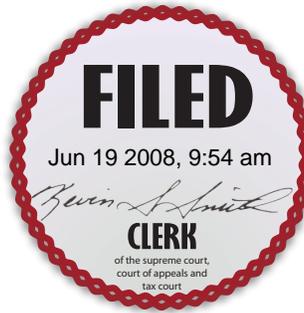


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

CASEY DYER,)
)
Appellant-Defendant,)
)
vs.)
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

No. 27A02-0802-CR-132

APPEAL FROM THE GRANT SUPERIOR COURT NO. 2
The Honorable Randall L. Johnson, Judge
Cause No. 27D02-0607-FC-130

June 19, 2008

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, Casey Dyer (Dyer), appeals the trial court's restitution order following Dyer's convictions for two counts of burglary, as a Class C felony, Ind. Code § 35-43-2-1.

We reverse and remand with instructions.

ISSUE

Dyer raises a single issue on appeal: Whether the trial court erred in ordering him to pay restitution as a condition of probation without inquiring into his ability to pay or fixing the manner of performance, as required by Indiana Code § 35-38-2-2.3(a)(5).

FACTS AND PROCEDURAL HISTORY¹

In the early morning hours of June 18, 2006, Dyer and three others burgled the Natural Gifts and Healing store in Marion, Indiana. The store's owners, John and Donna Powell (collectively, the Powells), reported "Losses Due to Burglary" of \$70,964.00. (Appellant's App. p. 26). On or about June 23, 2006, Dyer broke into the Two the Soul tattoo parlor in Marion and took tattoo and piercing equipment.

¹ We notice that Dyer's counsel has reproduced the entire transcript from this case in the Appellant's Appendix. However, he then cites to only five pages of that seventy-nine-page portion of the appendix in his brief. We direct counsel to Indiana Appellate Rule 50, which states that the appellant's appendix shall contain, among other things: "(d) the *portion* of the Transcript that contains the rationale of decision and any colloquy related thereto, if and to the extent the brief challenges any oral ruling or statement of decision"; "(g) any other *short excerpts* from the Record on Appeal, in chronological order, such as essential portions of a contract, pertinent pictures, or *brief portions of the Transcript*, that are important to a consideration of the issues raised on appeal"; and "(h) any record material relied on in the brief *unless the material is already included in the transcript*." (Emphases added). As this rule recognizes, the inclusion of the entire transcript in the appellant's appendix will rarely be necessary. This is not one of those rare cases.

On July 21, 2006, the State filed an Information charging Dyer with Count I, burglary, as a Class C felony, I.C. § 35-43-2-1, and Count II, theft, as a Class D felony, I.C. § 35-43-2-1, based on the incident involving the Natural Gifts & Healing store. On October 3, 2006, the State added Count III, burglary, as a Class C felony, I.C. § 35-43-2-1, based on the incident involving the Two the Soul shop.

On September 24, 2007, Dyer entered into a plea agreement with the State by which Dyer agreed to plead guilty to Counts I and III and the State agreed to drop Count II. The parties further agreed that Dyer would be sentenced to six years, with two years executed and four years suspended to probation, for each burglary, with the sentences to be served concurrently. Finally, the parties agreed to “Restitution as determined by Probation as a condition of probation.” (Appellant’s App. p. 56).

On October 29, 2007, the trial court held a sentencing hearing. The trial court sentenced Dyer in accordance with the plea agreement and ordered him to pay \$17,741.00 in restitution to the Powells, one-fourth of their claimed loss of \$70,964.00. The probation department’s “Ordering [sic] Imposing Conditions of Probation” included Dyer’s restitution obligation. (Appellant’s App. p. 52).

Dyer now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

Before we address the merits of the appeal, we note that Dyer’s attorney included a copy of the presentence investigation report on white paper in the Appellant’s Appendix. In *Hamed v. State*, 852 N.E.2d 619, 621 (Ind. Ct. App. 2006), we explained:

Ind. Appellate Rule 9(J) requires that “[d]ocuments and information excluded from public access pursuant to Ind. Administrative Rule 9(G)(1) shall be filed in accordance with Trial Rule 5(G).” Ind. Administrative Rule 9(G)(1)(b)(viii) states that “[a]ll pre-sentence reports pursuant to Ind. Code § 35-38-1-13” are “excluded from public access” and “confidential.” The inclusion of the presentence investigation report printed on white paper in his appellant’s appendix is inconsistent with Trial Rule 5(G), which states, in pertinent part:

Every document filed in a case shall separately identify information excluded from public access pursuant to Admin. R. 9(G)(1) as follows:

(1) Whole documents that are excluded from public access pursuant to Administrative Rule 9(G)(1) shall be tendered on light green paper or have a light green coversheet attached to the document, marked “Not for Public Access” or “Confidential.”

(2) When only a portion of a document contains information excluded from public access pursuant to Administrative Rule 9(G)(1), said information shall be omitted [or redacted] from the filed document and set forth on a separate accompanying document on light green paper conspicuously marked “Not For Public Access” or “Confidential” and clearly designating [or identifying] the caption and number of the case and the document and location within the document to which the redacted material pertains.

We ask that counsel follow this procedure in the future.

Turning to the merits, Dyer argues that the trial court violated Indiana Code § 35-38-2-2.3(a)(5) by ordering him to pay restitution as a condition of probation without inquiring into his ability to pay or fixing the manner of performance. The State correctly concedes this point. Indiana Code § 35-38-2-2.3(a)(5) provides that “[w]hen 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.” Here, the trial

court neither determined Dyer's ability to pay nor fixed the manner of performance. As such, we must remand this cause so that the trial court may do so.

CONCLUSION

Based on the foregoing, we conclude that the trial court erred by ordering Dyer to pay restitution as a condition of probation without inquiring into his ability to pay or fixing the manner of performance. We remand this cause so that the trial court may do so.

Reversed and remanded with instructions.

BAKER, C.J., and ROBB, J., concur.