In The State of South carolina

In The Court of Appeals

Appeal From York County

John C. Hayes,III,Circuit Court Judge

Daniel Dewitt Hall,Circuit Court Judge

Appellate Case no: 2015-001004

Antonio Gordon, Appellant,

v.

State of South Carolina, Respondent.

Petition for Rehearing Rule 221(a),SCACR

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Index

Questions presented

(1) Whether this Court Unpublished Opinion overlooked or misapprehended Gordon's entire subject matter jurisdiction question and argument on whether the General Sessions Court was without the jurisdiction over the subject matter and him because family court acquired the first jurisdiction over him and the subject matter upon him being found violating a criminal law and taken into custody pursuant to S.C. Code Ann §20-7-7205(a)
(1)(a) Whether the circuit court was without jurisdiction over the subject matter and Gordon because family court acquired the first jurisdiction over the subject matter and Gordon upon him being found violating a criminal law and taken into custody pursuant to section 20-7-7205(a)?

(2) Whether this Court Unpublished Opinion overlooked or misapprehended Gordon's question and argument whether the lower court committed error of law and abuse it discretion when it found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?

Statement of the case

July 23,1998,Rock Hill City police in York County made a warrantless arrest of Antonio Gordon.See ROA Volume one pages 80 line 16- page 83 line 16,page 88 line 24-page 89 line 10 (Detective John Thickens testimony)-with ROA Volume one page 208 line 19-24 (Captain Charles Cabiness testimony). Gordon was apprehended and taken into custody at approx 9:30a.m-10:30a.m. ROA Volume one page 208 line 19-page 209 line 12 (Charles Cabiness testimony)See Fn1

Approx 6 to 8 hours after the Appellant was apprehended and taken into custody he appeared before a magistrate judge and signed an arrest warrant for murder and had a bond hearing.See ROA Volume one pages 89 line 13-page 90 line 12- ROA Volume one page 101 line 1-24 (John Thicken testimony). Gordon was booked into the city jail at approx 16:57pm.See ROA Volume one pages 211-213.

On July 27,1998,Gordon was issued arrest warrants for two counts of attempted armed robbery,possession of a weapon during the commission of a violent crime,criminal conspiracy and possession of a pistol by a person under twenty-one years of age. ROA Volume one pages 222-224.

October 15,1998,the York County Grand Jury indicted Appellant for murder,two counts of attempted armed robbery,three counts of possession of a weapon during the commission of a violent crime,possession of a pistol by a person under twenty-one and criminal conspiracy without family court binding Gordon over to the court of general sessions. ROA Volume one pages 225-247.

On July 16,1999,after a Jackson v. Denno hearing Appellant plead guilty in general sessions and had not been given a detention hearing,served with a juvenile petition,notice,hearing,full investigation,counsel,access to materials considered by the court and a statement of reason in family court as those similarily situated less than seventeen years of age found violating a criminal law and taken into custody. On July 19,199,the Honorable John C. Hayes,III,sentence Gordon to a forty year defacto life sentence.

Appellant filed his first post-conviction relief application June 29,2000.Antonio Gordon v. State,2000-cp-46-1414. In the application he asserted as a ground for relief that counsel was ineffective pursuant to family court matters. ROA 248-252. Appellant filed a second PCR application while (1414) were pending.Antonio Gordon v. State,01-cp-46-1866. In the application Gordon asserted "Lack of subject matter jurisdiction" (family court never relinquished jurisdiction). ROA Volume one pages 254-257. Gordon amended his application to raise a second subject matter jurisdiction issue,namely,because section 20-7-6605(1) statutory was unconstitutional general sessions was without jurisdiction to convict and impose sentence. ROA Volume one pages 2688.See Fn2

Fn1 Gordon was "sixteen" years of age with an IQ 68 when he was taken into custody.

Fn2 Gordon asked counsel to present both jurisdiction issues to the PCR court.Counsel inadequately raised the issues to the court.

At an evidentiary hearing convened on July 29,2003,court appointed counsel Tara D. Shurling,esquire,inadequately raised Appellant's jurisdictional issues as ineffective assistance of counsel (failure to make a concerted effort to convince the solicitor's office to remand the case to family court). ROA Volume one page 285 line 15-24 page 286 line 23-page 287 line 1. The PCR Court did not make specific finding of fact and conclusion of law on the jurisdictional issues in its order. ROA Volume one pages 348-358.

