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DISCRETIONARY REVIEW FROM 2007-CA-2259

CAMERON HUNT

APPELLANT

v.

APPEAL FROM HICKMAN CIRCUIT COURT  
HON. TIMOTHY A. LANGFORD, JUDGE  
INDICTMENT NO. 06-CR-00031

COMMONWEALTH OF KENTUCKY

APPELLEE

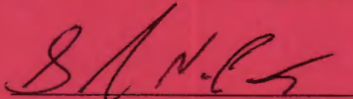
**BRIEF FOR APPELLANT**

Submitted by:

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The undersigned does certify that copies of this Brief were mailed, first class postage prepaid, to the Hon. Timothy A. Langford, Judge, 1st Circuit, 8574 State Route 1128 RR 1, Hickman, KY 42050; the Hon. Mike Stacey, Commonwealth's Attorney, P.O. Box 788, Wickliffe, Kentucky 42087; the Hon. Jamey Mills, Assistant Public Advocate, Department Of Public Advocacy, 400 Park Avenue, Suite B, Paducah, Kentucky 42001; and to Hon. Wm. Robert Long, Jr., Asst. Attorney General, Office of Criminal Appeals, 1024 Capital Center Drive, Frankfort, Kentucky 40601 on December 18<sup>th</sup>, 2009. I hereby further certify that the record on appeal has been returned to the Kentucky Supreme Court.

  
\_\_\_\_\_  
SAMUEL N. POTTER

## **Introduction**

This Court granted discretionary review of the Court of Appeals' opinion that affirmed the Hickman Circuit Court's order that revoked Cameron Hunt's probation. Mr. Hunt was sentenced to 10 years in prison.

## **Statement Regarding Oral Argument**

Mr. Hunt welcomes oral argument if the Court feels it would help to render a fair and just decision in his case.

## **Statement of Points and Authorities**

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## **Statement of the Case**

Cameron Hunt knew he had problems, and he knew he had to make some changes in his life. As with far too many young people, drug use led to poor decisions, and this culminated in criminal problems. The reality of becoming a parent, as it often does, forced Mr. Hunt to reconsider the direction of his life. Mr. Hunt acknowledged these things to the Circuit Court in a series of letters. Transcript of Record (TR), 64-65; 66; 68.

Mr. Hunt pled guilty to first degree fleeing and evading and first degree wanton endangerment, along with various misdemeanors and violations, on March 1, 2007. TR, 37-41. He originally agreed to a total sentence of three years. At his final sentencing, the Circuit Court increased his sentence to ten years in exchange for releasing him on probation. VR No. 1: 3/1/07; 10:31:40; 10:42:10. His requirements for probation included paying child support, working on his GED, paying court costs, paying for electric monitoring, no drugs or alcohol, random drug screenings, completing the Scared Straight Program at the Kentucky State Penitentiary, and completing 200 hours of community service. VR No. 1: 3/1/07; 10:32:30-10:41:10; TR, 42-44.

Mr. Hunt's probation officer filed a Special Supervision Report on April 16, 2007, alleging several violations. TR, 53. A Notice of Preliminary

Hearing was filed on September 14, 2007. It listed seven alleged violations. TR, 54. A revocation hearing was held on September 20, 2007.

The first order of business at the revocation hearing was to fill out an IFP motion for Mr. Hunt so he could be assigned a lawyer. VR No. 1: 9/20/07; 10:39:30. Once the Department of Public Advocacy was appointed to represent him, his lawyer told the court she had only looked at the file that morning and that Mr. Hunt may want more time. VR No. 1: 9/20/07; 10:41:30. The court inquired about the allegations. The Commonwealth said he had been on the run since March and had not done anything. The Commonwealth then read the allegations. VR No. 1: 9/20/07; 10:41:45.

