

STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM YORK COUNTY

The Honorable Daniel D. Hall, Circuit Court Judge

Appellate Case No.: 2015-001004

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JUL 22 2016

SC Court of Appeals

Antonio Gordon, # 259798,

Appellant,

vs.

State of South Carolina,

Respondent.

INITIAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

JUSTIN J. HUNTER
Assistant Attorney General
SC Bar No. 101254

ATTORNEYS FOR RESPONDENT

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APPELLANT'S STATEMENT OF ISSUES ON APPEAL

1. Whether the Circuit Court was without jurisdiction over the subject matter and appellant because family court acquired first jurisdiction over the subject matter and his person upon him being found violating a criminal law and taken into custody under § 20-7-7205(A)(Supp. 1993) Title "Taken Into Custody"?
2. Whether Judge Couch's Order dated January 31, 2008 granting his Rule 60(b) Motion is void.
3. Whether the lower court abused its discretion and committed error of law when it found appellant's *Austin* review must fail because he was not prejudice because he was granted the relief contemplated in his pleading.
4. Whether the lower court committed error of law and abused its discretion when it found Appellant had previously raised his jurisdiction issue that the unconstitutionality of § 20-7-6605(1) deprived the York County Grand Jury and General Sessions of its jurisdiction to indict and accept his guilty plea in the initial filing and that it had been heard and ruled on, untimely and could have been raised in (PCR) 2008-CP-46-4951.
5. Whether the lower court abused its discretion and committed error of law when it found Appellant had not filed his Rule 59(e) Motion timely per 59(e).

STATEMENT OF THE CASE

Appellant is currently incarcerated in the South Carolina Department of Corrections. He was indicted in October 1998 by the York County Grand Jury for Murder (1998-GS-46-2847), three counts of Possession of a Firearm During the Commission of a Violent Crime (1998-GS-46-2847-A; 1998-GS-46-1949-A; 1998-GS-46-1950-A), two counts of Attempted Armed Robbery (1998-GS-2849, 1998-GS-46-2850), Criminal Conspiracy (1998-GS-46-2851), and Possession of a Pistol by a Person Under Twenty-One (1998-GS-46-2852). Daniel D'Agostino, Esquire, represented Appellant.

A hearing on Appellant's motion to suppress was held on July 12, 14, and 16, 1999. On July 16, 1999, following a suppression hearing, Appellant pled guilty as indicted. On July 19, 1999 the Honorable John C. Hayes, III sentenced Appellant to confinement for thirty years for Murder; five years for Possession of a Firearm During the Commission of a Violent Crime; five years for Criminal Conspiracy; five years for Possession of a Pistol by a Person Under Twenty-One, all to run concurrently; and ten years for Attempted Armed Robbery, running consecutive to the thirty year sentence for Murder. This was a negotiated guilty plea to a cumulative forty years confinement.

Appellant filed a timely notice of appeal and an Anders brief was submitted on his behalf pursuant to *Anders v. California*, 386 U.S. 738 (1967). The South Carolina Court of Appeals dismissed the Appellant's appeal. *State v. Gordon*, 2000-UP-747 (S.C. Ct. App. Filed December 6, 2000). The remittitur was issued on January 9, 2001.

Appellant subsequently filed a PCR application originally dated June 20, 2001 and amended on May 8, 2003 (2000-CP-46-1414). An evidentiary hearing was held on July 29, 2003. Tara D. Shurling, Esquire, represented Appellant, who was present at the hearing. Jeanette C.

Vanginhoven, of the South Carolina Attorney General's Office, represented the Respondent. Appellant alleged his guilty plea was involuntary and that defense counsel was ineffective for failing to discuss with him evidence of a palm-print found on the victim's car door. On August 20, 2003, the Honorable J. Ernest Kinard issued an Order denying and dismissing the application. Appellant subsequently made a "Motion for Rehearing/Motion for Reconsideration of the Facts" on December 9, 2003. The Honorable J. Ernest Kinard dismissed Appellant's motion by written Order filed December 15, 2003.

Appellant filed a petition for writ of certiorari appealing the Order dismissing his first PCR action. On July 21, 2005, the South Carolina Supreme Court issued an Order denying the petition. The remittitur was issued on August 9, 2005.

On July 6, 2004, while his appeal from the denial of his first PCR action was still pending, Appellant filed a second PCR application (2004-CP-46-1700). Appellant raised issues previously raised in his first PCR action, including allegations that his guilty plea was involuntary and that defense counsel was ineffective. On December 30, 2004, the Honorable Lee S. Alford issued a Conditional Order of Dismissal in which he expressed the intent to summarily dismiss the application because Appellant failed to comply with the filing procedures of the Post-Conviction Procedure Act as set forth in S.C. Code Ann. §17-27-45(A) and §17-27-90, and because the application was an improper successive action, but granted Appellant twenty (20) days to show why the order should not become final. Appellant did not respond to the conditional order of dismissal. Thereafter, by Order dated May 20, 2005, the PCR court denied and dismissed Appellant's second PCR action.

