

The State of South Carolina
In The Supreme Court
Appeal from York County
Court of Common Pleas
John C. Hayes, III, Circuit Court Judge
Daniel Dewitt Hall, Circuit Court Judge

Appellate Case No: 2018-000021

Antonio Gordon,

Petitioner,

v.

State of South Carolina,

Respondent.

Petitioner's Reply Brief

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MAR 21 2018

S.C. SUPREME COURT

Question Presented

Whether the Court of Appeals erred when the Court found any material fact or principle of law has been either overlooked or disregarded where the Court Unpublished Opinion failed to address Petitioner's "Subject matter jurisdiction question and argument" properly raised to the Court for the first time on appeal in his initial, reply, and final briefs and Petition for rehearing?

Whether the Circuit Court was without jurisdiction over the subject matter Petitioner 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)?

Statement of the case

July 23,1998,Rock Hill City Police in York County made a warrantless arrest of the Petitioner Antonio Gordon based upon probable cause. ROA Vol.I,page 80 line 16-page 83 line 16,page 88 line 24- page 89 line 10 (detective John Thickens testimony)-with ROA Vol.I, page 208 line 19-24 (Captain Charles Cabiness testimony). The Petitioner was apprehended and taken into custody approx 9:30a.m-10:30a.m. ROA Vol.I, page 208 line 19- page 209 line 12.See Fn1

Approx 6 to 8 hours after the Petitioner were taken into custody he appeared before a magistrate judge and sign an arrest warrant for murder and had a bond hearing.See ROA Vol.I, page 89 line 13-page 90 line 12-Vol.I, page 101 line 1-24 (John Thicken testimony).

On July 27,1998,Gordon were issued arrest warrants for possession of a weapon during the commission of a violent crime,two counts of attempted armed robbery,criminal conspiracy. ROA Vol.I, pages 222-224.

October 15,1998,the York County Grand Jury indicted the Petitioner for murder,two counts of attempted armed robbery,three counts of possession of a weapon during the commission of a violent crime and criminal conspiracy. ROA Vol.I, pages 225-247.See Fn2

On July 16,1999,after a Jackson v. Denno hearing the Petitioner plead guilty in general sessions court to murder,three counts of possession of a weapon during the commission of a violent crime,two counts of attempted

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

Fn2 The indictments was not filed with the Clerk of Court office once the grand jury returned the true bill but were filed after the case ended. Appendix volume one(A) page 128(A).

armed robbery and criminal conspiracy. On July 19,1999,the Honorable John C. Hayes,III,sentenced the Petitioner to a forty year defacto life sentence. ROA Vol.I.,pages 204 line 8-25.

Petitioner filed his first Post-Conviction Relief application June 29,2000. Gordon v. State,2000-cp-46-1414. ROA Vol. I, pages 248-252. Petitioner filed a second Post-Conviction Relief application during the pendency of PCR (1414).Gordon v. State,01-cp-46-1866. See Fn3 In the application Petitioner properly raised to the PCR Court a "subject matter jurisdiction claim" (family court never relinquished jurisdiction). ROA Vol I, pages 256-257. Petitioner properly amended his application and raised a second subject matter jurisdiction claim and constitutional challenge to S.C. Code Ann. §20-7-6605(1)(Supp.1998) Title "Definition" statute. ROA Vol I, pages 268-274

Tara D. Shurling,esquire was court appointed to represent Petitioner. At an evidentiary hearing convened on July 29,2003,counsel inadequately raised Petitioner's jurisdictional questions and constitutional challenge to §20-7-6605(1) as a ineffective assistance of trial counsel claim (failure to make a concerted effort to convince the solicitor's office to remand the case to family court). ROA Vol I, pages 285 line 15- pg 289 line 11. The PCR Court addressed the ineffective assistance of counsel claim in its order of dismissal and not the subject matter jurisdiction claim. ROA Vol I, page 354.

Petitioner's counsel was not properly served with the order of dismissal. ROA Vol I, page 345. Petitioner asked counsel to file a Rule 59(e) motion.ROA Vol I, page 366 second paragraph lines 8-11. At some point Petitioner filed a timely Rule 59(e) motion pro se. The PCR court denied and dismissed finding

Fn3 These two applications were merged together.

all grounds raised had been ruled on. ROA Vol I, page 362. This Court eventually nullified Petitioner's motion and vacated the PCR Court order as being improperly filed un Foster. ROA Vol I, page 365.

Subsequently why Petitioner's Appeal were pending in PCR (1414) he filed a second Post-Conviction Relief application and asserted as a ground for relief the trial court was without subject matter jurisdiction (no waiver hearing). The PCR court denied as being successive and time barred. ROA Vol I, pages 372-405.