Mr. Hunt, through his lawyer, said he went to drug court once, though he did not say why he did not go back. VR No. 1: 9/20/07; 10:42:20. He also made his first meeting with his probation officer. He showed up for the second meeting, but was told to come back the next day. When he returned, he was told there was a warrant for his arrest because he missed his meeting. VR No. 1: 9/20/07; 10:44:30. His first drug screen at the jail was clean. VR No. 1: 9/20/07; 10:46:00. He had a job waiting for him at Pilgrim's Pride, where his mother worked, if he was released. VR No. 1: 9/20/07; 10:46:20.

The Circuit Court decided to revoke Mr. Hunt's probation. VR No. 1: 9/20/07; 10:48:30; 10:49:40. An order was entered on September 21, 2007, that stated the reasons for the revocation: failing to complete drug court, not paying supervision fees, not complying with electronic monitoring, absconding supervision, not completing community service, and not paying court costs and fines. TR, 61-62. Mr. Hunt was ordered to serve ten years in a state penitentiary. TR, 61-62. He now appeals that order to this Court.

## **Argument**

### **I. Mr. Hunt Deserves a New Revocation Hearing Because the Circuit Court Violated His Right to Due Process by Untimely Appointing a Lawyer to Represent Him, Improperly Shifted the Burden of Proof to Him, and Unfairly Forced Him to Speak at the Hearing.**

#### **Preservation**

While this issue was not preserved at the Circuit Court level, the Court of Appeals reached the merits of Mr. Hunt's argument. Thus, Mr. Hunt respectfully requests this Court review this issue, even if it is pursuant to RCr 10.26.

#### **Argument**

Certain process is due to people facing the revocation of probation or parole. *Robinson v. Commonwealth*, 86 S.W.3d 54, 56 (Ky. App. 2002)(citing *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972)). The minimum due process requirements for parole revocation hearings

include (1) written notice of the claimed violations; (2) disclosure of evidence against him; (3) opportunity to be heard in person and to present witnesses and documentary evidence; (4) the right to confront and cross examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (5) a neutral and detached decision maker; and (6) a written statement by the fact finder as to the evidence relied on and reasons for the revocation. *Morrissey*, 408 U.S. at 489; U.S. Constitution, 5<sup>th</sup> and 14<sup>th</sup> Amds.; Ky. Constitution, §§ 2, 10, 11, and 14.

The United States Supreme Court saw no difference relevant to the guarantee of due process between hearings involving the revocation of parole and the revocation of probation. *Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973). This led the Court to apply the due process protections of *Morrissey* to probation revocation hearings. *Gagnon*, 411 U.S. at 786. Following the reasoning in *Gagnon*, the Court of Appeals found no distinction between probation and parole in terms of the due process rights provided to a person facing revocation. *Murphy v. Commonwealth*, 551 S.W.2d 838, 840 (Ky. App. 1977). *Murphy* adopted the six minimum due process requirements from *Gagnon* and *Morrissey*. *Murphy*, 551 S.W.2d at 840.

Probation may be revoked if a violation is established by a preponderance of the evidence. *Rasdon v. Commonwealth*, 701 S.W.2d 716, 719 (Ky. App. 1986). The standard of review for these hearings is abuse of discretion by the judge. *Tiryung v. Commonwealth*, 717 S.W.2d 503, 504 (Ky. App. 1986).

1. *The Circuit Court untimely appointed a lawyer to represent Mr. Hunt.*

The proceedings below resembled an inquisition more than a hearing governed by due process. Three structural errors denied Mr. Hunt due process of law. To start with, Mr. Hunt was not provided a lawyer until the hearing began. His indigence was established in the first couple of minutes of the hearing. Once this was done, the hearing began without Mr. Hunt being given an opportunity to confer with his newly appointed lawyer. VR No. 1: 9/20/07; 10:39:20-10:41:30. No meaningful defense could be raised when Mr. Hunt did not meet his lawyer until the day of his hearing.

The Court of Appeals' opinion exposes the harm that accrued from this error. The Court was "unable to glean from the record any viable defense Hunt may have raised which could have substantially affected the outcome of the hearing." Opinion, 5. On appeal, an appellant is only allowed to argue facts that can be cited from the four corners of the record on appeal. It is incumbent upon the defendant, with the assistance of counsel, to create a record in Circuit Court that would



allow meaningful review by an appellate court. This was not done in Mr. Hunt's case because the Circuit Court did not appoint a lawyer to represent him until a few moments before the court revoked his probation. How could Mr. Hunt possibly prepare a defense having only met his lawyer that morning? Using that effect of that error against him on appeal highlights the harm he suffered below.