Gordon filed a second PCR application and filed a subject matter jurisdiction issue (failure to have waiver hearing).Antonio Gordon v. State,2004-cp-46-1700. The application was dismissed as being timed barred and successive. ROA Volume one pages 372-405

Appellant then filed a petition for writ of habeas corpus in York County Clerk of Court. Antonio Gordon v. State,2006-cp-46-0010. In the application he asserted two issues relating to him being tried as an adult. ROA Volume one pages 425-427,429.See Fn3 The respondent filed a return and motion to dismiss petition for writ of habeas corpus. ROA Volume one pages 435-439. The Honorable John C. Hayes,III,issues an order of dismissal with prejudice dated April 30,2007,filed June 1,2007. ROA Volume One pages 440-444. Judge Hayes did not inform Gordon he could appeal. 90 Days later Gordon filed a Rule 60(b) motion alleging judge Hayes was a conflict of interest and asked that he recused himself and a different judge who is not a conflict with the case hear it on the merits. ROA Volume one pages 444-449. Judge Couch in a order dated January 31,2008,filed February 6,2008,granted Appellant's motion amending judge Hayes order to state Appellant was without prejudice to file a habeas corpus in the South Carolina Supreme Court. ROA Volume one pages 450.

February 2,2015,Gordon filed a second Rule 60(b),(5)-Austin v. State,409 S.E.2d 395 (S.C.1991) review alleging counsel failed to file a notice of appeal at his request and that judge Couch granted him relief he did not ask for and considered his first Rule 60(b) motion as a Rule 59(e) and attached two juvenile jurisdiction issues. ROA Volume one pages 451-453. Judge Hayes in a order dismissed the motion without prejudice finding he was not a conflict of interest,appellant had already raised the juvenile jurisdiction issues and appellant was not entitled to an Austin review because he was granted relief asked for in his motion. ROA Volume one pages 459-463. Appellant received Judge Hayes order on March 19,2015,and filed his Rule 59(e),SCRCP on March 25,2015,asking the court to reconsider,alter and amend his judgment to find he was a conflict of interest, Appellant's

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Fn3 The argument Gordon presented was (1) he was allowed to plea guilty under ambiguous children children code of laws (2) General sessions lack jurisdiction over his person because there was no waiver hearing conducted in family court.

jurisdiction claim (b) was not previously raised and that he was entitled to an Austin review. ROA Volume one pages 464-468. The Respondent in a letter dated March 31,2015,informing Judge Hall it does not intend to respond to Appellant's motions. ROA Volume one page 71.

Judge Hayes recused himself a second time and Judge Hall presided over the matter and made specific finding of fact and conclusion of law and denied Gordon's morions ROA Volume one page 269.

This Court Affirmed in an Unpublished Opinion October 18,2017,without addressing Gordon's "subject matter jurisdiction" argument that never been raised before but raised for the first time in this Court Jurisdiction. This Court Unpublished Opinion also failed to address error of fact and law by the lower court that was properly raised by Gordon in his Initial and final brief.

This Court Unpublished Opinion overlooked or misapprended Gordon's entire subject matter jurisdiction question and argument on whether the General Sessions Court was without jurisdiction over the subject matter and him because family court acquired the first jurisdiction over him and the subject matter upon him being found violating a criminal law and taken into custody pursuant to S.C. Code Ann §20-7-7205(a)(supp.1998) Title "Taken a Child into custody" statutory.

INTRODUCTION

Pursuant to Rule 221(a),SCACR the Appellant Antonio Gordon (pro se) respectfully petition this Court for rehearing of Unpublished Opinion No.2017-UP-385,dated October 18,2017. Rehearing is warranted when the Court has overlooked or misapprended an argument.Kennedy v. S.C. Retirement System,349 S.C. 531,564 S.E.2d 322 (2001). When a court fails to address some of the arguments raised in the appeal,a "prima facie" case for rehearing has been made".Covar v. Sallat,22 S.C. 265,272 (1885).