Appellant then filed a federal Petition for Writ of Habeas Corpus on December 22, 2005 (2:05-3327-MBS-RSC) and an amendment to his federal habeas corpus action on April 14, 2006.

On October 16, 2006, Federal Magistrate Judge Robert S. Carr entered his Report and Recommendation that habeas relief should be denied. On October 30, 2006, Appellant filed an "Objection to Report and Recommendation of Magistrate Judge." Appellant raised the probable cause issue regarding his arrest and claimed that defense counsel was ineffective for failing to advise him that by pleading guilty he waived his right to challenge the lawfulness of his arrest or the statements he made to law enforcement after he was arrested. On February 16, 2007, the Honorable Margaret B. Seymour entered an Order dismissing Appellant's petition without prejudice to permit him to exhaust all State remedies.

Subsequently, Appellant filed a state Petition for Writ of Habeas Corpus on January 3, 2006 (2006-CP-46-0010). He then filed an amendment to the state habeas corpus action on January 23, 2007 to which he attached two statements given to law enforcement by Chyneca Dixon on July 23, 1998. Appellant alleged that law enforcement did not have probable cause to arrest him. The Honorable John C. Hayes denied and dismissed the Appellant's state habeas corpus petition with prejudice by written order dated April 30, 2007 and filed on June 1, 2007.

Appellant then filed a Rule 60(b) motion in which he alleged a conflict of interest with the Honorable John C. Hayes, III, who was original sentencing judge at Appellant's guilty plea. Appellant also claimed that the order dismissing his state habeas corpus action did not advise him of right to appeal the order. On January 31, 2008 the Honorable Roger L. Couch granted Appellant's Rule 60(b) motion to reconsider, amend, and clarify, and issued a written order finding that Appellant was without prejudice to bring a petition for writ of habeas corpus in the original jurisdiction of the South Carolina Supreme Court.

On January 9, 2009, Appellant filed his third PCR application alleging newly discovered evidence, ineffective assistance of trial counsel, and prosecutorial misconduct, *Brady* violation,

involuntary guilty plea, no probable cause to arrest, and personal jurisdiction. Respondent made its return and motion to dismiss on July 27, 2009 asserting that the application must be summarily dismissed as an improper successive action and as having been filed after the expiration of the applicable statute of limitations. The Honorable John C. Hayes, III issued a Conditional Order of Dismissal on August 24, 2009, in which Judge Hayes expressed the intent to summarily dismiss the application because Appellant failed to comply with the filing procedures of the Post-Conviction Procedure Act as set forth in S.C. Code Ann. §17-27-45(A) and §17-27-90, and because the application was an improper successive action, but granted Appellant twenty (20) days to show why the order should not become final. Respondent also filed a motion to restrict future filings on November 19, 2009 pursuant to *In re Theron Maxton*, 325 S.C. 3, 478 S.E.2d 679 (1996). Appellant did not file a response to the Conditional Order of Dismissal.

A hearing into Respondent's motion for summary dismissal was convened on December 1, 2009. At the hearing, Respondent proceeded on a motion to dismiss all of Appellant's claims as procedurally barred by the statute of limitations and rule against successive applications. By an Order of Dismissal signed January 4, 2010, the Honorable Lee S. Alford denied and dismissed the application with prejudice, and ordered that Appellant be prohibited from filing any future application for post-conviction relief that raises the same issues as raised in that application or other applications.

Appellant filed a Motion for Relief from Judgment Pursuant to SCRPC Rule 60(b)(5) dated February 2, 2015, alleging that Judge Hayes recused himself due to a conflict of interest, that the Family Court should have had jurisdiction over his conviction, and that he should be entitled to an *Austin* review regarding his prior counsel's failure to appeal Judge Couch's 2008

Order. On March 4, 2015, Judge Hayes issued an Order dismissing Appellant's 60(b) Motion without prejudice because Judge Couch's January 31, 2008 Order granted Appellant the right to file a Habeas Corpus action and presented no grounds by which Appellant could have appealed.

Appellant then filed a Motion to Reconsider, Alter, and Amend Judgment Pursuant to Rule 59(e) on March 25, 2015. By an Order dated April 14, 2015, the Honorable Daniel Hall denied Appellant's motion. Judge Hall found that all issues raised had been litigated and ruled upon and that Appellant's motion was untimely because it was not filed within ten days after receipt of the written notice.

