No. SC96159

In The
Supreme Court of Missouri

STATE OF MISSOURI EX REL. STEPHANIE WINDEKNECHT,

Petitioner,

vs.

ANGELA MESMER, SUPERINTENDENT,

Respondent.

PETITIONER'S REPLY BRIEF

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REPLY ARGUMENT

I.

Respondent incorrectly concludes that the holding of State v. Bazell, 497 S.W.3d 263 (Mo. banc 2016) does not apply to stealing in excess of $500 because: 1) "value" is an element of the offense of stealing because other courts have held as much; 2) other Missouri criminal statutes modify the core offense by adding elements in later subsections, the language of § 570.030.3 must similarly modify the offense of stealing; 3) the restrictive language of § 570.030.3 both refers to back to stealing as defined in § 570.030.1 *and* creates a new crime of "stealing something of value"; and 4) rules of statutory construction and evident legislative intent trump the plain language of the statute as written. This point responds to Respondent's Point I.

The rationale of Bazell applies to all enhancements in § 570.030.3

The defect in the stealing statute, identified in Bazell, invalidates every enhancement provision contained in § 570.030.3. The defect in the stealing statute is in the prologue to § 570.030.3 which seeks to enhance only those stealing offenses "in which the value of property or services is an element." Because stealing, as defined by § 570.030.01, does not include "value" as an element of the offense, the whole of § 570.030.3 is infirm. The Court made this clear in Bazell, writing,

> Section 570.030.3 provides for the enhancement to a class C felony of "any offense in which the value of property or services is an element" if certain conditions are met. The

> definition of stealing in section 570.030.1 is clear and unambiguous, and it does not include the value of the property or services appropriated as an element of the offense.

Id. at 265. Respondent relies on various arguments to undermine the Court's definitive holding.

Cases Holding Value is an Element of Stealing Rely on dicta *or Inapplicable Statutes*

Respondent contends that it is indisputable that value is an element of the crime of stealing over $500 (Respondent's Brief at pp. 5-6). Petitioner questions the robustness of cases cited by Respondent: State v. Miller, 466 S.W.3d 635 (Mo. App. S.D. 2012) quoted State v. Slocum, 420 S.W.3d 425 (Mo. App. E.D. 2014) a receiving stolen property case; State v. Calicotte, 78 S.W.3d 790 (Mo. App. S.D. 2002) reviewed the statute in effect prior to the 2002 amendment to § 570.030; State v. Brown, 457 S.W.3d 772 (Mo. App. E.D. 2014) cited Calicotte, *supra*; and State v. Tivis, 948 S.W.2d 690 (Mo. App. W.D. 1997) another case reviewing the statute prior to 2002. To the extent that courts have understood there is such a crime as "stealing over $500" one would expect that value is an element of the State's burden of proof. But the question at issue here is more fundamental: from 2002 to 2016 did the statute create and punish the crime of "stealing over $500"? It did not.

Elements of an Offense are Defined by the Plain Language of the Statute

Respondent points to other Missouri statutes that define the offense in one subsection and enhance the offense in a latter subsection (Respondent's Brief at pp. 7-8). For instance, Respondent points out § 566.100.1 (Supp. 2013) defines first degree sexual assault and lists it as a class C felony. Id. But § 566.100.2 (Supp. 2013) "adds the element of age to enhance the crime to a class B felony" (Respondent's Brief at p. 7). The defect in the stealing statute is not with the position or proximity of subsection 3 to subsection 1, but with its wording. For instance, if § 566.100.2 instead read,

> 2. Notwithstanding any other provision of law, any offense in which the age of the victim is an element is a class B felony if:
>
> (1) The victim is less than fourteen years of age;

the accused might profitably complain that § 566.100.2 does not enhance his crime because the crime of sexual abuse in the first degree – defined in in § 566.100.1 – does not have age of the victim as an element. The statutes cited by Respondent all share common language to the effect, "_____ is a class ___ felony, unless _____ in which case it is a class _____ felony." *See*, § 565.050 (2000)(assault in the first degree), § 566.060 (Supp. 2013) (sodomy in the first degree), and § 566.030 (Supp. 2013) (rape in the first degree).These statutes are worded differently from the former stealing statute. The best evidence that the stealing statute was infirm is that the legislature chose to amend it. § 570.030 *et seq* (Supp. 2017).

