Commonwealth of Kentucky
Supreme Court

No. 2009-~~CA~~-768
SC

WILLIAM D. GOLDSMITH — **APPELLANT**

Appeal from Hickman Circuit Court
Indictment No. 07-CR-00001
Hon. Timothy Langford, Judge

v.

COMMONWEALTH OF KENTUCKY — **APPELLEE**

Brief for Commonwealth

Submitted by,

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CERTIFICATE OF SERVICE

I certify that the record on appeal has been returned to the Clerk of this Court and that a copy of the Brief for Commonwealth has been mailed this 30th day of March, 2011, to Hon. Timothy Langford, Judge, Hickman Circuit Court, Courthouse, 114 East Wellington Street, P.O. Box 167, Hickman, Kentucky, 42050; Hon. Mike Stacy, Commonwealth's Attorney, P.O. Box 788, Wickliffe, Kentucky 42087; and Hon. Julia K. Pearson, Assistant Public Advocate, Department of Public Advocacy, 100 Fair Oaks Lane - Suite 302, Frankfort, Kentucky 40601, Counsel for Appellant.

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INTRODUCTION

This case is before the Court on a grant of discretionary review. The Appellant, William D. Goldsmith, violated his probation on three (3) forgery charges and was revoked - being sentenced to serve fifteen (15) years (consecutive to time being served for crimes committed in a different case in Carlisle County). On appellate review, the Kentucky Court of Appeals affirmed the trial court's order.

ORAL ARGUMENT STATEMENT

The Commonwealth does not believe oral argument is necessary in this appeal because the issues are sufficiently addressed in the parties' briefs.

STATEMENT CONCERNING THE RECORD ON APPEAL

The Record in this case contains one (1) transcript of record (referred to as TR), one (1) video tape (referred to as VR No. 1, 11/12/06, 10:50:00]), and one (1) supplemental video tape (referred to as Supp. VR No. 1, 2/15/07, 10:00:00).

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATEMENT OF THE CASE

Pursuant to CR 76.12(4)(d)(iii), the Commonwealth does not accept the Appellant's statement of the case.

The facts and procedural history of this case were summarized by the Kentucky Court of Appeals in Goldsmith v. Commonwealth, 2007-CA-001685, 2009 WL 3399662 (Ky.App. October 23, 2009), as follows:

> Goldsmith appeals the revocation of his probation. After review, which we will discuss at length below, we affirm the order of the Hickman Circuit Court revoking Goldsmith's probation.
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> FACTS
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> At the time of these events, Goldsmith was dating Cari Moore (hereinafter Moore). According to the Uniform Citation, Goldsmith was initially charged with possessing a single forged check, while his girlfriend possessed the other two. The checks had been written from Moore's grandmother's checking account which had been closed due to the death of the grandmother. Goldsmith was charged by information, on January 17, 2007, with three counts of violating Kentucky Revised Statute (KRS) 516.060, criminal possession of a forged instrument in the second degree. The total amount of value of the checks was $150.00.
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> Counsel for Goldsmith entered his appearance on January 30, 2007. On February 15, sixteen (16) days later, Goldsmith was arraigned and entered a guilty plea to all three counts in the information. It appears that he and Moore were also facing charges in neighboring Carlisle County and that a "package deal" had been worked out resolving both cases. The plea offer in the instant case was a sentence of imprisonment for one year on each count, to be served consecutively for a total of three years in exchange for his plea of guilty.
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> The sentencing hearing was held on March 1, 2007, wherein Goldsmith moved the court to grant him probation. The Commonwealth opposed the immediate probation request. The court then stated that it would not agree to probate Goldsmith on a three year sentence, but would consider immediate probation to a drug

treatment program if Goldsmith were to agree to the maximum term of imprisonment (five years) on each of the charges, for a total of fifteen years. The Commonwealth opined that this arrangement would be "setting [Goldsmith] up for failure" with a fifteen year sentence and stated that the Commonwealth would prefer "shock" probation to a drug program on the original plea bargain of three years. Despite the Commonwealth's vocalized trepidation, and with woefully inadequate time for consultation with counsel,*FN2* Goldsmith persisted in his pursuit of immediate probation.*FN3* Goldsmith had likewise been sentenced to fifteen years in the case in Carlisle County in which, Judge Langford was also the presiding judge. The court granted probation and Goldsmith entered treatment at Lifeline Ministries, a religious based treatment program.

