

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO THE COURT OF APPEALS
Appeal from York County

The Honorable Daniel D. Hall, Circuit Court Judge

2017-UP-385 (S.C. Ct. App. filed October 18, 2017)
Appellate Case No.: 2018-000021

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S.C. SUPREME COURT

ANTONIO GORDON,

Petitioner,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION TO WRIT FOR CERTIORARI

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PETITIONER'S STATEMENT OF ISSUES ON APPEAL

1. Whether the Court of Appeals erred when the court found that any material fact or principle of law has been either overlooked or disregarded where the Court of Appeals' Unpublished Opinion failed to address Petitioner's "subject matter jurisdiction question and argument" properly raised to the Court of Appeals for the first time on appeal in Petitioner's Initial, Reply and Final Briefs and Petition for rehearing?
2. Whether the Circuit Court was without jurisdiction over the subject matter and Petitioner because the 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. § 20-7-7 205(a)(Supp. 1998).

STATEMENT OF THE CASE

Underlying Convictions

Petitioner 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). (ROA Vol. I, pp. 225-247). Daniel D'Agostino, Esquire, represented Petitioner.

A hearing on Petitioner's motion to suppress was held on July 12, 14, and 16, 1999. On July 16, 1999, following a suppression hearing, Petitioner pled guilty as indicted. (ROA Vol. I, p. 174). On July 19, 1999 the Honorable John C. Hayes, III sentenced Petitioner 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. (ROA Vol. I, p. 204, ll. 9-24). This was a negotiated guilty plea to a cumulative forty years confinement.

Direct Appeal

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

First PCR (2000-CP-46-1414)

Petitioner filed a PCR application originally dated June 20, 2001 and amended on May 8, 2003 (2000-CP-46-1414). (ROA Vol. I, pp. 248-252). An evidentiary hearing was held on July 29, 2003. Tara D. Shurling, Esquire, represented Petitioner, who was present at the hearing. Jeanette C. Vanginhoven, of the South Carolina Attorney General's Office, represented the Respondent. Petitioner alleged his guilty plea was involuntary and 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. (ROA Vol. I, pp. 348-359). Petitioner subsequently made a "Motion for Rehearing/Motion for Reconsideration of the Facts" on December 9, 2003. The Honorable J. Ernest Kinard dismissed Petitioner's motion by written Order filed December 15, 2003. (ROA Vol. I, p. 362).

Petitioner 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. (ROA Vol. I, p. 364).

Second PCR (2004-CP-46-1700)

On July 6, 2004, while his appeal from the denial of his first PCR action was still pending, Petitioner filed a second PCR application (2004-CP-46-1700). (ROA Vol. I, pp. 372-387). Petitioner 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 Petitioner 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 Petitioner twenty days to show why the order should not become final. (ROA Vol. I, pp. 396-401). Petitioner did not respond to the Conditional Order of Dismissal. Thereafter, by Order dated May 20, 2005, the PCR court denied and dismissed Petitioner's second PCR action. (ROA Vol. I, pp. 402-405).

Federal Habeas Corpus (2:05-3327-MBS-RSC)

Petitioner 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. (ROA Vol. I, pp. 406-433). 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, Petitioner filed an "Objection to Report and Recommendation of Magistrate Judge." Petitioner 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 Petitioner's petition without prejudice to permit him to exhaust all State remedies.

State Petition for Writ of Habeas Corpus (2006-CP-46-0010)

Subsequently, Petitioner filed a state Petition for Writ of Habeas Corpus on January 3, 2006 (2006-CP-46-0010). (ROA Vol. I, pp. 406-433). 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. Petitioner alleged law enforcement did not have probable cause to arrest him. The Honorable John C. Hayes, III, denied and dismissed

Petitioner's petition with prejudice by written order dated April 30, 2007 and filed on June 1, 2007. (ROA Vol. I, pp. 440-444).

Rule 60(b) Motion from (2006-CP-46-0010)

Petitioner 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 Petitioner's guilty plea. (ROA Vol. I, pp. 444-449). Petitioner claimed that the order dismissing his state habeas corpus action did not advise him of right to appeal the order. Petitioner also claimed that the manner in which Judge Hayes' Order reads might prejudice him from filing a state habeas corpus petition in the original jurisdiction of the Supreme Court. On January 31, 2008 the Honorable Roger L. Couch granted Petitioner's Rule 60(b) motion to reconsider, amend, and clarify, and issued a written order finding that Petitioner was without prejudice to bring a Petition for Writ of Habeas Corpus in the original jurisdiction of the South Carolina Supreme Court. (ROA Vol. I, p. 450).