Moreover, Respondent faults Petitioner for reading "any offense" in § 570.030.3 as referring solely to the offense of stealing defined in subsection 1(Respondent's Brief at pp. 9-11). But that was how this Court read the phrase in Bazell. Respondent counters that "any offense" means any offense in the whole of Missouri Statute (Respondent's Brief at p. 11, writing it is "non-controversial" that the phrase "includes other offenses in entirely different statutory sections"). Surely the legislature could not have intended to alter the reach and interpretation of the entirety of Missouri Statute by one phrase in its stealing statute.

Respondent attempts to carve out an exception to the reasoning of Bazell by recourse to a hypothetical statute defining dinner and feasts on turkey (Respondent's Brief at pp. 13-14). Respondent's argument seems to be that § 570.030.3 which refers to "any offense in which the value of property or services is an element" actually creates a new offense of "theft of something of value." Subsection 3 obviously refers the reader to subsection 1 where stealing is defined, it does not create a new element to the offense.

Rules of Statutory Interpretation and Appeals to Legislative Intent Must Yield to the Plain Language of the Statute

Respondent concludes canons of statutory interpretation validate her argument that § 570.030.3 creates the offense of "stealing over $500." (Respondent's Brief at p. 14). Respondent conducts a scholarly analysis of statutory interpretation, but overlooks the fact that where the statute is clear and unambiguous, there is no need to engage in interpretation. "Where the language of a statute is clear and unambiguous, there is no room for construction." Ryder Student Transp. Servs., Inc. v. Dir. of Revenue, State of

Mo., 896 S.W.2d 633, 635 (Mo. banc 1995); *see also*, Jones v. Director of Revenue, 832 S.W.2d 516, 517 (Mo. banc 1992); State ex. rel Missouri State Bd. of Registration for the Healing Arts v. Southworth, 704 S.W.2d 219, 224 (Mo. banc 1986) and § 1.090 (2000)("[w]ords and phrases shall be taken in their plain or ordinary and usual sense"). Only if § 570.030 was ambiguous would it be necessary for this Court to resort to statutory interpretation.

Likewise, Respondent appeals to legislative intent to deflect focus from the plain language of the statute. Petitioner agrees it was undoubtedly the intent of the legislature, in 2002, to sort out the stealing statute and create an enhanced punishment depending on the value of the property or services stolen. Or as a colleague of undersigned counsel put it, to create "18 crimes of stealing separate from § 570.030.1." The legislature failed at the task. But it is not the task of this Court to bend the plain language of a statute to the perceived intent of the legislature. For it is just as clear that the legislature intended to enhance the stealing of a firearm to a felony, but in Bazell, the Court was constrained by the plain language of the statute to vacate those felony convictions.

As with statutory interpretation, legislative intent is divined from the plain language of the statute. "Courts are without authority to read into a statute a legislative intent contrary to the intent made evident by the plain language, even when a court may prefer a policy different from that enunciated by the legislature." State v. Smith, 972 S.W.2d 476, 479 (Mo. App. W.D. 1998). Here, the legislative intent – as expressed in the language of the statute – was to enhance to a class C felony "any offense in which the value of property or services is an element." That there is no such offense where value is

an express element may be a drafting error, but this Court cannot supply a different meaning to the words used even if it (and the legislature) wish it read otherwise.

As a matter of due process, criminal statutes must put defendants on advance notice of the illegality of their contemplated actions. State v. Young, 695 S.W.2d 882, 886 (Mo. banc 1985). The defect in the prologue to § 570.030.3 affects all its subparts equally. Three districts of the Missouri Court of Appeals have considered whether the logic of Bazell applies to the offense of stealing over $500 and have concluded it does. State v. Turrentine, (SD34257) 2016 WL 6818938 (Mo. App. S.D. Nov. 18, 2016); State v. Metternich, (WD79253) 2016 WL 7439121 (Mo. App. W.D. Dec. 27, 2016); and State v. Bowen, (ED103919) 2017 WL 361185 (Mo. App. E.D., Jan. 24, 2017)("we conclude that the Bazell decision bars all § 570.030.3 enhancements from being applied to a stealing offense charged under § 570.030"). This Court must conclude that § 570.030.3 did not, by its clear language, create a felony offense of stealing over $500. As with Ms. Bazzell's conviction for stealing firearms, Ms. Windeknecht's conviction for stealing in excess of $500 must be corrected.