> *FN2. The record reflects that less than three minutes passed between the time the plea agreement was discussed with the court and the time of acceptance by Goldsmith. The majority of Goldsmith's counsel's advice is audible on the record. At no time during this brief discussion between attorney and client is there any mention of the potential dire consequences of this course of action.*
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> *FN3. Three days prior to his sentencing hearing, Goldsmith turned nineteen years of age.*

On June 7, 2007, the court held a hearing on allegations that Goldsmith had violated the terms of his probation via his dismissal from Lifeline. The alleged violation was due to using a cellular phone to text message his co-defendant, Moore, more than 100 times while in treatment. The record reflects Goldsmith was given a number of warnings that this violation of the rules at Lifeline could result in his dismissal from the program and that he had refused to comply with the discipline imposed regarding the cell phone.*FN4* Goldsmith stipulated to violating the terms of his probation, and was briefly questioned by his counsel as follows: *FN5*

> *FN4. This dismissal from Lifeline also resulted in a probation revocation hearing in Carlisle County.*
>
> *FN5. Goldsmith was represented by different counsel at the revocation hearing than he had previously been represented by during the underlying case.*

Defense counsel: Can you state your name for the record please?

Goldsmith: William Dustin Goldsmith.

Defense: And how old are you, Mr. Goldsmith?

Goldsmith: 19.

Defense: Um is it true that you had your probation revoked in Carlisle County?

Goldsmith: Yes sir.

Defense: Ok and what was the result of that?

Goldsmith: Uh, they revoked me in Carlisle.

Defense: Right and now you have a 15 year sentence?

Goldsmith: Yeah.

Defense: Correct?

Goldsmith: Yeah.

Defense: You were being revoked for having a cellular phone at Lifeline, is that correct?

Goldsmith: Yes sir.

Defense: And you were receiving treatment at Lifeline Ministries?

Goldsmith: Yes sir.

Defense: Um and now essentially, as you understand, the court can sentence you or revoke your probation the full 15 years in this jurisdiction?

Goldsmith: Yes.

Defense: Is that correct?

Goldsmith: Yes sir.

Defense: Ok. No further questions.

The court asked Goldsmith questions regarding the allegations, as follows:

Judge: So you were well aware that you had to complete their program, you couldn't just violate the rules, weren't you?

Goldsmith: I didn't know that rehab was church based rehab. Y'all just rushed me into that. I wasn't ready for that.

Judge: You mean you didn't want to go to that rehab?

Goldsmith: Nobody told me nothing about it. I figured I was going there to get help. All it is, is like church. That's all it is.

Judge: It didn't help you any?

Goldsmith: No sir.

When asked about the cell phone text messages, Goldsmith advised the court that he had been found "not guilty" on the charge of harassment in another county regarding the messages.*FN6*

FN6. The record reflects that the harassment charge was dismissed.

In his argument to the court, Goldsmith's attorney requested that the original sentence be altered to run concurrently, for a total of five years, citing Goldsmith's age, the non-violent nature of the offense, the amounts of the checks, and the fact that fifteen years was an unduly harsh punishment given the circumstances. The Commonwealth countered with the fact that Goldsmith had been given a "wonderful opportunity" which he squandered.

The trial court then noted the stipulation of violation and the following occurred after the court announced that it would run the sentences in Carlisle County and Hickman County consecutively:

Judge: Really thought I would, Mr. Goldsmith, but an answer of "no excuse" would have been a whole lot better than you

telling me that its church based. I can't imagine that anything up there was designed to hurt you or inflict anything on you other than help. Those words make me want to run this consecutive.

Goldsmith: F* * *in' do it.

Judge: What say son?

Goldsmith: I said do it.

Judge: Ok. (voice from off camera: Mr. Goldsmith try to remain silent.)

Defense counsel: Sir I would just-again I understand the court's made its decision but again, 30 years for this is unduly harsh.

Judge: I think you're right.

Defense counsel: Regardless of this ...

Judge: I think you're right but your defendant's attitude is not the best in the world and once he wants to come back, I'll be glad to look at it another day but today its going to be consecutive for a total of 30 years in the penitentiary consecutive with Carlisle County 07-CR-001. Give you a little time to think about that Mr. Mills. You may decide you want to ask for help again, I'll be glad to hear from you, the door's not shut to that. But you best work on a little attitude adjustment between now and then.

Defense counsel: Yes sir.

Goldsmith: Maybe you all should work on your little doings.

Prosecutor: Mr. Goldsmith please be quiet. Be quiet.

Goldsmith: I thinks its pretty crappy you are gonna give me 30 years for f* * *ing getting kicked out with a cell phone. That's f* * *in' crazy.

Judge: Sheriff, remove the defendant from this courtroom.

