IN THE
MISSOURI SUPREME COURT

TERRY J. WOODS,	)	
Appellant,	)	
vs.	)	No. SC 87028
STATE OF MISSOURI,	)	
Respondent.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF ST. LOUIS COUNTY, MISSOURI
TWENTY-FIRST JUDICIAL CIRCUIT, DIVISION 11
THE HONORABLE EMMETT O'BRIEN, JUDGE

APPELLANT'S SUBSTITUTE REPLY BRIEF

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JURISDICTIONAL STATEMENT

Appellant adopts the Jurisdictional Statement and the Statement of Facts in his original brief.

POINT RELIED ON

I.

The motion court was clearly erroneous by not vacating appellant's felony stealing conviction because there was no factual basis established to accept appellant's guilty plea to felony stealing pursuant to Section 570.040, i n that appellant was not found guilty or did not plead guilty to two prior stealing offenses on separate occasions, as required by the statute. (Response to Respondent's Point I, subparts B and C).

State v. Stewart, 832 S.W.2d 911 (Mo. banc 1992);

Fainter v. State, No. WD 65201, ____S.W.3d____ (Mo. App. W.D. 2005);

§§ 558.016, 558.021, 570.030, and 570.040; and

Rule 24.035.

ARGUMENT

The motion court was clearly erroneous by not vacating appellant's felony stealing conviction because there was no factual basis established to accept appellant's guilty plea to felony stealing pursuant to Section 570.040, in that appellant was not found guilty or did not plead guilty to two prior stealing offenses on separate occasions, as required by the statute. (Response to Respondent's Point I, subparts B and C).

Appellant was convicted for stealing a small amount of clothing of low monetary value (L.F. 43), which normally would have been only a misdemeanor offense. However since appellant had entered a plea of guilty *on one occasion* to two offenses of stealing, the state charged and prosecuted him for felony stealing under Section 570.040 (L.F. 4-5). Ultimately, appellant entered a plea of guilty for felony stealing, and was sentenced to four years in the Department of Corrections (L.F. 7-9).

While the offenses used as the predicate to support the felony stealing under 570.040 occurred on different occasions, the guilty pleas or findings of guilt occurred on one occasion. And that brings us to the heart of the issue in this case: Was appellant properly charged and convicted of felony stealing under Section 570.040? Clearly, he was not. The language of 570.040, which elevates what is normally a misdemeanor stealing offense to the much more serious felony stealing, requires, by its clear terms, that the pleas or findings of guilt occur on separate occasions, and not, as Respondent asserts, that only the offenses occurred on separate occasions:

> *Every person who has previously pled guilty or been found guilty on two separate occasions of stealing,* and who subsequently pleads guilty or is found guilty of stealing is guilty of a class C felony and shall be punished accordingly. *[emphasis added]*.

Section 570.040.1, RSMo 2000.[1] Despite the very clear language of the statute, respondent says appellant's interpretation of the statute "defies common sense" (Resp. Br. At 13). What interpretation? Appellant is only looking at the clear and unambiguous language of the statute. What is far from clear is respondent's explanation of how the statutory amendments under 570.040 don't actually mean what they say.[2]

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[1] This was a statute in effect at the time of appellant's offense and controls the current matter. It has since been amended to include additional restrictions on the prior stealing offenses in regard to time from the prior offenses to the current offense, jail time on the prior offenses, although the pleas or findings of guilt still must have occurred on separate occasions.

[2] "The 1995 amended statute reads 'every person who has previously pled guilty or been found guilty on two separate occasions of stealing, and who subsequently pleads guilty or is found guilty of stealing' is guilty of a class C felony and shall be punished accordingly. [Section 570.040, RSMo 2000]. By placing the words 'pled or been found guilty' in two places, the 1995 amendment actually broadened the range for when an enhancement is proper." (Resp. Br. At 11). In point of fact, the language of the

All three canons of statutory construction[3] cited in appellant's opening substitute brief compel but one conclusion: The prior pleas or findings of guilt must have taken place on separate occasions. The language of the statute is clear, and that appellant was not properly convicted is a conclusion mandated by the language of the statute under which he was charged.

Not only does respondent accuse appellant of an interpretation of the statute that "defies common sense," but also one that "completely circumvents the purpose of the statute." Really? It seems pretty clear what the purpose of the statute is: To elevate what is normally a minor offense to a very serious one, only for someone who has been through the system on repeated occasions. Such a person will have been through the gravity of the legal system twice, yet would continue, despite those experiences and

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statute does not broaden, but rather restricts the enhancement to class C felony, as a person must have previously pled guilty or been found guilty on two separate occasions of stealing. The two separate occasions referred to in the statute clearly modifies the pleas or findings of guilt, not the occurrences of the offense.

[3] The canons applicable as discussed in appellant's opening substitute brief are: 1) the legislature is not presumed to have intended a useless act when it changes the language of a statute; 2) the plain language of a statute should be utilized to ascertain legislative intent; and 3) recidivist statutes, which are highly penal in nature, must be strictly construed against the state and liberally in favor of the defendant. See, *e.g.*, appellant's opening substitute brief at pages 19-21.

frankly chances to change, to not change. Under these circumstances, it hardly defies "common sense" to conclude the General Assembly may want this to be the reason to elevate a petty theft to a serious crime that will subject the offender to penitentiary time.