SUMMARY OF ARGUMENT

Our Supreme Court has held the jurisdiction of a court over the subject matter of a proceeding is fundamental.Anderson v. Anderson,299 S.C. 110,115,382 S.E.2d 897,900 (1983). "Lack of subject matter jurisdiction may not be waived,even by consent of the parties,and should be taken notice of by this Court". Id. It is well-settled that issues related to subject matter jurisdiction may be raised at anytime,including for the first time on appeal in this Court.Carter v. State,329 S.C. 355,495 S.E.2d 773 (1998);State v. Funderburk,259 S.C. 256,191 S.E.2d 520 (1972). Furthermore,the acts of a court with respect to matter as to which it has no jurisdiction are void.Funderburk,259 S.C. at 261,191 S.E.2d at 522.

Gordon asserts this Court has overlooked or misapprended and should sue sponte address the jurisdiction argument properly raised to this Court. The process in which family court jurisdiction attaches over children sixteen years of age found violating a criminal law and taken into custody based on probable cause under the Children Code of laws,title 20,§20-7-7205(a) and eventually (without an order being issued) **"[t]ransferrd"** out of family court "first" attached jurisdiction into the jurisdiction of General Sessions court upon being **"[charged]"** with a Class A,B,C, or D felony as defined in §20-7-6605(1) is inadequate.

Gordon asserts family court properly acquired the "first" jurisdiction over him and the subject matter when he was found violating a criminal law and taken custody based on probable cause under §20-7-7205(a)-20-7-6605(1),(2). Gordon was **[not] "[c]harged"** with one of the statutory offenses in §20-7-6605(1) prior to or when he was taken into custody under §20-7-7205(a). Pursuant to §20-7-400(b)(supp.1998) Title "Exclusive original jurisdiction of family court" statutory,once family court acquired jurisdiction under

§20-7-7205(a) it continues so long as,in the judgment of the court,it may be necessary to retain jurisdiction for the correction or education of Gordon,but jurisdiction shall terminate when he attain twenty-one years of age. Likewise,family court was the sole court for initiating an action against Gordon pursuant to §20-7-400(a),(d),(3). Gordon asserts before General sessions could accept his guilty plea and sentence him as an adult offender,family court had to first as a matter of statutory law issue an order relinquishing its jurisdiction pursuant to §20-7-400(A),(3) and State v. England,271 S.C. 129,245 S.E.2d 608 (1978). In the Supreme Court England argued the disposition of his case should have been handled under §14-21-620,dealing with "children". At the time of England case section 14-21-510(a) (3),provided the Family Court exclusive original jurisdiction of a person over seventeen years of age who is alleged to have violated the law prior to becoming that age. Our Supreme Court held and where,as here,jurisdiction has not been relinquished in favor of another court under applicable statute,that section states...such person shall be dealt with under the provisions of this chapter relating to children". It is clear,therefore,that the charge against appellant should have been dealt with under §14-21-620." Just like England,Gordon too fell within family court jurisdiction when he was found violating a criminal law and taken into custody based on probably cause under §20-7-7205(a). Because Gordon was not charged with one of the class felonies listed in §20-7-6605(1) when he was taken into custody,family court was the sole court for initiating an action.§20-7-400(a),(3). Disposition of Gordon case should have been handled under §20-7-400(a),(3),dealing with children.State v. England,supra. Gordon's guilty plea judgment as a adult offender is therefore void pursuant to §20-7-400(a),(3) and State v. England,supra,and should be vacated as a matter of law.

To further support Gordon's argument that he retain the protection of the children code of laws because he was not **[charged]** with one of the class felonies listed in §20-7-6605(1) when he was found violating a criminal law and taken into custody under §20-7-7205(a),Gordon point this Court attention to the case of PEOPLE v. Pico,678 .N.E.2d 780 (1997). In Pico case he was 16 years old at the time of the offense,contended the trial judge should have suppressed his confession because the police failed to make a reasonable attempt to notify his parents,as required by section 5-6(2) of the Juvenile Court Act of 1987 (the Act). 705 ILCS 405/5-6(2) (West 1994). The trial judge denied Pico's motion to suppress his statement,finding,based on the testimony of Detective Boudreau,that the requirements of section 5-6(2) has been satisfied. Initially,the State contended that section 5-6(2) did not apply to Pico,because he was in custody as a murder suspect and was,therefore,not a "delinquent minor" who benefits from the protection in the Act. The Court of Appeals disagreed finding. Section 5-5 of the Act,to which section 5-6(2) refers,provides that "[a] law enforcement officer may,without a warrant,take into custody a minor*** whom the officer with reasonable cause believes to be a delinquent minor". 705 ILCS 405/5-5(1). Section 5-3(1) of the Act defines "delinquent minor" as "any minor who prior to his 17th birthday has violated