After the entry of the order revoking his probation, Goldsmith through Mills, moved the court on July 16, 2007, to reconsider the fifteen year sentence. At the hearing on the matter,*FN7* the following exchange took place:

> *FN7. Goldsmith was not present in the courtroom during this "hearing".*
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> Judge: Commonwealth v. William Dustin Goldsmith
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> Defense counsel: Judge, that's my motion to reconsider the court's decision in his probation revocation hearing to run-
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> Judge: Mr. Goldsmith was the man that cursed *inaudible* in this courtroom.
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> Defense counsel: He did, Judge. Mr. Goldsmith ...
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> Judge: Overruled.
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> Judge: I will take this under advisement but is there anything you want to say, Mr. Mills?
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> Defense counsel: (shakes head) Again, I just reiterate that 30 years for 3 class D felonies is unduly harsh.
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> Judge: The court will say on the record that you are 100% right. An idiot. But I know if you could tell me some way I could punish him for his outburst in the courtroom other than that, I'll be glad to consider it. But the problem I've got is that young man sat over there with me having the word concurrent all but written on a piece of paper and he convinced me to consecutive. He was gonna say whatever he wanted to say and if he didn't hear what he wanted to hear he was gonna take it out on everybody. He can curse in front of me all he wants to, other than respect for this bench but when he starts doing it in front of my clerks and everybody else in this courtroom, that's a whole different ballgame.
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> Defense counsel: I understand Judge. (head down while speaking).

> Judge: You got longer. You still got some 110 days to file this motion. You may convince me later to do something for him cause I agree with you, 30 years is too harsh. But, its also too fresh in my memory what he sat right over there and did last time. Overruled.
>
> Subsequently, there were no further motions filed by Goldsmith. Instead, this appeal followed.
>
> Goldsmith v. Commonwealth, *Slip Opinion,* pgs. 1-9 (attached hereto as Appendix No. 1).

Goldsmith appealed the probation revocation to the Kentucky Court of Appeals on two grounds: (1) that his probation revocation violated minimal due process requirements; and (2) that the trial court could have revoked his probation and punished him contemporaneously for criminal contempt - as opposed to running Goldsmith's sentences consecutively. *Slip Opinion*, pg. 9. The Court of Appeals, after noting that Goldsmith had not preserved his due process claim, correctly found no manifest injustice. *Slip Opinion*, pgs. 10-13. In so holding, the Court of Appeals noted the fact that Goldsmith had stipulated to his probation violation- thus the lack of factual findings in the trial court's written order could not reach palpable error because Goldsmith had admitted the factual basis for his stipulation. *Slip Opinion*, pgs. 11-13. As to his second claim of error, the Court of Appeals found that while Goldsmith could have been punished for criminal contempt (and was not), the trial court had no discretion regarding whether to run Goldsmith's sentences consecutive or concurrent because the trial court had lost jurisdiction to alter or amend the previous judgment via CR 59.05 (*citing* Commonwealth v. Gaddie, 239 S.W.3d 59, 62 (Ky. 2007)). *Slip Opinion*, pgs. 13-15. Therefore, the only option for the trial court was to enforce the original sentence or continue probation. Id.

Notably, while the Court of Appeals found that there was no legal reason in the present case to fail to affirm the trial court, in *dicta* the opinion did contain critical language with regard to the

proportionality of the sentence reached at the plea haring (in relation to the crimes committed by Goldsmith) and the conduct of defense counsel (in the amount of time spent advising Goldsmith at his plea hearing). *Slip Opinion*, pg. 15.

On December 14, 2009, Goldsmith applied to this Court for discretionary review and the Commonwealth responded on January 5, 2010. In particular, with respect to minimal due process, after identifying the standard, Goldsmith never actually addressed in any fashion how that standard was not reached in this case.[1] Therefore, no exception was taken to the decision of the Court of Appeals on this issue.

As to his second claim of error, Goldsmith's discretionary review motion failed to offer any legal justification or misconception to show that the reasoning of the Court of Appeals was not sound with respect to the trial court's inability to alter or amend its judgment due to CR 59.05. That issue was completely unaddressed in Goldsmith's motion.

Instead, Goldsmith's motion for discretionary review was actually an attempt to have this Court act as a trial court for what should have been dealt with in a post-conviction motion. Goldsmith relied on *dicta* from the opinion that was critical of the trial court in Goldsmith's case, as well as Goldsmith's defense counsel, to attempt to gain another bite at the apple. Motion for

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[1] On the contrary, as was noted by the Commonwealth's brief to the Kentucky Court of Appeals, Goldsmith received all that was required: written notice of his parole violations (TR 34), disclosure of the evidence against him - as Goldsmith stipulated to the violations (VR No. 1, 7/5/07, 11:30:10), an opportunity to be heard in person and to present witnesses/documentary evidence (See VR No. 1, 7/5/07 - which he did by choosing to focus on evidence in mitigation), no adverse witnesses were presented (thus there was no need to cross-examine any adverse witnesses), a neutral and detached hearing body heard his case, and written findings were made regarding the violation (TR 37-38). *See* Morrissey v. Brewer, 408 U.S. 471, 480 (1972). Goldsmith stipulated and admitted the facts that caused his violation, therefore, there was no error in the trial court's failure to detail those facts in the written order. *Slip Opinion*, pgs. 11-13.