Petitioner then filed a State habeas corpus in York County. Gordon v. State, 2006-cp-46-0010. In the petition he asserted General Sessions was without jurisdiction because family court never relinquished its jurisdiction and that his due process rights were violated because there were no waiver hearing. ROA Vol I, page 4340. The Respondent filed a return and motion to dismiss the petition for writ of habeas corpus. ROA Vol I, page 435-439. The Honorable John C. Hayes, III, issued an order of dismissal with prejudice finding Petitioner to a large extent raised his claims in his previously post convictions. ROA Vol I, pages 443-444. Approx 90 days later Petitioner filed a Rule 60(b) motion alleging judge Hayes were a conflict of interest and that he failed to inform Gordon he could have appealed his decision. ROA vol I, pages 444(b)-449. A hearing was convened in January of 2008 and the Honorable Couch granted the motion providing relief that Petitioner did not request for in his motion. ROA Vol I, page 450.

February 2, 2015, Petitioner filed a 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) motion and attached two jurisdiction issues. ROA Vol I, pages 451-458. The Honorable John C. Hayes, III, in a order dismissed the motion without prejudice finding he was not a conflict of interest, Petitioner had already raised the juvenile

jurisdiction issues and Petitioner was not entitled to an Austin review because he was granted relief asked for in his motion. ROA Vol I, pages 461-463. Petitioner filed a Rule 59(e) motion asking the court to reconsider, alter and amend the judgment to find he was a conflict of interest, Petitioner's jurisdiction claim (E) was not previously raised and ruled on and that he was entitled to Austin review. ROA Vol I, pages 464-468. The Honorable D. Hall issued an order making specific findings of fact and conclusion of law finding Petitioner had already raised the jurisdiction issues and that the jurisdiction issues were untimely. ROA Vol I, page 469.

Petitioner appealed to this Court and this Court transferred to the Court of Appeals. In Petitioner's initial brief he properly raised a "[n]ew" subject matter jurisdiction claim and argument to the court. ROA Vol one(a) page 5A first claim, argument at page 11A second paragraph-page 16A. However, the Court of appeals issued an Unpublished Opinion on October 18, 2017, which did not address Petitioner's jurisdiction question and argument. Appendix Vol one(A) page 111(a)-112(A). Petitioner filed for a Petition for Rehearing and raised the following questions:

(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 the 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 §20-7-7205(a)(supp.1998) Title "Taking child into custody"

(2) Whether the circuit court was without jurisdiction over the subject matter and Gordon 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 § 20-7-7205 (A) ?

ROA Vol one(A) page 116(a). The Court of Appeals denied Petitioner's Petition for rehearing finding the court was unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. ROA Vol one(A) page 127(a).

Argument

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 Unpublished Opinion failed to address Petitioner's "subject matter jurisdiction" question and argument" properly raised to the Court for the "[f]irst" time on appeal in his initial, reply, and final briefs and Petition for rehearing

Petitioner hereby provide a reply to the Respondent's procedural argument. The Respondent in their return contended that the Court of Appeals opinion properly rules on the rule 60(b) order from which the Petitioner appealed. Petitioner contends the Respondent is mistating his facts and argument to this Court on writ for certiorari. Gordon is not alleging the Court of Appeals erred in failing to properly address the Rule 60(b) order for which he appealed but to the contrary that of the Court of Appeals erred when the Court did not address his "[s]ubject matter jurisdiction question and argument" **which is fundamental and maybe raised "any time" including for the "[f]irst" time on appeal in the Court of Appeals.** Thus, this Court has ruled that issues of subject matter jurisdiction can be raised at "[a]ny time" and for the "first time on appeal". See Brown v. State, 343 S.C.342, 540 S.E.2d 848, 849 (S.C.2001). See Fnl Gordon's subject matter jurisdiction question and argument may not be waived, even by consent of the parties and should have been taken

Fnl Gordon direct this Court attention to the case of Moses Anderson v. State of South Carolina, Opinion No:3112, Submitted December 7, 1999, filed February 7, 2000, in the Court of Appeals where Anderson filed an appeal from the denial of a writ of mandamus. The Court of appeals found the lower court properly dismissed Anderson's petition because Anderson possess no specific legal right to the requested information and the clerk of court has no duty to provide it. However, while on appeal Anderson raised a "subject matter jurisdiction question and argument". The State argued the issue was not preserve because Anderson did not raise the issue in the circuit court in his mandamus petition. The Court of Appeals found "subject matter jurisdiction may be raised at any time and failure to raise it in the lower court did not preclude the court's consideration of the claim and remanded the claim to the lower court for a subject matter jurisdiction hearing. On a procedural aspect Gordon's case is similar to Anderson the only difference is the type of petition Anderson traveled in.

notice of by the Court of Appeals pursuant to Brown v. State, Supra. See Fn2 Therefore, pursuant to Brown and Anderson the Court of Appeals erred when it did not address Gordon's subject matter jurisdiction question and argument that has never been raised and ruled upon in no Court. Brown v. State, supra; Anderson v. State, supra, and this Court should therefore reverse and remand to the lower Court for a subject matter jurisdiction hearing and or whatever this Court deem necessary.

