

In exchange for his pleas, the State agreed to recommend that the defendant be sentenced to 15 years' imprisonment for aggravated robbery, a concurrent 364-day sentence for resisting a correctional institution employee, and a consecutive sentence of 4 years in prison for aggravated battery. The State also agreed to dismiss various felony charges against the defendant and declined to prosecute misdemeanor charges against him in another case. The defendant waived his right to a presentence investigation report. The prosecutor informed the court that the defendant had prior convictions for residential burglary, " 'a regular burglary, and four misdemeanors,' " but did not state what sentences had been imposed for the convictions.

¶ 5 When admonishing the defendant pursuant to Supreme Court Rule 402(a) (eff. July 1, 1997), the circuit court advised him that the sentence range for aggravated robbery was from 4 to 15 years' imprisonment, but that because of his criminal history he could be sentenced to a maximum of 30 years' imprisonment. The court also advised the defendant that any prison sentence would be followed by two years' MSR. The judge then accepted the plea and sentenced the defendant in accordance with the terms of the negotiated pleas of guilty.

¶ 6 The defendant filed through counsel a motion to withdraw his pleas of guilty. Following the appointment of new counsel, an amended motion to withdraw his pleas was filed. Both the original and the amended motion asserted that the defendant's pleas of guilty were involuntary because they had been induced by the defendant's fear of his jailors. Following a hearing, the court denied the defendant's motion.

¶ 7 On appeal, this court vacated the defendant's sentence because the circuit court failed to review the defendant's criminal history, as required by section 5-3-1 of the Unified Code of Corrections (Code) (730 ILCS 5/5-3-1 (West 2006)). We remanded to the circuit court for a new sentencing hearing. *People v. Phelps*, No. 5-07-0585 (Sept. 25, 2009)

(unpublished order under Supreme Court Rule 23 (eff. May 30, 2008)).

¶ 8 On remand, the circuit court sentenced the defendant to the same terms, except that the court stated that the defendant's MSR term for the aggravated robbery conviction would be for three years. The defendant filed a motion to withdraw his guilty pleas. The court denied the motion. This appeal followed.

¶ 9 ANALYSIS

¶ 10 We review the circuit court's denial of a motion to withdraw a guilty plea by an abuse of discretion standard. *People v. Turley*, 174 Ill. App. 3d 621, 625 (1988). We review the issue of an improper sentence *de novo*. *People v. Smith*, 345 Ill. App. 3d 179, 189 (2004).

¶ 11 On appeal, the defendant argues that at the time of his guilty plea, the circuit court failed to admonish him that, as a result of his criminal history, he was subject to mandatory Class X sentencing for the Class 1 felony offense of aggravated robbery. The defendant notes that not only is the minimum sentence for a Class X offense higher than the minimum extended-term sentence for a Class 1 felony offense (730 ILCS 5/5-8-1(a)(3), 5-8-2(a)(3) (West 2006)), a Class X sentence requires a three-year period of MSR, whereas a Class 1 felony sentence only requires two years of MSR (730 ILCS 5/5-8-1(d)(1), (d)(2) (West 2006)). Citing *People v. Whitfield*, 217 Ill. 2d 177 (2005), the defendant contends that as a result of the trial court's incorrect admonitions his cumulative sentence of 19 years' imprisonment must be reduced to 18 years. The State agrees that the defendant was required to be sentenced as a Class X offender and that the circuit court's admonitions were improper. The State accepts the defendant's proposed resolution, but contends that it would be more appropriate to reduce the defendant's sentence for aggravated robbery to 14 years' imprisonment plus 3 years' MSR.

¶ 12 Supreme Court Rule 402(a)(2) requires that, prior to accepting a plea of guilty, a circuit court must admonish the defendant of "the minimum and maximum sentence

prescribed by law, including, when applicable, the penalty to which the defendant may be subjected because of prior convictions." Ill. S. Ct. R. 402(a)(2) (eff. July 1, 1997). Compliance with Rule 402(a)(2) also requires that the defendant be admonished that the MSR period pertaining to the offense is part of the sentence that will be imposed. *Whitfield*, 217 Ill. 2d at 188. Where a defendant pleads guilty in exchange for a specific sentence and the circuit court fails to advise him that an MSR term will attach to his sentence, due process is violated because the addition of the MSR term to the agreed-upon sentence results in a sentence more onerous than the one the defendant agreed to at the time of the plea. *Id.* at 195. In such cases there are two possible solutions: the defendant may withdraw his guilty plea or the promise must be fulfilled. *Id.* at 202 (citing *Santobello v. New York*, 404 U.S. 257, 262-63 (1971)). Here, the defendant asks that the promise be fulfilled.