Discretionary Review, pgs. 8-11. However, as noted by the Court of Appeals, Goldsmith's "harsh", bargained-for sentence and "minimal guidance from his attorney [as reflected by the record]", are matters that the Court of Appeals could not deal with "at this time". *Slip Opinion*, pg. 15. Goldsmith also took issue with his sentence itself in the motion - arguing it was disproportionate and harsh. Motion for Discretionary Review, pgs. 10-11.

On June 9, 2010, this Court granted discretionary review.

Goldsmith filed his brief in this Court on November 22, 2010. In the brief, Goldsmith morphed his arguments - raising new claims - to fit a subsequent case decided by this Court (Hunt v. Commonwealth, 326 S.W.3d 437 (Ky. 2010)) which involved the same trial judge. *See* Brief for Appellant, pgs. 7-14. Goldsmith also expanded his sentencing claim in the brief to include a new issue asserting that the overall sentence in Goldsmith's case was in violation of the statutory maximum allowed for Goldsmith (in violation of the separation of powers doctrine). Brief for Appellant, pgs. 15-20.

Additional facts will be noted in the Argument section of this brief where necessary and appropriate.

ARGUMENT

GOLDSMITH'S PROBATION REVOCATION SHOULD BE AFFIRMED, HOWEVER, A REMAND IS REQUIRED FOR FURTHER CONSIDERATION OF HIS ULTIMATE SENTENCE.

Appellant asserted in his brief that preservation would be asserted in each sub-part of his brief, mostly due to the fact that portions of the claims of error have not been preserved (as they were not alleged in the Court of Appeals and/or were not alleged in the motion for discretionary review). Instead, Goldsmith has taken a subsequent opinion by this Court involving the same judge and attempted to morph Goldsmith's case into a substantially similar case (Hunt v. Commonwealth, 326 S.W.3d 437 (Ky. 2010) - when in fact they are not similar.

A. The question regarding the adequacy of Goldsmith's "counsel" is not properly before this Court.

(1) Argument Improperly Raised.

In his brief to this Court, as his lead argument, Goldsmith acknowledged that this issue was not preserved - as it was never raised as part of his appeal to the Court of Appeals - nor referred to in the motion for discretionary review. Goldsmith has acknowledged that the Court of Appeals opinion was critical of Goldsmith's counsel *sua sponte* - he had not raised any prior claim challenging the adequacy of his counsel. Further, in the motion for discretionary review, Goldsmith did not argue *lack of/inadequate* counsel as a claim of error for review, instead noting two (2) other claims of error: (1) abuse of discretion by the trial court for imposing an unduly harsh sentence; and (2) that the sentence itself was unduly harsh. However, in the time between the motion being granted and the time for filing of Goldsmith's brief, this Court decided Hunt v. Commonwealth, 326 S.W.3d

437 (Ky. 2010). Based on Hunt, Goldsmith changed tactics and raised this new claim - morphing part of his claim against the trial court into an "inadequate counsel" claim. Because this issue was not raised in the Court of Appeals, this claim was procedurally defaulted and should not be reviewed.[2] Similarly, failure to raise this claim in the motion for discretionary review bars review in this proceeding. Wells v. Commonwealth, 206 S.W.3d 332 (Ky. 2006)(issues not raised in the motion for discretionary review will not be addressed by this Court despite being briefed before us and addressed at oral argument);Coleman v. Bee Line Courier Service, Inc., 284 S.W.3d 123 (Ky. 2009); Ellison v. R & B Contracting, Inc., 32 S.W.3d 66, 71 n. 8 (Ky.2000). Indeed, as noted by the Court of Appeals in its earlier opinion, the issue with regard to defense counsel was not available for review "at this time" (*Slip Opinion*, pg. 15) - alerting Goldsmith with a virtual smoke signal regarding its thoughts on the efficacy of a future ineffective assistance of counsel claim. Instead of heeding the signal, Goldsmith has attempted to substitute this Court for the Hickman Circuit Court.[3] Any fault with the assistance of Goldsmith's defense counsel was not raised in the probation revocation appeal (as it does not even relate to the probation revocation proceedings - but rather the sentencing hearing) and should be dealt with in the appropriate forum at the appropriate time (i.e.,

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[2] Where a party specifies his grounds for an objection at trial, he cannot present a new theory of error on appeal. Ruppee v. Commonwealth, Ky., 821 S.W.2d 484 (1991) . To borrow Justice Lukowsky's oft-quoted principle, "appellants will not be permitted to feed one can of worms to the trial judge and another to the appellate court." Kennedy v. Commonwealth, Ky., 544 S.W.2d 219, 222 (1976). See also, Garrett v. Commonwealth, Ky., 48 S.W.3d 6 (2001)(an issue is not properly before the appellate court if the specific nature of the claim raised in the appeal was not presented to the trial court for consideration).