The Respondent further contended that the Court of Appeals did not err when it fail to address Petitioner's subject matter jurisdiction question and argument because the lower court correctly found that Gordon had previously raised and the Court's ruled upon his jurisdiction claim. Petitioner asserts this is a factual error asserted by the Respondent and the lower court. Petitioner asserts the lower court nor the Respondent has directed this Court or the Court of Appeals attention to any material evidence in the record on appeal to support their claim that Gordon's jurisdiction claim that's currently before this Court and raised for the first time on appeal in the Court of appeals has been adjudicated on the merits, therefore, Gordon ask that this Court take judicial notice that in Gordon's first PCR (2001-cp-46-1414) he did raise a **subject matter jurisdiction claim** ("failure of family court to relinquished it jurisdiction"). See ROA Vol. I Page 257 However, the PCR Court did not make specific findings of fact and conclusion of law on the claim pursuant to section 17-27-80. See ROA Vol. I pages 348-360.

In Gordon's second PCR (2004-cp-46-1700) he raised yet a different subject matter jurisdiction claim ("failure to have waiver hearing in family court"). ROA Vol I. pages 373-384. The PCR Court did not make specific findings of fact or conclusion of law on the claim in its order of dismissal with prejudice but found the application were time barred and successive under the Uniform Post-Conviction Relief Act. ROA Vol. I pages 396-403

Fn2 Res Judicata does not bar Gordon's jurisdiction argument. See Brown v. State, supra, Fn1.

(1)

Gordon filed a third petition (2006-cp-46-0100) which was a habeas corpus and he raised a personal jurisdiction claim ("failure of family court to relinquish its jurisdiction"). ROA Vol.I page 429 The PCR Court specifically found that Gordon had raised his claim to a large extent in his previous two applications and dismissed with prejudice. ROA Vol.I pages 440-444

Petitioner asserts its clear from the record on appeal before this Court that no PCR court or appellate court in this State has ever issued an order or opinion addressing his jurisdiction question and argument on the merits "whether the circuit court was without jurisdiction over the subject matter and Gordon 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)". Apparently its the Respondent position Gordon's jurisdiction claim that's currently before this Court and raised for the first time in the Court of Appeals is the same identical claim raised in his first, second and third application. This Court in Brown v. State, supra, dealt specifically with this exact procedural defect where Brown had raised several subject matter jurisdiction claims relating to a code section in his indictments. This Court specifically found that the jurisdiction claim Brown raised for the first time on writ for certiorari was not adjudicated by no PCR Court or the Appellate Court's and was thus proper for this Court to entertain. Here in the instant case, Gordon has raised several different subject matter jurisdiction arguments under different code section under the children code of laws but has never raised this particular jurisdiction claim before no court. According to Brown Gordon was proper before the Court of Appeals on his subject matter jurisdiction question and argument. Therefore, the Unpublish Opinion should be reversed where it failed to address an issue which is fundamental and may be raised at "any time" including for the first time on appeal. Brown v. State, supra.

Assuming arguendo this Court find in favor of Respondent that Gordon's jurisdiction question and argument are the same as in his first, second and third petition. Gordon asserts due process of law under South Carolina Constitution Article 1., §3 and the 14th Amendment to the United States Constitution mandates that he have an opportunity to be heard in a meaningful way and manner on his jurisdiction claim in his original application PCR (1414) where Respondent alleges Gordon first raised the claim in a motion to restrict future filing of Gordon. ROA Vol.II page 21. PCR counsel Tara Shurling, esquire inadequately raised the claim thereby deprived Gordon of his statutory right under section 17-27-90 to have all his claims adjudicated in one timely PCR application. ROA Vol.I pages 285 line 15-page 290 line 6. It's clear the claim is not in the PCR Order of (1414). ROA Vol.I pages 348-360 Gordon asserts when PCR counsel inadquately raised his jurisdiction claim to the court it deprived him of his procedural right to one full fair bite at the apple pursuant to Odom v. State, 523 S.E.2d 753 (1999) which should entitle Gordon to an evidentiary hearing on his jurisdiction claim in the interest of justice. Therefore, in the interest of justice this Court should grant certiorari to cure a miscarriage of justice and a gross miscarriage of justice.

