

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DeWAYNE D. McNAIR,	§
	§ No. 90, 2013
Defendant Below,	§
Appellant,	§
v.	§ Court Below—Superior Court
	§ of the State of Delaware,
	§ in and for New Castle County
STATE OF DELAWARE,	§ Cr. ID No. 0607000129
	§
Plaintiff Below,	§
Appellee.	§

Submitted: July 19, 2013
Decided: August 29, 2013

Before **BERGER, JACOBS** and **RIDGELY**, Justices.

ORDER

This 29th day of August 2013, upon consideration of the briefs of the parties and the record below, it appears to the Court that:

(1) The defendant-appellant, DeWayne D. McNair, filed an appeal from the Superior Court’s February 6, 2013 violation of probation (“VOP”) sentencing order. We find no merit to the appeal. Accordingly, we affirm.

(2) The record before us reflects that, on February 22, 2007, McNair was found guilty by a Superior Court jury of Possession With Intent to Deliver Heroin and Maintaining a Vehicle for Keeping Heroin, and was sentenced as a habitual offender to life in prison. McNair’s convictions were

subsequently reversed and remanded for a *Flowers* hearing by this Court.¹

On June 19, 2008, McNair pleaded guilty to Possession With Intent to Deliver Heroin. On that same date, he was sentenced to 10 years of Level V incarceration, to be suspended after 5 years for decreasing levels of supervision, in accordance with the State's recommendation. The record reflects that, at sentencing, the Superior Court declared McNair a habitual offender under Del. Code Ann. tit. 11, § 4214(b), but chose not to sentence him in accordance with the habitual offender statute.

(3) On August 30, 2012, following a hearing, McNair was found to have committed a VOP. He was re-sentenced to 5 years at Level V, with credit for 19 days previously served, to be suspended for 1 year of probation. On February 6, 2013, after again committing a VOP, he was re-sentenced to 5 years at Level V, to be followed by 1 year of Level II probation. This appeal followed.

(4) In his appeal, McNair claims that, because he originally was sentenced for drug possession as a habitual offender under § 4214(a)—which does not permit suspended sentences—the 5 years of Level V time that were suspended in his original sentence should not now be available for inclusion in his VOP sentence. As such, McNair does not challenge his

¹ *McNair v. State*, 2008 WL 199831 (Del. Jan. 23, 2008).

most recent VOP sentence, but, rather, the original sentence he received after entering his guilty plea in June 2008.

(5) McNair's claim regarding his original sentence is untimely because it was not filed within 30 days of June 19, 2008, the date the sentence was imposed.² Even if McNair had filed his claim in a timely manner, it is without merit. If McNair had been sentenced as a § 4214(a) offender, as he claims, he would have been sentenced to a mandatory 10 years at Level V, with no probation.³ He was not. Or, if he had been sentenced as § 4214(b) offender, he would have been sentenced to life in prison. Again, he was not. Because McNair's instant claim of error in his VOP sentence is based on the faulty premise that he originally was sentenced as a habitual offender, his instant claim of error in his VOP sentence is without merit.

(6) While the State argues, and we agree, that the judgment of the Superior Court must be affirmed, the State also notes in its answering brief that the one-year probationary term imposed in McNair's February 6, 2013

² SUPR. CT. R. 6.

³ DEL. CODE ANN. tit. 16, § 4763(a)(1)(d).

VOP sentencing order is not permissible pursuant to § 4204(1).⁴ For that reason, the State requests that this matter be remanded to the Superior Court for the limited purpose of reducing the probationary term to 6 months in accordance with the statutory requirement. We agree that this matter should be remanded for that limited purpose. In all other respects, the Superior Court's judgment will be affirmed.

NOW, THEREFORE, IT IS ORDERED that this matter is hereby REMANDED to the Superior Court for the limited purpose of modifying the probationary portion of McNair's February 6, 2013 VOP sentencing order in accordance with this Order. In all other respects, the judgment of the Superior Court is AFFIRMED. Jurisdiction is not retained.

BY THE COURT:

/s/ Jack B. Jacobs
Justice

⁴ See *Larson v. State*, 1995 WL 236650 (Del. Apr. 13, 1995) (holding that, where the defendant has been sentenced to the statutory maximum sentence of imprisonment, the transitional probationary period under § 4204(1) may not exceed 6 months).