¶ 13 Initially, we note that the record supports the defendant's assertion that he was required to be sentenced as a Class X offender. The relevant statute states:

"When a defendant, over the age of 21 years, is convicted of a Class 1 or Class 2 felony, after having twice been convicted in any state or federal court of an offense that contains the same elements as an offense now classified *** shall be sentenced as a Class X offender." 730 ILCS 5/5-5-3(c)(8) (West 2006).

This provision has been interpreted as mandatory, and sentencing courts do not have any discretion when applying it to a sentence. *People v. Fields*, 383 Ill. App. 3d 920, 923 (2008). The defendant was 25 years old at the time of his conviction, thereby meeting the age requirement of section 5-5-3(c)(8) of the Code. He had two previous felonies, a Class 1 felony and a Class 2 felony. As per section 5-5-3(c)(8), the defendant should have been sentenced as a Class X offender.

¶ 14 At the initial sentencing hearing when the defendant agreed to plead guilty in exchange for a specified sentence, the circuit court failed to admonish him that Class X

sentencing was required and erroneously admonished him that he would have two years' MSR, which was not in accord with the statutory mandate of three years' MSR for a Class X offender. When resentencing the defendant on remand, the court did not readmonish the defendant pursuant to Rule 402(a)(2). The court imposed the same prison sentences as before, and although the court stated that "[a]ttached to the end of that [sentence] is a three-year period of mandatory supervised release as previously imposed by this court," the written judgment and sentence order entered after resentencing indicates an MSR term of two years. Under these circumstances, we agree that the circuit court did not substantially comply with Rule 402(a)(2).

¶ 15 The defendant concedes that three years' MSR is mandatory per section 5-5-3(c)(8). Arguing that "an 'equitable solution' would be to modify the sentence to one which defendant proposed and which would approximate the penal consequences contemplated by the original plea agreement" (*Whitfield*, 217 Ill. 2d at 205), the defendant requests that his original plea agreement be enforced, and that, as per *Whitfield*, his overall sentence be reduced from 19 years' imprisonment to 18 years' imprisonment. As noted above, the State agrees with the defendant's proposed solution, but argues that it would be more appropriate to reduce the sentence for aggravated robbery from 15 to 14 years' imprisonment to give the defendant what he bargained for when he originally pled guilty. We agree. Pursuant to Supreme Court Rule 615(b) (eff. Aug. 27, 1999) we modify the circuit court's judgment and reduce the defendant's sentence for aggravated robbery to 14 years' imprisonment, to be served consecutive to his 4-year prison sentence for aggravated battery, with the aggregate 18-year prison term to be followed by a 3-year term of MSR.

¶ 16 The defendant next contends, and the State concedes, that he should be given 1,438 days of sentence credit rather than 935 days. This court has the authority to correct a mittimus. *People v. Hernandez*, 345 Ill. App. 3d 163, 171 (2004). 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 5/5-8-7(b) (West 2006). The defendant was in pretrial incarceration from February 6, 2006, until June 20, 2006, totaling 135 days' incarceration. Between his sentencing and resentencing, he was incarcerated from June 21, 2006, to January 14, 2010, totaling 1,303 days' incarceration. Adding those two numbers together equals 1,438 days' incarceration, and the defendant should receive credit for those days. Consequently, we modify the circuit court's judgment to reflect a presentence incarceration credit of 1,438 days.

¶ 17

CONCLUSION

¶ 18 For the foregoing reasons, we modify the judgment of the circuit court of Williamson County and reduce the defendant's sentence for aggravated robbery to 14 years' imprisonment, to be served consecutive to his 4-year sentence for aggravated battery, with the aggregate 18-year prison term to be followed by a 3-year term of MSR, and we amend the mittimus to reflect a presentence incarceration credit of 1,438 days.

¶ 19 Affirmed as modified.