any state law." 705 ILCS 405/5-3(1). The State correctly notes that section 5-4(6)(a) exempts certain minors from the definition of delinquency as set forth in section 5-3;however,we do not believe the language of section 5-4(6)(2) supports the proposition that Pico was exempt at the time Detective Boudrea began and continue to question him. The Court of Appeals continue to find that section 5-4(6)(a) states that "[t]he definition of delinquent minor under Section 5-3 of this Act shall not apply to any minor who at the time of an offense was at least 15 years of age and who is charged with first degree murder. These charges and all other charges arising out of the same incident shall be prosecuted under the Criminal Code of 1961". (Emphasis added) 705 ILCS 405/5-4(6)(a). We believe that the plain language of section 5-4(6)(a) indicates that its **exemption is triggered only when the minor has been charged. Until that point,the minor retains the protection of the Act.** This is the only logical interpretation of section 5-4(6)(a),for until such time as the minor is charged,the State cannot know whether he will be tried pursuant to the Criminal Code as an adult or ass a delinquent minor under the Act. 678 N.E.2d at 783,784..

Gordon asserts his argument is very similar to the Justice holding in Pico but that in his case because he was [not] "charged" with one of the class felonies listed in §20-7-6605(1) when he was taken into custody,family court as a matter of statutory law acquired the first jurisdiction pursuant to §20-7-7205(a)-20-7-6605(1),(2) and that family court was the sole court for initiating the action under section 20-7-400(a),(3) and that because he was later **[charged]** with one of the offenses listed in §20-7-6605(1) that required the mandatory transfer of him and his case to general sessions,family court was required under sections 20-7-400(a),(3) issue an **"[order]"** relinquishing its first attached jurisdiction to general sessions and because there was no order issued by family court relinquishing its first attached jurisdiction to general sessions,general sessions was without the authority to exercise it jurisdiction over the subject matter and Gordon pursuant to sections 20-7-400(a),(3);State v. England,... Gordon's guilty plea judgment is therefore a nullity and void ab initio.State v. England,supra.

This Court Unpublished Opinion overlooks or misapprehend Gordon's question and argument whether the lower court committed error of law and abused it 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 the General Sessions of its jurisdiction to induct 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

The Court's Unpublished Opinion overlooked and misapprehends Gordon's argument because it lacks legal analysis and interpretation of the question which this case presents.

In the present case the lower court found in its order,this case was fully adjudicated,complete with an order granting a Rule 60(b). The Appellant then had a second PCR action,complete with a full evidentiary hearing (2008-cp-46-5951) and an appeal. The lower court proceeded on to find,this handwritten motion requests that the court reconsider "for at a second time" the jurisdictional **"[i]ssues"** have been litigated and **"[o]rders"** issued. Since these issues have been previously heard and "ruled" on,and since these issues are untimely,the Defendant's motions are denied.See ROA Volume one page 469.

Gordon asserts the lower court findings result in a manifest error. In instant case Gordon filed his State Habeas Corpus dated December 5,2005,filed January 3,2006. In the petition Gordon raised "two" issues relating to him being tried as an adult in general sessions court.See ROA Volume one page 425 and 429.See Fn1 However,the issue at ROA volume one page 429 it was alleged by Gordon because there was no Kent v. United States,383 U.S. 542,86 S.Ct 1045 (1966) waiver hearing held in family court,general sessions was without jurisdiction in accepting his plea and that his due process rights were violated. Judge Hayes did not adjudicate the claim on the merits but found that the claim had been raised in Gordon's first PCR to a large extent.See ROA Volume one page 440-444.

It is obvious the constitutionality challenge put forth to §20-7-6605(1) under the equal protection clauses of South Carolina Constitution Article 1.,§ and the 14th amendment to the United States Constitution raised by Gordon in the lower court are separate distinguish claims than the two juvenile jurisdiction claims raised in the initial filings in this case.See Fn2

Fn1 It can be found that the juvenile jurisdiction arguments are similar in nature but there is a difference in the argments. In one Gordon asserted §20-7-6605(1) was unconstitutional under the due process clause of the United States Constitution.See ROA Volume one page 427.