In this current appeal, Appellant is appealing Judge Hayes' order dated March 4, 2015 denying Appellant's 60(b) Motion. He is also appealing Judge Hall's order dated April 14, 2015 denying Appellant's 59(e) Motion. Appellant also makes several claims that will be addressed below.

ARGUMENT

1. The Circuit Court properly had jurisdiction over the subject matter and Appellant's plea.

First, although Appellant claims that he did not raise this exact jurisdiction argument but instead raised similar jurisdiction arguments in his four prior proceedings, this argument is improper before this Court as he clearly raised or **could have raised this argument** in his numerous previous proceedings. The only difference between his previous allegations and this current allegation is that he now adds that the General Sessions court lacked jurisdiction over him because the Family Court acquired first jurisdiction.

Regardless of this claim being successively raised at every prior proceeding, it is clear that the General Sessions Court had jurisdiction over Appellant. Pursuant to S.C. Code Ann. §20-7-6605¹, 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 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." Appellant was sixteen years old when he committed the crime for which he was indicted and the crimes committed were Class A, B, C or D felonies. Therefore, the General Sessions Court had jurisdiction. The decision to remand the case to Family Court was within the Solicitor's discretion. Appellant mistakenly believes that any time a child is taken into custody, the Family Court and only the Family Court may exercise exclusive jurisdiction. Aside from the fact that this claim has **already been adjudicated**, this allegation should be dismissed as the court of General Sessions properly had jurisdiction over Appellant.

2. Judge Couch's Order dated January 31, 2008 granting his Rule 60(b) Motion is not void.

¹ This was the applicable code section at the time of Appellant's arrest and plea. This Section is currently cited as § 63-19-1210.

Appellant alleges that Judge Couch's order dated January 31, 2008 granting his Rule 60(b) Motion is void. The motion was filed in response to Judge Hayes' order denying and dismissing Appellant's State Habeas action (2006-CP-46-0010). Judge Hayes' order specifically found that the Petition should be dismissed because Appellant was barred from bringing a Writ of Habeas Corpus action in the circuit court. This is well established law clearly outlined in the order. See *Keeler v. Mauney*, 330 S.C. 568, 571, 500 S.E.2d 123, 124 (Ct. App. 1998) (holding "[a] person is procedurally barred from petitioning the circuit court for a writ of habeas corpus where the matter alleged is one which could have been raised in a PCR application") (internal citations omitted).

Since Appellant's state habeas petition was procedurally barred as filed in the incorrect jurisdiction, Judge Couch's order actually helps Appellant by making sure Appellant is aware that he has every opportunity to bring a State Habeas action in the original jurisdiction of the South Carolina Supreme Court. Appellant asserts in his current appeal that Judge Couch's order is void because it grants him relief on issues that he did not consider. This is without merit because his State Habeas was denied as filed in the wrong jurisdiction and because his claims could have been raised in previous actions. The court did not reach the merits of or analyze his current allegations. The court had the complete authority and discretion to rule accordingly, regardless of whether it gave Appellant proper "notice" of how it would rule. Additionally, Appellant argues, but cites no authority, that Judge Couch lacked jurisdiction to rule on his 60(b) motion. Accordingly, this allegation should be dismissed.

3. The lower court did not abuse its discretion and commit error of law when it found Appellant's Austin review must fail.

In Appellant's 60(b) motion, filed March 9, 2015, he asked the court to for relief pursuant to *Austin v. State*, 305 S.C. 453, 454, 409 S.E.2d 395, 396 (1991). *Austin* recognizes a general

exception to the rule barring successive PCR applications where prior post-conviction relief counsel fails to appeal the denial of the application. Pursuant to *Austin*, a post-conviction relief applicant may petition the South Carolina Supreme Court for discretionary review of the dismissal of their application.

Austin is inapplicable to this current situation because Appellant was not denied the opportunity to file an appeal to his 2006-CP-46-0010 State Habeas or the corresponding Rule 60(b) Motion. This current action before the Court is the very appeal that Appellant claims he was not afforded. Additionally, in the Order dismissing his State Habeas (2006-CP-46-0010) the lower court "conducted an *Austin* review" and specifically found "that the failure to appeal a ruling, which granted Appellant the relief he sought, resulted in no prejudice to Appellant. Appellant asked to and was granted the right to file a Habeas Corpus proceeding in the Supreme Court of South Carolina. Therefore, there existed no grounds upon which an appeal favorable to Petition could be predicated." Accordingly, this allegation should be dismissed.

