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## BACKGROUND

¶ 4 Previous to this case, the defendant had been convicted of two Class 4 felonies, both of which stemmed from unlawful possession of a controlled substance. He received probation in both cases, and in both cases, he failed to comply with the conditions of his probation.

¶ 5 In the present case, the defendant was charged with three counts of delivery of more than 1 gram but less than 15 grams of a substance containing cocaine, one count of unlawful possession of a controlled substance with intent to deliver, one count of unlawful delivery of more than 30 grams but less than 500 grams of cannabis, and one count of unlawful delivery of more than 10 grams but less than 30 grams of cannabis. The defendant was arrested on March 30, 2007, and was released on bond on May 22, 2007. Upon his arrest, the defendant stated that he was "pretty much the biggest drug dealer in the area." On July 16, 2009, the defendant entered an open plea of guilty to two counts of unlawful delivery of a substance containing cocaine. At his sentencing hearing on July 29, 2010, the defendant requested that he be sentenced to eight years' imprisonment so that he could participate in impact incarceration. The circuit court stated that impact incarceration could be problematic for the defendant as he had received two gunshot wounds in the past three years and impact incarceration involves heavy physical labor. The circuit court noted, however, that the decision to allow a defendant into impact incarceration was determined by the Department of Corrections. Impact incarceration is only applicable when the defendant has been sentenced to eight years' imprisonment or less. 730 ILCS 5/5-8-1.1(b)(4) (West 2008). The circuit court sentenced the defendant to nine years' imprisonment with credit for 53 days already served. The defendant was arrested again on August 22, 2007, for unlawful possession of a controlled substance. He posted bond the same day.

¶ 6

## ANALYSIS

¶ 7 The defendant argues that the circuit court did not carefully and reasonably consider mitigating factors when sentencing the defendant but instead focused on aggravating factors. Specifically, the defendant claims that the circuit court did not consider the fact that the defendant pled guilty, entered an open plea, and apologized for his actions. We start by noting that the circuit court has considerable discretion when imposing a sentence, and such decisions will not be overturned unless there has been an abuse of discretion. *People v. Wilson*, 143 Ill. 2d 236, 250-51 (1991). Indeed, the circuit court is in the best position to determine an appropriate sentence. *People v. Fern*, 189 Ill. 2d 48, 53 (1999). As the circuit court is in the best position to determine an appropriate sentence, a reviewing court may not substitute its own judgment for that of the circuit court. *Id.*

¶ 8 The defendant contends that his sentence was too long because he presented mitigating circumstances. When an imposed sentence is within the statutory range, the circuit court has not abused its discretion unless the sentence is manifestly disproportionate to the nature of the offense. *People v. Hauschild*, 226 Ill. 2d 63, 90 (2007). Further, "[e]ven where there is evidence in mitigation, the court is not obligated to impose the minimum sentence." *People v. Sims*, 403 Ill. App. 3d 9, 24 (2010) (citing *People v. Madura*, 257 Ill. App. 3d 735, 740-41 (1994)).

¶ 9 The statutory maximum for a Class 1 felony is 15 years' imprisonment. 730 ILCS 5/5-4.5-30(a) (West 2008). As the defendant in this case was sentenced to nine years' imprisonment, the sentence falls below the statutory maximum. The defendant had two previous felonies when he was convicted of the charges in the instant case. He also referred to himself as "pretty much the biggest drug dealer in the area." In light of that statement and his history of controlled substance-related felonies, the sentence was not disproportionate to the offense.

¶ 10 In addition, the defendant argues that the circuit court and the State were not in a position to argue that he could not handle the physical requirements of impact incarceration. However, though the circuit court expressed concern over the defendant's ability to participate in the rigors of impact incarceration, he stated that "the final decision about impact incarceration is up to the Department of Corrections." Therefore, the circuit court did not make any decision with respect to impact incarceration. Nor did the circuit judge need to make any decision as the decision is determined by the Department of Corrections and he sentenced the defendant to nine years' imprisonment, which exceeds the requirement for impact incarceration.

¶ 11 The defendant further asserts that the circuit court did not consider his rehabilitative potential. The defendant argues that, because he entered an open plea without agreement as to a sentence and because he apologized during sentencing, he has taken full responsibility for his actions, which shows his rehabilitative potential. A defendant's rehabilitative potential is only one of several factors a circuit court considers when imposing a sentence. *People v. Goodwin*, 208 Ill. App. 3d 829, 831 (1991). The circuit court also considers the defendant's history, character, the seriousness of the offense, the need to protect society, and the need for deterrence and punishment. *Id.* The circuit court is in the best position to determine the candor of a defendant's statements of remorse. *People v. McGee*, 121 Ill. App. 3d 1086, 1090 (1984). Furthermore, a defendant's rehabilitative potential is not entitled to more weight than the seriousness of the offense. *People v. Donath*, 357 Ill. App. 3d 57, 72 (2005).

¶ 12 Though the defendant's apology may have been sincere, the circuit court was in the best position to determine how to sentence the defendant, in light of the apology and the above-listed factors. As for the defendant's rehabilitative potential, the defendant was given probation for his two previous drug-related felonies and he violated the terms of his

probation in both cases. Moreover, the defendant was arrested for unlawful possession of a controlled substance even after he was arrested in the present case. The defendant has had several opportunities to rehabilitate and has not chosen to take advantage of those opportunities.

¶ 13 Under these facts and established law, the circuit court did not abuse its discretion when it sentenced the defendant to nine years' imprisonment. The defendant's sentence of nine years is affirmed.

¶ 14 Next, the defendant argues that he should receive 55 days of credit for time served rather than 53 days. The State concedes this issue.

¶ 15 The issue of sentence credit is mandatory and can be raised for the first time on appeal. *People v. Cook*, 392 Ill. App. 3d 147, 149 (2009). A defendant is entitled to credit for each day spent in pretrial custody, including any portion of a day spent in custody. 730 ILCS 5/5-4.5-100(b) (West 2008). A defendant held in custody for any part of the day is given credit against his sentence for that day. *People v. Johnson*, 396 Ill. App. 3d 1028, 1033 (2009).

¶ 16 The defendant was arrested on March 30, 2007, and was released on bond on May 22, 2007. At that point, the defendant was entitled to 54 days of credit for time served. The presentence investigation report incorrectly stated that the defendant was again arrested on August 22, 2009, when really, the defendant was again arrested on August 22, 2007. The defendant posted bond on the same day. He is therefore entitled to an additional day of credit, totaling 55 days.

¶ 17 **CONCLUSION**

¶ 18 For the foregoing reasons, the judgment of the circuit court of Jackson County is affirmed as modified.

¶ 19 Affirmed as modified.