Third PCR Application (2008-CP-46-4951)

On January 9, 2009, Petitioner filed his third PCR application alleging newly discovered evidence, ineffective assistance of trial counsel, prosecutorial misconduct, *Brady* violation, involuntary guilty plea, no probable cause to arrest, and personal jurisdiction. (2008-CP-46-4951). (ROA Vol. I, p. 470- Vol. II, p. 16). 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. (ROA Vol. II, pp. 26-34). 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 Petitioner 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 Petitioner twenty days to show why the order should not become final. Petitioner did not file a response to the Conditional Order of Dismissal.

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). (ROA Vol. II, pp. 17-26).

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 Petitioner'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 Petitioner be prohibited from filing any future application for post-conviction relief that raises the same issues as raised in that application or other applications. (ROA Vol. II, pp. 36-60).

Second Rule 60(b) Motion from (2006-CP-46-0010)

Petitioner filed a Motion for Relief from Judgment Pursuant to SCRCF 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. (ROA Vol. I, pp. 452-458).

On March 4, 2015, Judge Hayes issued an Order dismissing Petitioner's 60(b) Motion without prejudice because Judge Couch's January 31, 2008 Order granted Petitioner the right to file a Habeas Corpus action and presented no grounds by which Petitioner could have appealed. (ROA Vol. I, pp. 461-463).

Petitioner then filed a Motion to Reconsider, Alter, and Amend Judgment Pursuant to Rule 59(e) on March 25, 2015. (ROA Vol. I, pp. 464-466). By an Order dated April 14, 2015, the Honorable Daniel Hall denied Petitioner's motion. Judge Hall found that all issues raised had been litigated and ruled upon and that Petitioner's motion was untimely because it was not filed within ten days after receipt of the written notice. (ROA Vol. I, p. 469).

Current Appeal

In his current appeal, Petitioner is appealing Judge Hayes' order dated March 4, 2015 denying Petitioner's 60(b) Motion. The Court of Appeals affirmed the orders by an unpublished opinion filed October 18, 2017. *Antonio Gordon v. State*, 2017-UP-385 (Ct. App. filed October 18, 2017). Petitioner filed a Petition for Writ of Certiorari to the South Carolina Supreme Court. This Return follows.

ARGUMENT

1. The Court of Appeals did not err in affirming the lower court order.

Petitioner claims the Court of Appeals erred in failing to address Petitioner's subject matter jurisdiction claim. Respondent would contend the Court of Appeals' opinion properly rules on the Rule 60(b) motion from which Petitioner appealed. Petitioner continues to raise various claims in various actions and motions in courts across South Carolina, including his claim that the plea court did not have subject matter jurisdiction to take his plea. The Court of Appeals must affirm or reverse the order from which Petitioner appeals, and not address the merits of various other claims. It is clear the Court of Appeals' opinion properly addressed the order denying Petitioner's Rule 60(b) motion by addressing the court's rulings in that order. Petitioner has not shown that he should be entitled to relief for any of the reasons outlined in Rule 60(b) and the Court of Appeals agreed. The lower court denied Petitioner's motion, finding that the jurisdiction argument had been previously raised and ruled upon. The Court of Appeals properly affirmed.

2. The Circuit Court properly had jurisdiction over the subject matter and Petitioner's plea.

It is clear that the Court of General Sessions had jurisdiction over Petitioner to hear his guilty plea. 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.**" (emphasis added). Petitioner 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

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

jurisdiction. The decision to remand the case to Family Court was within the Solicitor's discretion. Petitioner 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 Petitioner.

CONCLUSION

Respondent submits the Court of Appeals opinion should be affirmed.

Respectfully submitted,

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By: 
ATTORNEYS FOR RESPONDENT

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ANTONIO GORDON,

Petitioner,

vs.

STATE OF SOUTH CAROLINA,


Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of Return to Petition for Writ of Certiorari has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

Antonio Gordon, #259798
Kershaw Correctional Institution
4848 Goldmine Highway
Kershaw, SC 29067

This 8th day of March, 2018


MALLORY MORRIS
Legal Assistant for Respondent



RECEIVED

MAR 08 2018

S.C. SUPREME COURT

ALAN WILSON
ATTORNEY GENERAL

March 8, 2018

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

RE: Antonio Gordon v. State of South Carolina
Appellate Case No. 2018-000021
Lower Court Case No: 2006-CP-46-0010

Dear Mr. Shearouse:

Enclosed for filing are the original and six (6) copies of the **Return to Petition for Writ Certiorari** in the above-referenced case. By copy of this letter we are serving opposing counsel today. If there are any questions or comments, please do not hesitate to contact me at any time.

Sincerely,

Justin J. Hunter
Assistant Attorney General
S.C. Bar No. 101254

JJH/mm
Enclosures

cc: Antonio Gordon, #259798