[3] The criminal appellate process, which attacks the "final judgment", is not "haphazard and overlapping", but rather "organized and complete". Gross v. Commonwealth, 648 S.W.2d 853, 856 (Ky.1983). As this Court explained, "[t]hat structure is set out in the rules related to direct appeals, in RCr 11.42, and thereafter in CR 60.02." Gross, at 856.

an RCr 11.42 motion).

(2) Merits.

The Commonwealth firmly disputes the efficacy of this claim due to the procedural irregularities, and does not address the merits to forego that principle. Nevertheless, in an abundance of caution, if the merits of the claim are addressed, the Commonwealth does desire to be heard and argue in support of affirming the lower courts.

It is important to note several distinct differences in this case - as compared to the Hunt[4] case cited prominently by Goldsmith. In Hunt, three (3) errors with respect to Hunt's probation revocation proceeding were noted - violating his due process rights. First, Hunt was denied the opportunity to cross-examine/confront adverse witnesses - as the trial court took testimony from a probation officer (not Hunt's probation officer) while that party was not under oath or subject to lawyer questioning. Second, the burden of proof was improperly shifted to the defendant as the trial court required him to "show cause" why probation should not be revoked (as opposed to the proponderance of the evidence standard). Lastly, appointing counsel for Hunt minutes before the hearing was deemed inadequate, as it was acknowledged by Hunt's counsel that insufficient time was available to prepare and investigate all of Hunt's alleged probation violations. Hunt v. Commonwealth, 326 S.W.3d 437, 439-440 (Ky. 2010).

As an initial matter, in the instant case, the alleged inadequacies of counsel noted by the Court of Appeals occurred at Goldsmith's sentencing hearing - not the revocation - illustrating the correctness of the opinion from the Court of Appeals that Goldsmith's issues with counsel would only be appropriate for a later time (in an RCr 11.42 when the issue was actually raised). Therefore,

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[4] Hunt v. Commonwealth, 326 S.W.3d 437 (Ky. 2010).

the alleged inadequacies of Goldsmith's counsel noted by the Court of Appeals did not include his revocation hearing counsel or that hearing and do not enter into discussion of his due process rights with respect to that hearing.

Further, and as a collateral matter, the Court of Appeals allegations against Goldsmith's sentencing counsel suffer from several assumptions that are not supported by the record. The Court of Appeals noted in *dicta* that Goldsmith had inadequate time - only three (3) minutes - to confer with counsel regarding the decision to trade his plea-bargained three (3) year sentence (one [1] year per count with three [3[total counts) to a probation sentence with fifteen (15) years if revoked (five [5] years per count with three [3] counts). *Slip Opinion*, pg. 15. On the contrary, based on statements by the prosecutor opposing probation, it was obvious that this trial court had a policy of only accepting probation (and refusing the accept a plea bargain) if a defendant agreed to the maximum penalty for all probated sentences - an arrangement which defense counsel was likely also aware. VR No. 1, 3/1/07, 10:47:20. *See also* VR No. 1, 3/1/07, 10:48:20 and TR 29-32. The Commonwealth adamantly opposed the arrangement calling for probation (noting Goldsmith's "long" history of felonies and that the probated sentence would set him up for failure and likely end in a fifteen [15] year sentence[5]). VR No. 1, 3/1/07, 10:47:20. 10:47:50. The judge agreed, noting to Goldsmith he did not think it was a good deal for him, and telling him that he could have the entire day to think about it (as Goldsmith was to be sentenced later that afternoon by the same judge in Carlisle County) and that if he changed his mind he could let him know later and the judge would

[5] In fact, as proof this arrangement was court policy, the prosecutor noted the conversion of the sentence to a 15 year arrangement before it was mentioned by the trial court. It was at that time that the trial court explained to Goldsmith that the only way he would entertain probation would be a refusal of the plea bargain and a plea by Goldsmith the maximum on each charge. VR No. 1, 3/1/07, 10:47:20, 10:48:20

retroactively change the order. Id. at 10:51:50, 10:55:30. Trial counsel and the judge also discussed the Carlisle case, and the judge made it clear that he understood Goldsmith would be seeking probation in the Carlisle case as well, telling defense counsel that he did not anticipate that Goldsmith would be seeking probation in this case and a jail sentence in Carlisle County. Id. Goldsmith claims none of the three (3) minute discussion with defense counsel included details about what would happen if he violated the probation (Brief for Appellant, pg. 8 - *citing* Slip Opinion, pg. 3, 15), however, same is untrue as many parts of the conversation are inaudible and based on Goldsmith's discussions and his statements to the trial court, it was clear that Goldsmith wanted probation despite being aware of the risk (and apparently - upon greater reflection - did not change his mind when he sought the same relief in Carlisle County). Id. at 10:49:15. Goldsmith was explained the consequences of violating his probation and noted his understanding. Id. This is not the case of Goldsmith blindly entering into this decision.