Further, the General Assembly most certainly knows the difference with the language it used in 570.040.1, requiring the prior pleas or findings of guilt to be on separate occasions, as opposed to the offenses themselves occurring on separate occasions. One need look no further than Section 558.016 to uncover this. Subsection (3) of that statute defines a "persistent offender" as "one who has pleaded guilty to or has been found guilty of two or more felonies committed at different times." Note that unlike 570.040.1, it says nothing about those prior pleas or findings of guilt occurring on "separate occasions." Section 558.016.5 defines a "persistent misdemeanor offender" as "one who has pleaded guilty to or has been found guilty of two or more class A or B misdemeanors, committed at different times [under certain chapters]." Again, unlike 570.040.1, no mention is made that those prior pleas or findings of guilt must occur on separate occasions.

If the General Assembly intended the result respondent urges, they could have simply defined the crime under 570.040.1, something along the lines they used in defining the persistent offenders noted above, so as to read "every person who has pled guilty or been found guilty of two or more stealing offenses committed at different times, and who subsequently pleads guilty or is found guilty of stealing is guilty of a class C felony and shall be punished accordingly." This would compel the result respondent argues for in his brief. But that's not the language they used, and the

language utilized compels only one conclusion, that urged by appellant, which is neither illogical, nor one that "defies common sense."

The General Assembly and courts must live by the clear language used in the statute, whether it is the actual intent of the General Assembly or not. See, *State v. Stewart*, 832 S.W.2d 911, 913 (Mo. banc 1992). However, considering the differences in the language defining persistent felony and misdemeanor offenders in Section 558.016, compared with the language in Section 570.040.1, as well as the prior language of 570.040 which only required two prior stealing convictions without regard to when the person pled or was found guilty of those convictions, it is unmistakenably clear that the General Assembly intended for the pleas or findings of guilt to have occurred on separate occasions, the very language it used in the statute.

Finally, in responding to respondent's argument that appellant waived this issue, appellant has a right to correct judgment and sentence under Rule 24.035, and appellant has properly raised this issue. Respondent claims appellant waived this issue under Section 558.021. Presumably, respondent is referring to subsection (5), whereby "[t]he defendant may waive proof of the facts alleged." However, appellant is not challenging just the facts of those two prior offenses charged by the state, but rather the *factual basis* for the plea to justify the appellant's judgment and sentence. As appellant was not properly charged nor subject to the statute for felony stealing under which he was prosecuted and sentence, 570.040, his conviction must fall.

In fact, the Western District Court of Appeals was very recently confronted with a similar situation. In *Fainter v. State*, No. WD 65201, ____S.W.3d____ (Mo. App.

W.D. 2005), the defendant entered a plea of guilty to felony stealing of a motor vehicle, specifically a riding lawnmower. He wasn't held to have "waived" whether the vehicle was a motor vehicle within the meaning of a chapter 570 violation by pleading guilty to the crime and admitting he stole a motor vehicle. In fact, like appellant here, Mr. Fainter brought a 24.035 action seeking to vacate judgment and sentence since, he argued, he didn't steal a motor vehicle so as to be subject to felony prosecution, but rather, stole something with a monetary value making him eligible for only misdemeanor stealing, and therefore there was no factual basis for the judge to accept his guilty plea to felony stealing of a motor vehicle. The Western District first found that a riding lawnmower is not a "motor vehicle" for purposes of felony stealing under 570.030.3(3)(a), since its primary purpose is not to transport people or things, but rather to cut grass. *Fainter*, ____S.W.3d at ____, slip op. at page 3. The Court then found there was no factual basis to accept Mr. Fainter's guilty plea to felony stealing, and remanded for further proceedings.[4]

[4] While the Court got the analysis correct, appellant believes it got the remedy wrong. It remanded for an evidentiary hearing, but it should have remanded for further proceedings on the underlying criminal action, particularly to go forward with the charges on misdemeanor stealing. This wasn't a case where the motion court could have concluded, contrary to the appellate court's decision, that a riding mower was in fact a "motor vehicle" within the meaning of 570.030; that matter was decided and was law of the case. Nor was it a question of whether defendant was properly advised, even

This should be the result here as well. Appellant could not have been charged and convicted with felony stealing under 570.040. The predicate offenses the state relied on did not qualify for this prosecution under the clear language of the statute. There was no factual basis to accept the plea, nor sentence appellant to the penitentiary for the misdemeanor stealing offense which he committed. Therefore, this Court should remand to the trial court for appellant to be prosecuted for misdemeanor stealing.

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de hors the record, of the factual basis underpinning the charges; in fact there could be no factual basis since there was no felony charge.

CONCLUSION

Wherefore, for the foregoing reasons, as well as those asserted in appellant's opening substitute brief, appellant respectfully requests that this Court reverse and remand these proceedings to the trial court for further action on the appropriate underlying criminal matter, misdemeanor stealing.

Respectfully submitted,

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Certificate of Compliance and Service

I, Lew Kollias, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2002, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 1,988 words, which does not exceed the 7,750 words allowed for an appellant's reply brief.

The floppy disk filed with this brief contains a complete copy of this brief. It has been scanned for viruses using a McAfee VirusScan program, which was updated in November, 2005. According to that program, the disks provided to this Court and to the Attorney General are virus-free.

Two true and correct copies of the attached brief and a floppy disk containing a copy of this brief were mailed, postage prepaid this 3rd day of November, 2005, M. Steven Brown, Assistant Attorney General, Laclede Gas Bldg., 720 Olive Street, Suite 2150, St. Louis, MO 63101.

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