*2. The Circuit Court improperly shifted the burden of the revocation hearing from the Commonwealth to Mr. Hunt.*

The Circuit Court applied the wrong burden of proof during the substantive portion of the hearing. The court stated that Mr. Hunt was before the court to "show cause" why his probation should not be revoked. VR No. 1: 9/20/07; 10:48:35. Requiring the defendant to show cause is the wrong standard. Probation can only be revoked when a violation has been proved by the preponderance of the evidence. *Rasdon*, 701 S.W.2d at 719. This requires the Commonwealth to offer at least some proof that a violation existed. However, the Commonwealth never even called a witness. When the court forced Mr. Hunt to show cause why he should not be revoked, the court improperly and unconstitutionally shifted the burden of proof.

This Court would not tolerate a criminal conviction that resulted from a trial when the standard applied was a preponderance of the evidence or even clear and convincing evidence. While a 'show cause' standard is

perfectly appropriate in a situation that involves civil contempt or when a lawyer fails to timely file a brief in accordance with *Caldwell v. Commonwealth*, 157 S.W.3d 215 (Ky. App. 2004), a 'show cause' standard is inappropriate for the revocation of probation. Plainly, this was an error that affected the outcome the hearing.

3. *The Circuit Court unfairly forced Mr. Hunt to incriminate himself.*

The court forced Mr. Hunt to incriminate himself. Mr. Hunt, through his lawyer, told the court he showed up for his second meeting with his probation officer, but was told to come back. When he did, he was told a warrant for his arrest had already been issued. The court asked Mr. Hunt why he did not try to straighten out the situation with his probation officer after he learned of the warrant. Mr. Hunt stood there for a moment as the judge waited for an answer. The lawyer appointed to represent Mr. Hunt a whole eight minutes before told Mr. Hunt he had to answer the court's question. Then the court asked Mr. Hunt if he did nothing because a warrant had been issued, and Mr. Hunt said yes. VR No. 1: 9/20/07; 10:44:30-10:46:00. Mr. Hunt was never sworn in as a witness. *U.S. v. Dodson*, 25 F.3d 385 (6<sup>th</sup> Cir. 1994). The court and his lawyer compelled him to answer a question that incriminated him against his will.

Mr. Hunt had the **opportunity** to be heard. *Gagnon v. Scarpelli*, 411 U.S. 778, 786 (1973); *Murphy v. Commonwealth*, 551 S.W.2d 838, 840

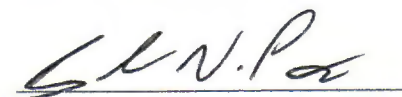
(Ky. App. 1977). He should not have been compelled to reveal incriminating information against his will by the court seeking to revoke his probation, contrary to *Gamble v. Commonwealth*, 293 S.W.3d 406, 410-411 (Ky. App. 2009). The court then relied on his forced, inculpatory response to revoke his probation (because he did not 'show cause' why it should not be revoked).

These structural errors affected the framework of Mr. Hunt's revocation hearing. *Arizona v. Fulminate*, 499 U.S. 279, 308-310 (1991). The court did not afford Mr. Hunt the process due to him in the hearing when a lawyer was not provided to him until after the hearing started, the wrong burden of proof was used, and he was forced to answer questions against his will. These structural defects fall short of the due process required by *Gagnon* and *Murphy*. Mr. Hunt deserves a new revocation hearing.

## **Conclusion**

For these reasons, Mr. Hunt respectfully requests this Court to reverse and remand his case to the Hickman Circuit Court with instructions to hold a new revocation hearing that conforms to the minimum due process requirements of the U.S. and Kentucky Constitutions. Further, Mr. Hunt respectfully requests any and all other relief this Court determines is appropriate.

Respectfully submitted,



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