Second, as to his revocation proceeding, Goldsmith stipulated to the revocation allegations and, as correctly noted by the Court of Appeals, his minimal due process rights were protected at the revocation hearing. *Slip Opinion*, pgs. 11-13. Goldsmith received all that was required: written notice of his parole violations (TR 34), disclosure of the evidence against him - as Goldsmith stipulated to the violations (VR No. 1, 7/5/07, 11:30:10), an opportunity to be heard in person and to present witnesses/documentary evidence (See VR No. 1, 7/5/07 - which he did by choosing to focus on evidence in mitigation), no adverse witnesses were presented (thus there was no need to cross-examine any adverse witnesses), a neutral and detached hearing body heard his case, and written findings were made regarding the violation (TR 37-38). Morrissey v. Brewer, 408 U.S. 471, 480 (1972). *See also Slip Opinion*, pgs. 11-13. As previously noted, because Goldsmith stipulated

and admitted the facts that caused his violation, there was no error in the trial court's failure to detail those facts in the written order. *Id.* Goldsmith never disputed this finding in his discretionary review motion. Therefore, no improper burden shifting occurred and Goldsmith was not prevented from confrontation. In sum, the Hunt case and Goldsmith's case are not similar. Goldsmith received a substantial benefit of getting a probated sentence (despite adequate warnings) and in exchange risked a longer sentence if he violated the terms of his probation. Goldsmith sentence appears harsh - but he received a significant, bargained-for benefit (probation) - and only received his greater punishment after he altered the landscape of his initial plea agreement and then violated the terms of his probation order (to which he stipulated).

In addition, Goldsmith claims inadequate representation due to the fact that the trial court spoke to him about his alleged violations at a hearing on June 7. Brief for Appellant, pg. 8-12. On the contrary, the interaction between the trial court and Goldsmith at the June 7th hearing was irrelevant and/or harmless. While undoubtedly the trial court engaged Goldsmith concerning the reason he was before the trial court in more detail than necessary, Goldsmith was appointed new counsel at the hearing and the case was continued for a month so that Goldsmith's new attorney could prepare (his new counsel told the judge he was not familiar with Goldsmith or his situation/case). VR No. 1, 6/7/07, 10:55:45, 10:56:10. Goldsmith's revocation counsel having been appointed a month prior to his revocation hearing, he was very familiar with Goldsmith's case by the time the revocation hearing took place. In fact, his counsel's strategy based on the evidence against Goldsmith was to stipulate to the probation violation and focus on mitigation evidence - as Goldsmith had already been revoked in Carlisle County for the same reasons. VR No. 1, 7/5/07, 11:30:10. Therefore, the matters discussed between Goldsmith and Judge Langford were ultimately

neutralized by the later strategy to stipulate to the clear probation violation and focus on mitigating evidence. There was no indication whatsoever that the discussions from the June 7 hearing had any bearing on the later revocation hearing itself or the decision by Goldsmith to stipulate to his violations. In sum, Goldsmith was not denied counsel.

B. As has been previously noted, and was found by the Court of Appeals, the revocation hearing met minimal due process requirements.

Goldsmith stipulated to the revocation allegations and, as correctly noted by the Court of Appeals, his minimal due process rights were protected at the revocation hearing. VR No. 1, 7/5/07, 11:30:10 and *Slip Opinion*, pgs. 11-13. Goldsmith received all that was required: written notice of his parole violations (TR 34), disclosure of the evidence against him - as Goldsmith stipulated to the violations (VR No. 1, 7/5/07, 11:30:10), an opportunity to be heard in person and to present witnesses/documentary evidence (See VR No. 1, 7/5/07 - which he did by choosing to focus on evidence in mitigation), no adverse witnesses were presented (thus there was no need to cross-examine any adverse witnesses), a neutral and detached hearing body heard his case, and written findings were made regarding the violation (TR 37-38). *See* Morrissey v. Brewer, 408 U.S. 471, 480 (1972). Because Goldsmith stipulated and admitted the facts that caused his violation, there was no error in the trial court's failure to detail those facts in the written order. *Slip Opinion*, pgs. 11-13. Likewise, given the stipulation, it was impossible for the burden to have been shifted to Goldsmith - his claim to the contrary is a weak attempt to fit this case into the facts of Hunt - which is entirely dissimilar on this issue.

