

*Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.*

**ENTRY ORDER**

SUPREME COURT DOCKET NO. 2001-054

JANUARY TERM, 2002

State of Vermont	}	APPEALED FROM:
	}	
v.	}	District Court of Vermont,
	}	
David Roy McGee	}	Unit No. 2, Chittenden Circuit
	}	
	}	
	}	DOCKET NO. 1031-3-97; 844-2-97
	}	2982/3/4/5-6/97; 3058-7-96; 4594-10-96
	}	Cncr
	}	
	}	Trial Judge: Michael S. Kupersmith

In the above-entitled cause, the Clerk will enter:

Defendant David McGee appeals from an order revoking his probation and imposing the underlying sentences in two of eight criminal charges to which he pled guilty. Citing State v. Draper, 167 Vt. 636 (1998) (mem.), McGee contends that the court's order impermissibly increased his sentence. We disagree and affirm.

On April 3, 1998, McGee pled guilty to eight criminal charges pending in Chittenden District Court. Pursuant to the plea agreement, sentences for five of the charges were concurrent but were suspended and McGee was placed on probation. The three remaining sentences were consecutive. <sup>(1)</sup> The agreement called for partial suspension of the consecutive sentences, with probation, such that McGee would serve four years on the consecutive sentences. The total effective sentence McGee received under the agreement was four to twenty-two years.

In December 1999, the State filed a probation violation complaint against McGee which alleged that he failed to comply with a probation condition requiring him to participate in sex offender counseling. That condition was imposed as a term of probation on each of the eight charges to which he pled guilty in April 1998. After a hearing on the merits of the State's complaint, the court found McGee in violation of his probation. At the sentencing hearing, the court revoked suspension and probation on two of the three consecutive sentences and imposed the underlying sentences, which were one to ten years on one charge and three to five years on the other. The order thus required McGee to serve four to fifteen years due to his probation violation. The court continued McGee on probation for the one remaining consecutive sentence and the five concurrent sentences. The court also modified McGee's probation conditions at the State's recommendation. McGee thereafter appealed

McGee's sole argument on appeal is that the court imposed a sentence greater than what was originally imposed pursuant to the 1998 plea agreement. He contends that the court severed one of his concurrent sentences but continued his probation on the other concurrent sentences in contravention of our holding in State v. Draper, 167 Vt. 636 (1998) (mem.). In Draper, we held that the district court was without authority to sever a concurrent sentence and continue a defendant on probation on that sentence while imposing the other underlying concurrent sentences after a finding that the defendant violated probation. Id. at 637. We explained that by doing so, the court modified the sentence outside the

time period provided by 13 V.S.A. 7042.

McGee claims Draper controls because one of the underlying sentences the court imposed, that is the sentence of three to five years, was concurrent not consecutive. Thus, he contends, the court impermissibly severed his concurrent sentences. Draper does not apply to the facts of this case, however. As the State points out, and as the record makes clear, the underlying sentence at issue was not to be served concurrently with the others, but was consecutive to them. There was no error continuing McGee on probation for all the concurrent sentences (as well as one of the consecutive sentences) but imposing the underlying sentences for the two remaining consecutive sentences because the court did not modify in any manner the sentences subject to the plea agreement - the concurrent sentences for which he is on probation will continue to be concurrent. We note that the court's order requires defendant to serve four to fifteen years on the two charges for which his probation was revoked. That time period is well within McGee's effective sentence of four to twenty-two years.

Affirmed.

BY THE COURT:

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Jeffrey L. Amestoy, Chief Justice

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James L. Morse, Associate Justice

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Denise R. Johnson, Associate Justice

1. McGee's brief asserts that only two of the eight sentences he received were consecutive. That assertion is key to his claim on appeal, but it is inaccurate as we later explain.