked" and or when he was told of the formal accusation against him at the initial appearance before a judicial officer. Butler v. Whitt, supra. Petitioner should have therefore been dealt with under the children code of laws. §20-7-7205(a), supra; §20-7-400(a), (3), supra; State v. England, supra.

Furthermore, Gordon argue to this court the Respondent cannot rely on §20-7-6605(1) because the term "[C]harged" is vague and indefinite, it is

subjected to a wide range of different meanings when a person "sixteen" years of age is being excluded from the definition of a "[child]" and family court exclusive jurisdiction when "[charged]" with a class A,B,C, or D felony as defined in section 16-1-20 or a felony which provide for a maximum term of imprisonment of fifteen years or more. See Fn4 Petitioner contends the language used does not convey a sufficient definite warning of the conduct proscribed, and persons of common intelligence must necessarily guess at its meaning and differs as to its application which renders the provision unconstitutionally void and invalid under the due process clauses of South Carolina Constitution Article 1., §3 and the 14th amendment to the United States Constitution. Smith v. Goguen, 94 S.ct 1242 (1974); Curtis v. State, 549 S.E.2d 591, 598 (2001), cert.denied 535 U.S. 926, 122 S.ct 1295 (2002), quoting City of Beaufort v. Baker, 432 S.E.2d 470, 472 (1993). Therefore, §20-7-6605(1) unconstitutional law is void and is not law and the guilty plea judgment too is a nullity void ab initio because it is predicated upon an unconstitutional statute. Herrera v. Com, 483 S.E.2d 492 (Va.App.1997); see also Ex Parte Siebold, 100 U.S. 371 (1879) ("An unconstitutional law is void and is not law. An offense created by it is not a crime. A conviction under it is not merely erroneous, but illegal and void, and cannot be a legal cause of imprisonment".).

Construing §20-7-6605(1) constitutional. Words in a statute must be given their plain and ordinary meaning without resorting to subtle or force construction to limit or expand the statute's operation. Epstein v. Coastal Timer Co, 711 S.E.2d 912, 917 (2011). Therefore courts are bound to give effect to the expressed intent of the legislature. thus, we must follow the plain

Fn4 Pursuant to the Blacks Law Dictionary Eighth Edition term "[C]harged" means "A formal accusation of an offense as a preliminary step to prosecution".

and unambiguous language in a statute and have no right to impose another meaning. Grier v. AMISUB of S.C., Inc, 725 S.E.2d 693,695 (2012). The words in §20-7-605(1) when following the plain ordinary unambiguous language without resorting to subtle or force construction to limit or expand the statutory operation it is clear Gordon had to first be "charged" with one of the class felonies prior to being taken into custody before he could be "[e]xcluded" from the definition of child and family court exclusive jurisdiction, here in the instant case the police made a warrantless arrest based upon probable cause and apprehended Gordon at 9:30am-10:30am, July 23, 1998, and at that time Gordon was considered taken into custody. In re M.W., 504 S.W.2d 189 (Missouri Court of Appeals, St Louis Division Two, 1973) (Under statute providing that jurisdiction of juvenile court attaches from the time the child is taken into custody, it is the time of apprehension that determines which court has jurisdiction, and once that jurisdiction attaches it is exclusive original); Gerrick v. State, supra. Family court jurisdiction over the subject matter and Gordon's person attached the moment Gordon was apprehended §20-7-7205(a) and could not be ousted. Butler v. Whitt, supra; D.C.W v. State, supra. For once jurisdiction of a court attaches it exists for all time until the cause is fully and completely determined. Minneapolis and St L.R. Co v. Peoria and P.U. Ry. Co, 270 U.S. 580, 46 S.Ct 402, 70 L.Ed 743. Gordon should have been dealt with under the children code of laws. §20-7-400(a), (3), supra; State v. England, supra.

Petitioner asserts because general sessions lacked jurisdiction, then it lacked "[a]ll jurisdiction" to adjudicate Petitioner's rights. Kulko v. Superior Court, 436 U.S. 84 (1978), and because family court exclusive jurisdiction has now terminated upon Gordon turning twenty-one years of age which has been over thirteen years ago, he's entitled to his "speedier and immediate" release. S.C. Code Ann §20-7-7810(supp.1998) Title "Commitment". Sanders v. State, 314 S.E.2d 319 (1984) (Family court jurisdiction cannot extend past juvenile twenty-first birthday).

Conclusion

It is respectfully asked that this court exercise its original jurisdiction under S.C. Const Art 5 section 5 due to the extraordinary circumstances and vacate Gordon's conviction and sentences and compel Respondent to release Petitioner immediately and or show cause why his current detention is not unlawful.

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Antonio Gordon

April 21, 2016

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM YORK COUNTY
COURT OF COMMON PLEAS
JOHN C. HAYES, III, PRESIDING JUDGE

APPELLATE CASE NO.: 2015-001014

ANTONIO GORDON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

CERTIFICATE OF SERVICE

I, Antonio Gordon, hereby certify that I did serve
Petitioner's Motion to vacate void conviction and sentence
on:

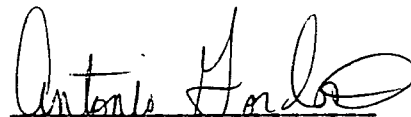
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by depositing a copy in the mail with sufficient funds this
21st day of April, 2016.


Antonio Gordon