C. Alleged Sentencing Error (Separation of Powers/Cruel and Unusual Punishment).

In this claim of error, Goldsmith has made two (2) allegations: (1) his sentence was enhanced to an unduly harsh and disproportionate sentence due to disrespectful comments he made to the trial court during his revocation hearing; and (2) an unpreserved claim that the sentencing structure in this case (containing a so-called "hammer clause"[6]) violated the separation of powers doctrine because combining Goldsmith's Carlisle County sentence to the time from Hickman County, served consecutively - in the aggregate, exceeded the statutory maximum pursuant to KRS 532.110(c). Brief for Appellant, pgs. 15-20. The second part of this allegation was not raised in the Kentucky Court of Appeals or in Goldsmith's motion for discretionary review.

As to the first part, as previously noted, Goldsmith's bargained-for plea agreement was refused by him due to his insistence on receiving probation. VR No. 1, 3/1/07, 10:49:15. After adequate warnings by the trial court (and opposition by the Commonwealth), Goldsmith persisted - leveraging the risk of a fifteen (15) year sentence against his belief he could successfully complete his probation requirements. VR No. 1, 3/1/07, 10:47:20, 10:47:50, 10:49:15, 10:51:50, 10:55:30. The sentence imposed in this case, fifteen (15 years), was within the statutorily prescribed limits of the crimes for which Goldsmith was convicted, therefore, no cruel or unusual punishment occurred.

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[6] The term "hammer clause" was noted by this Court in McClanahan v. Commonwealth, 308 S.W.3d 694 (Ky. 2010) - defined as "a provision of a plea agreement, apparently used in some locales, that allows a defendant to be released on his own recognizance pending sentencing . . . if a defendant fails to return to court for sentencing (or violates some other agreed-upon condition of release), the Commonwealth withdraws its original sentencing recommendation and the defendant agrees to serve a more severe sentence instead". Although it has no effect on this case, the Commonwealth would note that based on the definition, and apparent use of these clauses in plea agreements, the sentence in this case was not a "hammer clause" - as the Commonwealth was not a part of any agreement for a fifteen (15) year sentence (and actually opposed probation and the maximum sentence requirement).

Goldsmith admitted during his plea hearing that he forged checks on the checking account of his girlfriend's dead grandmother in order to continue his drug habit. VR Supp. No. 1, 2/15/07, 10:04:30-10:08:25. Within these proceedings, Goldsmith controlled his own fate. Goldsmith had a much lighter sentence in place via a very favorable plea agreement. VR No. 1, 3/1/07, 10:47:20 and TR 23. In fact, the Commonwealth even noted that shock probation for Goldsmith would not be opposed as long as it included drug treatment. VR No. 1, 3/1/07, 10:47:20, 10:47:50. Nevertheless, given his desire for immediate probation/release, Goldsmith chose to forego his plea agreement and plead guilty to the maximum sentence in exchange for probation - rather than taking advantage of what was deemed to be a better bargain for Goldsmith (by the trial court and the prosecutor). Id. at 10:49:15. Goldsmith's decision left the trial court with no options. As noted by the Court of Appeals, despite the appearance of a harsh sentence for his crimes, it was his subsequent violation that triggered the sentence - one which the trial court was unable to alter via CR 59.05 - *See Slip Opnion, pg. 14 - citing* Commonwealth v. Gaddie, 239 S.W.3d 59, 62 (Ky. 2007). Therefore, Goldsmith's contention that his sentence was improperly enhanced due to his disrespectful comments to the trial court is illusion. The trial court was divested of jurisdiction to alter the sentence. From that basis no Eighth Amendment violation occurred.

As to Goldsmith's new claim regarding the separation of powers doctrine, KRS 532.110(1)(c) places limits on the total aggregate for crimes of the same classification that are stacked (served consecutively). Reading KRS 532.110(1)(c) and 532.080(6)(b) together, Goldsmith's sentencing limit would be twenty (20) years. Goldsmith received a fifteen (15) year sentence in this case. TR 29-30, 37-38. Therefore, his sentence did not violate the statute. Goldsmith has claimed that this sentence is above the allowed statutory maximum when combined

and run consecutively with his sentences in his Carlisle County case - citing McClanahan v. Commonwealth, 308 S.W.3d 694 (Ky. 2010). While at the time of Goldsmith's sentencing, plea-bargaining a sentence that would have been illegal was permissible, Goldsmith is correct that McClanahan prevents imposition of a sentence that is beyond the statutory maximum. Therefore, a potential question exists as to whether the aggregate cap applied in this case - where both sentences from each county are under the cap — but in the aggregate are over the cap. Due to the failure to appeal and consolidate the Carlisle case with this action, it would seem that this claim is procedurally flawed with regard to this issue. Nevertheless, the ill-fated procedural posture is inconsequential, as this issue is apparently moot. Undersigned counsel was able to confirm that the Kentucky Department of Corrections (KDOC) has apparently classified Goldsmith's sentences for the two cases (Hickman and Carlise) as a twenty (20) year sentence - thus applying the cap.[7] Therefore, to the extent any of the time in this case, when combined with the Carlisle County time, exceeded the statutory maximum, it appears KDOC corrected it in light of KRS 532.110(1)(c), KRS

