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**IN THE
COURT OF APPEALS OF INDIANA**

STATE OF INDIANA,)
)
 Appellant-Plaintiff,)
)
 vs.) No. 71A05-0605-CR-270
)
 LEE ANN ORTIZ a.k.a. SAVANNAH ORTIZ,)
)
 Appellee-Defendant.)

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable William H. Albright, Judge
Cause No. 71D01-0410-FD-1019

November 17, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

The State appeals from the trial court's order sentencing Lee Ann Ortiz after she pleaded guilty to one count of Theft, as a Class D felony. The State presents a single issue for review, namely, whether the trial court abused its discretion when it did not order restitution.

We reverse and remand.

FACTS AND PROCEDURAL HISTORY

On October 12, 2004, the State charged Ortiz with four counts of theft, as Class D felonies, alleging that she engaged in an illegal ticket-selling scheme on eBay. On March 29, 2006, the parties filed a plea agreement regarding the theft charges and a charge filed under a separate information. That agreement provided, in relevant part:

1. That the Defendant, Savannah Ortiz,^[1] will be permitted to withdraw her former plea of NOT GUILTY and enter a plea of GUILTY to the Charge of the Information under [71D01-0601-FD-00065], Resisting Law Enforcement, a Class D Felony under [Indiana Code Section] 35-44-3-3 and Count I of the Information under [71D01-0410-FD-01019], Theft, a Class D Felony under [Indiana Code Section] 35-43-4-2.
2. That the Defendant shall pay restitution on all counts under [71D01-0410-FD-01019].
3. That the State agrees to a cap of two (2) years on any executed time in each cause and will make no further sentencing recommendation.

Appellant's App. at 16. As a result of the plea agreement, the State dismissed the remaining three theft counts.

¹ The record includes a Mishawaka Police Department Supplemental Case Report, which states that Lee Ann Ortiz is also known as Savannah Ortiz.

The trial court held a sentencing hearing on April 21, 2006. At the hearing, the State presented no evidence of the amount to be paid as restitution to Ortiz's victims. The trial court sentenced Ortiz to two years for theft, as a Class D felony, non-suspended, to be served as two years in the home detention program through the Ducomb Center. The State filed a motion to reconsider sentence, alleging that the trial court should have also included a restitution order. The trial court denied that motion. The State then filed its motion to correct error, again requesting that the trial court include an order of restitution in the sentencing order. The trial court denied that motion, and this appeal ensued.

DISCUSSION AND DECISION

The State contends that the trial court "erred in its ruling that it had no authority to enter the restitution order after final judgment had been entered." Appellant's Brief at 3. The State's assertion is based on the premise that the trial court is bound by the terms of a plea agreement that it has accepted. We must agree.

The concept of plea bargaining contemplates an explicit agreement between the State and defendant, which is binding upon both parties when accepted by the trial court. Schippers v. State, 622 N.E.2d 993, 994 (Ind. Ct. App. 1993). Once the trial court accepts a plea agreement, it also becomes bound by the terms of that agreement. Rivera v. State, 851 N.E.2d 299, 301 (Ind. 2006). To allow the trial court either to increase or suspend an executed sentence, for example, would deny the parties the essential purpose of their agreement. See Schippers, 622 N.E.2d at 994. It is to the interest of both the

defendant and the public to facilitate expeditious disposition of criminal cases. Id. Strict adherence to the agreement is essential to this purpose. Id.

The State argues that the trial court was bound to order restitution because such an order was incorporated in the written plea agreement accepted by the trial court. A trial court may only order a defendant to make restitution for actual expenses incurred by the victim before the date of sentencing. Mitchell v. State, 730 N.E.2d 197, 200 (Ind. Ct. App. 2000), trans. denied. The amount of actual loss is a factual matter that can be determined only upon the presentation of evidence. Id.

Here, the trial court stated that it did not order restitution because the State failed to present any evidence at the sentencing hearing of the losses sustained by Ortiz's victims. The record supports that statement, but it also shows that the trial court's decision not to order restitution was based at least in part on its frustration with the prosecutor's office. According to the trial court's statements at the sentencing hearing, the prosecutor has a history of appearing unprepared in court. The same held true at Ortiz's sentencing hearing, where the prosecutor's only contribution in response to a request for evidence of the victims' losses was as follows:

Prosecutor: You Honor, the State doesn't have a file on this case this morning.

Court: All right.

Prosecutor: So no, I don't have any numbers.

Transcript at 15. The prosecutor did not argue at the sentencing hearing that the trial court should have ordered restitution. Indeed, the prosecutor made no additional statements at all at the hearing.

The record shows that the prosecutor's office was repeatedly unprepared for court. While the trial court's stated reason for declining to order restitution was based on a legitimate rule of law, which requires that the prosecutor present evidence of the amount of losses to be repaid, the decision also appears to have been based, in part, on the trial court's understandable frustration with the prosecutor's repeated lack of preparation for trial. Although we disapprove of such conduct by the prosecutor, we conclude that the trial court's remedy here, namely, not to order restitution as provided in the plea agreement, was not a permissible option. Instead, the trial court could have issued a rule to show cause why the prosecutor should not be held in contempt for failing to introduce evidence on the restitution issue, see, e.g., Ind. Code §§ 34-47-3-2 and -5, or it could have allowed Ortiz to withdraw her guilty plea, see, e.g., Spalding v. State, 165 Ind. App. 64, 330 N.E.2d 774, 776 (1975) (quoting Santobello v. New York, 404 U.S. 257, 263 (1971) (holding that remedies for breach of a plea agreement include specific performance of the agreement or the opportunity to withdraw the same)). Either of those options would provide sanctions for the failure to fulfill prosecutorial duties without running afoul of the trial court's obligation to adhere to the terms of the plea agreement.

For the reasons stated above, we are obliged to conclude that the trial court erred when it declined to order restitution contrary to the plea agreement. Therefore, we reverse the trial court's sentencing order and remand the case to the trial court with

instructions to hold a new sentencing hearing, at which the State must present evidence of the victims' losses to support a restitution order. The State's failure to present such evidence should be deemed a repudiation of the plea agreement. In that event, the trial court may either initiate contempt proceedings against the State, see Ind. Code §§ 34-47-3-2 and -5, or allow Ortiz to withdraw her guilty plea, see Spalding, 330 N.E.2d at 776, Santobello, 404 U.S. at 263.²

Reversed and remanded with instructions.

BAKER, J., and DARDEN, J., concur.

² Normally, the result of one party's failure to fulfill its obligation under a plea agreement would be more favorable to the breaching party. We note the awkward posture of this case in that the State's failure to present evidence of the victims' losses resulted in a judgment more favorable to Ortiz than if the State had met its evidentiary burden and the trial court had ordered restitution. Through its oath of office and as an officer of the court, the prosecutor is required to perform its official duties in accordance with the statutes setting out its express powers and the Indiana Rules of Professional Conduct.