Fn2 Because this constitutional challenge to the children code of laws which effect general sessions jurisdiction if vacated has not been adjudicated on the merits in no final orders issued.See ROA Volume one pages 348-359 (PCR Order in PCR 1414)-Volume one pages 402-403 (PCR Oder in 1700)-volume one pages 440-444 (Habeas Order in 0010)-volume two 36-59 (PCR order 4951). Res judacata does not apply.See Town of Sullivan 's Island v. Felger,457 S.E.2d 626 (Ct.App.1995).

Gordon therefore argue the claim was properly before the court for consideration pursuant to to Brown v. State,343 S.C. 342,540 S.E.2d 846 (S.C. 2001). In Brown case he filed a second PCR application wherein one allegation was lack of subject matter jurisdiction. Initially,the application was summarily dismissed as succssive. On petition for writioarari,Brown argued that there was no subject matter jurisdiction because of erroneous code sections listed in the indictments. Our Supreme court found that the PCR court should not have dismissed the application as successive because subject matter jurisdiction may be raised at any time. The Court found no prejudice,however,and denied certioarari..

Because of some procedural irregularities in the initial handling of Brown application,the PCR court ordered a hearing after the Supreme Court issued its denial of certorari. At the hearing,Brown again raised a subject matter jurisdiction argument regarding the erroneous code sections in the indictments. The PCR Court dismissed the application as successive,and specifically found that this Court had ruled on the subject matter jurisdiction argument Brown raised at the hearing. Brown then filed another petition for writ of certorari and raised a "new" subject matter jurisdiction argument. For the first time,Brown questioned whether the trial court lacked subject matter jurisdiction to accept his guilty pleas to three counts of distribution within proximity of a school where the indictment alleged Brown distributed crack cocaine while within the grounds of Ann's Day Care Center. The Supreme Court granted the petition on that question.

The State submitted a procedural argument stating res judicata barred Brown claim. The Supreme Court held "while it is true that both this Court and the PCR Court have addressed subject matter jurisdiction arguments related to the code sections in the indictments,neither this Court nor the PCR court has addressed the precise challenge now at issue. Since subject matter jurisdiction is an issue which is fundamental and may be raised at any time,we decline to find that our review of this issue is precluded on procedural grounds.See Fn3

Like Brown,Gordon too has raised several subject matter jurisdiction arguments under the children code of laws,but never presented this precise challenge now at issue and recieved an adjudication of the claim on the merits,therefore,the lower court order on this issue is controlled by error of fact and law because Gordon's subject matter jurisdiction argument can be raised at any time.Brown v. State,supra. The lower court factual conclusion that the issue was previously raised,heard and ruled on is without evidentiary support. The Order should be reversed and a hearing ordered on his claim.

Fn3 Gordon could challenge the constitutionality of the statute under which he's held in custody on habeas corpus pursuant to Ex PArte Hollman,60 S.E. 60

Conclusion

WhEREFORE,It is respectfully asked that this Court grant Rehearing in the interest of justice to cure a gross miscarriage of justice. Gordon is properly before the Court on his subject matter jurisdiction argument pursuant to Brown v. State,540 S.E.2d at 849 (S.C.2001). therefore,in the interest of justice this Court should grant rehearing and vacate Gordon's conviction and sentences as an adult offender and issue an order granting him his "immediate and speedier release from unlawful confinement.

Antonio Gordon

October 25, 2017

In The State of South Carolina

In The Court of Appeals

Appeal From York County

John C. Hayes,III,Circuit Court Judge

Daniel Dewitt Hall,Circuit Court Judge

Appellate Case No:2015-001004

Antonio Gordon, Appellant,

v.

State of South Carolina, Respondent.

Certificate of service

I,Antonio Gordon,(pro se) hereby certify I did serve Appellant's Petition for Rehearing Rule 221(a) on:

South Carolina Attorney Office

Justin J. Hunter,Esquire

P.O. Box 11549

Columbia,SC 29211

by depositing a copy in the mail with sufficeint funds this 25th day of October,2017.

Antonio Gordon

October 25, 2017

Antonio Gordon,#259798
Kershaw C.I. Oak B#33
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October 25,2017

RE: Antonio Gordon v. State
Appellate Case No.:2015-001004

Dear Ms. Jenny Abbott Kitchings,Clerk:

Please find enclosed Appellant's Petition for Rehearing pursuant to Rule 221(a),SCACR I am filing. Could you please stamp copy and send me a copy back. Thanks in advance.

Respectfully Submitted

Antonio Gordon
October 25,2017

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