[7] See Resident Record Card of William Dustin Goldsmith - attached hereto as Appendix No. 2. Undersigned counsel spoke to the Department of Corrections on March 4, 2011. At that time, staff with Offender Information Services indicated that Goldsmith was serving a total sentence of twenty-four (24) years. Undersigned counsel attempted to confirm same with Goldsmith's counsel, Hon. Julia K. Pearson, however, after initially indicating she would verify Goldsmith's sentence via his resident card, she subsequently e-mailed undersigned counsel indicating she would not cooperate and/or confirm the sentence until the Appellee brief was filed. Subsequently, undersigned counsel became aware of a fellow Assistant Attorney General that had access to the Department of Corrections KOMS website and was able to retrieve a copy of the resident card. The card reflects that the Kentucky Department of Corrections has apparently applied the cap at twenty (20) years on Goldsmith's crimes from Hickman and Carlisle counties, and the remaining four (4) years comes from a subsequent Ballard County sexual abuse conviction (with that time being exempt from the cap because it was committed against another inmate while Goldsmith was incarcerated - See Goldsmith v. Commonwealth, 2009-CA-530). Note, a search of http://courtnet.kycourts.net revealed that Goldsmith did receive a fifteen (15) year sentence in each county (Hickman and Carlisle) with the sentences to be served consecutively to each other - so the discrepancy must be due to the cap.

532.080(b)(6), and McClanahan.

Further, and more importantly, although not raised by Goldsmith in this appeal, the sentencing order in this case (TR 29-30) was clear that the three (3) charges would be stacked with one another (5 years each totaling 15 years), however, the order does not specify that the probated sentence would run consecutive to any sentence out of Carlisle County. Because the Carlisle County case and its record are not before this Court, it is not certain if similar language is missing from the sentencing order in that case (although same is likely). Nevertheless, pursuant to KRS 532.110(2), if the trial court does not specify the manner in which a sentence is to run in relation to another sentence, the sentence shall run concurrently (subject to exceptions that do not apply in this case). In the instant case, the parties operated at the probation revocation hearings as though Judge Langford had discretion as to whether to run the sentences from the different counties consecutive or concurrent to one another. *But See* Commonwealth v. Tiryung, 709 S.W.2d 454 (Ky.1986), KRS 532.030, and KRS 532.110(1).[8] The Court of Appeals held otherwise, finding that CR 59.05 divested jurisdiction from the circuit court and that imposition of the fifteen (15) year sentence in each case was mandatory. *Slip Opinion*, pg. 13-15. Therefore, the Court of Appeals found that a thirty (30) year sentence was mandatory and had to be imposed without discretion. Id. It is unclear from what basis the Court of Appeals was operating to find that both fifteen (15) year sentences were required to be stacked to each other. For, despite the fact that Judge Langford noted on the revocation order (TR 37-38) that the Hickman County time (15 years) would be consecutive to the Carlisle County time (and same was apparently done in Carlisle County as reflected by the

[8] The Tiryung case (and the highlighted statutes) indicated that the language of KRS 532.030 was mandatory and that, upon conviction, a person shall have his punishment "fixed'. Tiryung, 709 S.W.2d at 455.

revocation order in that case when it referred to the Hickman County time - according to http://courtnet.kycourts.net (see footnote 7)), nothing from the final judgement and sentencing order (TR 29-30) indicated that the time from the two (2) cases was going to run consecutive. As noted, the intimations of the parties at the revocation hearings seemed to suggest otherwise (that the issue was still undetermined). Therefore, it seems apparent that the parties did not believe Judge Langford had already stacked the sentences in the two (2) cases. Because CR 59.05 divested jurisdiction, and based on the limitations in KRS 532.110(2) when consecutive/concurrent is not specified, it would appear that Goldsmith's sentences from the individual counties had to run concurrent to one another and his maximum should be fifteen (15) years. Such a construction would also make the issue relative to the twenty (20) year cap moot for a second reason. Again, because the Carlisle County record is not now before this Court, a remand would be required to properly determine these matters.

CONCLUSION

For the above-stated reasons, the opinion of the Kentucky Court of Appeals, should be affirmed in part (relative to the probation revocation itself), and reversed in part and remanded for further consideration of the issues with respect to the total amount of the sentence.

Respectfully submitted,

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