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IN THE
COURT OF APPEALS OF INDIANA

TAMMY BERRY,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0801-CR-39
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Heather A. Welch, Judge
Cause No. 49F09-0705-FD-81369

August 27, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Appellant-Defendant Tammy Berry appeals the trial court's restitution order. We affirm in part, reverse in part, and remand with instructions.

Issues

Berry raises two issues on appeal:

I. Whether the trial court erred in ordering restitution for property damage as a condition of probation on Berry's conviction for Failure to Stop After an Accident Resulting in Serious Bodily Injury, a Class D felony;[1] and

II. If the restitution order was proper, whether the trial court erred by failing to determine her ability to pay.

Facts and Procedural History

On May 7, 2007, Berry was involved in an accident that resulted in serious bodily injury to Indianapolis Metropolitan Police Officer Chad Dixon who was on motorcycle patrol. Berry left the scene of the accident. Subsequent to being charged, Berry pled guilty, pursuant to a plea agreement, to Failure to Stop After Accident Resulting in Serious Bodily Injury, a Class D felony. The trial court accepted the plea agreement and sentenced Berry accordingly. Because a term of the plea agreement was that Berry's probation would "terminate when restitution is repaid," the trial court held a separate hearing to determine the amount of restitution. Appendix at 26. Based on the evidence of property damage submitted by the State, the trial court ordered Berry to pay $1304.96 in restitution for the replacement of portions of Officer Dixon's uniform. This appeal ensued.

Discussion and Decision

Berry contests the trial court's restitution order arguing that the order was based on property damage that was not incurred by the victim as a result of the crime, which involved serious bodily injury. We review a trial court's restitution order for an abuse of discretion. Blixt v. State, 872 N.E.2d 149, 153 (Ind. Ct. App. 2007). An abuse of discretion occurs if no evidence or reasonable inferences therefrom support the trial court's decision. Little v. State, 839 N.E.2d 807, 809 (Ind. Ct. App. 2005).

Indiana Code Section 35-50-5-3 provides a court with the discretionary power to order a defendant to make restitution to the victim of the crime, the victim's estate, or the family of a victim who is deceased. The considerations upon which the trial court must base its restitution order require that the damage, loss, or cost incurred must be a result of the crime. I.C. 35-50-5-3(a)(1). Generally, restitution will be limited to those crimes for which a defendant is found guilty or to which he pled guilty. Polen v. State, 578 N.E.2d 755, 756 (Ind. Ct. App. 1991), trans. denied.

Here, Berry admitted to her criminal conduct of leaving the scene of a traffic accident that resulted in serious bodily injury. Being the driver at fault or who caused the accident is not an element of the crime of Failing to Stop and Remain at Scene of Accident Resulting in Injury or Death. Thus, the injuries and damage resulting from an accident arise from the negligence of one or all of the drivers, not the action of one of the drivers subsequently leaving the scene. The record does not indicate that Berry admitted fault for the accident.[2]

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[1] Ind. Code § 9-26-1-8(a)(1).

[2] Defense counsel at the restitution hearing stated that in fact "the fault is actually kind of hotly contested in this case." Tr. at 29.

Without more, Officer Dixon is an accident victim and not a victim of Berry's crime as contemplated by Indiana Code Section 35-50-5-3. See Utley v. State, 699 N.E.2d 723, 729 (Ind. Ct. App. 1998) (held restitution was improper where defendant was only convicted of failing to stop at the scene of the accident because the accident victim's funeral, burial or cremation costs were not a direct and immediate result of defendant's failure to stop), trans. denied; compare J.P.B. v. State, 705 N.E.2d 1075, 1077 (Ind. Ct. App. 1999) (where defendant who pled guilty to failing to stop after an accident admitted to striking victim's vehicle and evidence of loss suffered as a direct and immediate result was presented, the trial court did not abuse its discretion in ordering the defendant to pay restitution).

Here, there is more. Berry agreed to pay restitution in her plea agreement. In fact, at her guilty plea hearing Berry confirmed her understanding that she would pay restitution as a condition of her probation.[3] Absent an agreement by the defendant, a trial court may not order restitution in an amount greater than the sums involved in those crimes to which the defendant pled guilty. Polen, 578 N.E.2d at 756. Conversely, a trial court may order restitution where a defendant has agreed to pay restitution.

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[3] The Court: So you're going to have to pay restitution to Mr. Dixon and the City of Indianapolis. And so we'll, here in a few minutes, set a time period . . . to submit that information . . . .

The Court: . . . . So you will have to pay restitution, we just don't know the amount. If you successfully complete your Probation, then it will be a Class A Misdemeanor. And once you've paid your restitution, your – your Probation is going to terminate. Do you understand the recommendation in your case?

Berry: Yes, ma'am.
Tr. 8-9.

Berry contends that the restitution order should only be based on Officer Dixon's expenses resulting from his physical injuries because she pled guilty to failure to stop after an accident involving serious bodily injury. We disagree. First, we do not believe that restitution to make a victim whole where a defendant has agreed to do so should depend on whether the State chooses to charge the defendant with an elevated version of a crime rather than bringing numerous levels of the same crime. Furthermore, there was no limitation in the plea agreement that the restitution was only for those costs flowing from Officer Dixon's physical injuries. We conclude that the trial court did not abuse its discretion by ordering restitution for property damage resulting from the vehicle accident.

As for the second issue, the State concedes that the trial court erred by failing to inquire as to Berry's ability to pay. See Ind. Code § 35-38-2-2.3(a)(5) ("When restitution or reparation is a condition of probation, the court shall fix the amount, which may not exceed an amount the person can or will be able to pay, and shall fix the manner of performance."); Walsman v. State, 855 N.E.2d 645, 654 (Ind. Ct. App. 2006) (A trial court imposing restitution as a condition of probation must determine the defendant's ability to pay the amount of restitution ordered.), reh'g denied. We therefore remand with instructions that the trial court determine Berry's ability to pay.

Affirmed in part, reversed in part, and remanded with instructions.

FRIEDLANDER, J., concurs.

KIRSCH, J., dissents without opinion.