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. § 20-7-7205(a)(Supp.1998)

The Petitioner hereby provide a reply to the Respondent's claim that General Sessions properly had jurisdiction over him and to hear his guilty plea pursuant to S.C. Code Ann. § 20-7-6605(1), 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 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 "[i]ndicted" 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 were 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.

It is argued by Petitioner that when he was found violating a criminal law and taken into custody based upon probable cause 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 provides for a maximum term of imprisonment of fifteen years or more under section 20-7-6605(1) definition statute and that because he was not "[c]harged" with one of the class felonies listed in section 20-7-6605(1) prior to or when he was taken into custody, "family court as a matter of statutory law acquired the first jurisdiction over Gordon 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)". Section 20-7-7205(a) provides in relevant part:

When a child found violating a criminal law and taken into custody, the taking into custody is not an arrest. The jurisdiction of the court attaches from the time of the taking into custody. See Fn3

Petitioner asserts penal statutes must be construed strictly against the State and in favor of him. William v. State, 410 S.E.2d 564 (S.C.1991). Petitioner further asserts in construing statutory language, the statutes must be read as a whole and sections which are apart of the same general law must be construed together and each one given effect. A statute should not be construed by concentrating on an isolated phrase. S.C. State Ports Auth v. Jasper, 629 S.E.2d 624, 629 (S.C.2006). The court's primary function in interpreting a statute is to ascertain the intent of the legislature. State v. Blackmon, 403 S.E.2d 660, 662 (S.C.1991). When terms of a statute are clear and unambiguous, the Court must apply them according to their literal meaning. Furthermore, in construing a statute, words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation. S.C. State Ports Auth v. Jasper, supra.

Petitioner contends construing § 20-7-7205(a) and 20-7-6605(1), (2) of the Children Code of laws as a whole and together, it is clear the legislature intent is ascertain that family court jurisdiction attached over Petitioner and the subject matter soon as he was found violating a criminal law and taken into custody pursuant to § 20-7-7205(a), supra, and once family court jurisdiction attached it became exclusive original jurisdiction and shall be the sole court for initiating an action pursuant to § 20-7-400(a), (3). See Fn4

Fn3 Pursuant to § 20-7-6605(2) definition statute the "[C]ourt" means the "Family Court".

Fn4 Petitioner asserts that once the Grand Jury returned the true bill indictments and they were filed in the Clerk's office the "[S]olicitor were perhibited from remanding the case to family court because the South Carolina Constitution requires that the legislative, executive, and judicial departments of the government shall be forever separate and distinct from each others. S.C. Const. art. I, 8.

Thus, it is therefore argued by Gordon that because he was not "[c]harged" with one of the class felonies under § 6605(1) prior to or when he was taken into custody, family court acquired the "[f]irst" jurisdiction over him and the subject matter and that because he met the requirement of mandatory waiver/transfer to general sessions court, an order should have "first" been issued by family court relinquishing its "first attached jurisdiction before the grand jury could have exercise it authority in returning a true bill indictment because at the time the jury issued its true bill indictments, family court jurisdiction were still attached, therefore, it is argue because family court still posses jurisdiction and had not issued an order transferring jurisdiction his indictments is absolutely a nullity and void ab initio because the circuit court lack jurisdiction. McClure v. State, 289 S.E.2d 138 (S.C.1982) (No indictments may be true billed by grand jury when circuit court lacks jurisdiction). Petitioner also asserts his guilty plea judgment entered July 1999, in General Sessions court is absolutely a nullity and void ab initio because the court did not have the authority to exercise its ^{Jurisdiction} ~~authority~~ over the subject matter and him pursuant to § 20-7-400(a), (3); State v. England, 245 S.E.2d 608 (S.C.1978). Here Gordon is also entitled to his speedier and immediate release because family court jurisdiction has terminated over him pursuant to S.C Code Ann. § 20-7-400(b); Sanders v. State, 314 S.E.2d 319 (S.C.1984).

Conclusion

It is respectfully asked that this Honorable Court grant Gordon writ for certorari in the interest of justice and cure a miscarriage of justice and a gross miscarriage of justice.

Respectfully Submitted

Antonio Gordon

3-16-2018

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Certificate of Service

I, Antonio Gordon, the Petitioner hereby certifies that I did serve
Petitioner's Reply Brief on:

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by depositing a copy in the mail with sufficient funds on this 16th
day of March, 2018.

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