4. The lower court did not commit an error of law and abuse its discretion when it found Appellant had previously raised his jurisdiction issue that the York County Grand Jury and General Sessions was deprived of its jurisdiction to indict and accept Appellant's guilty plea and that the issue had been heard and ruled on, was untimely, and could have been previously raised.

Appellant alleges that Judge Hall's order dated April 14, 2015 denying his Rule 59(e) motion in his State Habeas (2006-CP-46-0010) contains error. He alleges that the court erred in finding that his subject matter jurisdiction claims had been raised and ruled upon in his prior actions. Appellant again argues that the General Sessions Court did not have jurisdiction over him and that he should have been tried in Family Court. Appellant has raised this issue, stated different ways, in three PCR actions, one State Habeas action, and at least one Federal Habeas action. The lower court was correct in finding that this allegation should be dismissed as having

been raised and ruled upon. Almost every angle of the General Sessions/Family Court jurisdiction argument has been examined by the court and it was correct in finding that Appellant's State Habeas should be dismissed.

5. The lower court did not abuse its discretion and commit error of law when it found Appellant had not timely filed his Rule 59(e) Motion per 59(e).

Appellant alleges that the lower court erred in finding that his Rule 59(e) Motion to his State Habeas was filed untimely. Judge Hall's Order dated April 14, 2015 finds that Appellant's Rule 59(e) Motion should be dismissed because the issues had been previously heard and ruled on and because Appellant submitted the Motion later than ten days after receipt of written notice of the entry of judgment.

As stated above, Appellant filed a Motion for Relief from Judgment Pursuant to SCRCF Rule 60(b)(5) dated February 2, 2015. On March 4, 2015, Judge Hayes issued an Order dismissing Appellant's 60(b) Motion without prejudice. Appellant then filed a Motion to Reconsider, Alter, and Amend Judgment Pursuant to Rule 59(e) on March 25, 2015. By an Order dated April 14, 2015, the Honorable Daniel D. Hall denied Appellant's motion. Judge Hall found that all issues raised had been litigated and ruled upon and that Appellant's motion was untimely because it was not filed within ten days after receipt of the written notice.

Respondent contends that the motion was not filed timely. Respondent also submits that the timeliness of Appellant's Rule 59(e) Motion is irrelevant because the motion was also dismissed on other grounds. Even if the court found that the Motion was filed timely, the court also dismissed the Motion because "these issues have been previously heard and ruled on." Thus Appellant's allegation is without merit and should be dismissed.

CONCLUSION

Respondent submits that Appellant's appeal be denied and dismissed.

Respectfully submitted,

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Assistant Attorney General
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July 22, 2016

STATE OF SOUTH CAROLINA
In The Court of Appeals

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Appeal from York County
The Honorable Daniel D. Hall, Circuit Court Judge

JUL 22 2016

SC Court of Appeals

Antonio Gordon, #259798,

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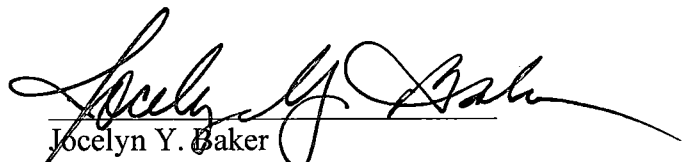
State of South Carolina

Respondents.

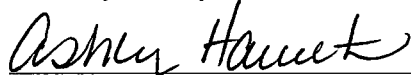
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Initial Brief of Respondent and Designation of Matter was served upon Appellant by depositing the same in the United States mail, postage prepaid, addressed to him at Kershaw Correctional Institution, 4848 Gold Mine Hwy, Kershaw, South Carolina, 29067-8069.

This 22nd day of July, 2016.


Jocelyn Y. Baker
Legal Assistant for Respondent

SWORN to before me this
22nd day of July, 2016.



Notary Public for South Carolina

My Commission Expires: 2-23-23



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JUL 22 2016

SC Court of Appeals

ALAN WILSON
ATTORNEY GENERAL

July 22, 2016

The Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
PO Box 11629
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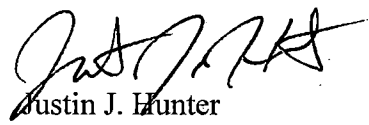
Re: Antonio Gordon, #259798 v. State of South Carolina
Appellate Case No. 2015-001004

Dear Ms. Kitchings:

Enclosed is the original and one copy of the Initial Brief of Respondent and Designation of matter in the above-referenced matter for filing in your office. Also enclosed for filing is an original and six (6) copies of my Motion to Relax.

By copy of this letter we are serving the Appellant with a copy of the Initial Brief, Designation of Matter, and Motion to Relax.

Sincerely,


Justin J. Hunter
Assistant Attorney General

JJH/jyb

Enclosures

cc: Antonio Gordon, #259798



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