II.

Respondent attempts to confine the reach of the Bazell decision arguing that this Court has, by implication, limited relief to only those individuals whose cases are on direct appeal by: 1) misapplying the *dicta* in State v. Ferguson, 887 S.W.2d 585 (Mo. banc 1994) to create a "general rule"; 2) concluding that the failure of the court in State v. Passley, 389 S.W.3d 180 (Mo. App. S.D. 2012) to grant plain error relief represented an "authoritative" statement of the law such that this Court created new law in Bazell; and 3) arguing that this Court only clarifies statutory language as a matter of first impression and that overruling prior precedent is by definition the creation of "new law." This point responds to Respondent's Point II.

Bazell Applies to Cases That are Final

The Respondent argues in this Court and below that Petitioner must remain imprisoned because her case is final. But retroactivity analysis is not required when a new decision clarifies existing law. Thornton v. Denney, 467 S.W.3d 292 (Mo. App. W.D. 2015). Petitioner does not seek retroactive application of a new rule of law; rather, she seeks application of the statute - - properly understood - - that was in effect at the time of her plea. Id. at 298-299. Respondent advances a variety of arguments opposing relief.

Respondent Misconstrues the Holding in Ferguson.

As an initial matter, Respondent attempts to extract from State v. Ferguson, 887 S.W.2d 585 (Mo. banc 1994), a rule setting forth the limits of retrospective application; an issue not before that Court. Petitioner responds that the discussion in Ferguson was

dicta, insomuch as Mr. Ferguson's case was on direct review at the time. Respondent concluded Ferguson's case was a Rule 29.15 appeal (Respondent's Brief at p. 27 n. 3, "In fact, retroactive application of new case law was a central issue in Ferguson. Ferguson came to the Court on appeal from the denial of a Rule 29.15 motion for post-conviction relief, not on direct review").

Respondent is mistaken as to the posture of Ferguson. In 1994, denials of Rule 29.15 motions in circuit court were the subject of a consolidated appeal of both the post-conviction claims and direct appeal of trial court error. Rule 29.15(l) (1994). Even if one were unaware of the history of Rule 29.15, it is obvious the issue decided by this Court in Ferguson was a matter of trial court error – a defect in the instruction on murder in the first degree. Ferguson, 887 S.W.2d at 586. If Ferguson's claim was based in a post-conviction challenge, then the Court would have violated the very rule is supposedly pronounced by granting relief. Moreover, the same Judge who authored the Ferguson opinion, the Honorable Stephen N. Limbaugh, wrote the opinion granting relief in Turner v. State, 245 S.W.3d 826 (Mo. banc 2008)(an appeal of the denial of a Rule 24.035 motion) which suggests Ferguson does not have the force Respondent assigns to it.

Neither the Effect on Pattern Instructions and Charges nor the Express Overruling of State v. Passley Limit the Reach of Bazell

The Respondent now argues this Court, in Bazell, changed the law insomuch as it overruled approved jury instructions and charges (Respondent's Brief at p. 29, 32-33). This argument puts the cart before the horse. Whenever the Court interprets and voids a particular statute (or portion thereof) that decision will necessarily affect the forms used

in the administration of the courts. That side effect of substantive decisions does not cause them to become "procedural" or limit their retrospective application.

Respondent argues that the overruling of State v. Passley, 389 S.W.3d 180 (Mo. App. S.D. 2012) limits the retrospective application of Bazell. Of course, Passley decided only that it was not plain error to enhance Passley's conviction for stealing a credit device. Id. Passley did not seek transfer to this Court. Respondent states Passley was the authoritative law of the land as of 2012. The subtext of Respondent's argument is that one can only seek retroactive relief following a substantive decision if that decision is a matter of first impression. Case law shows otherwise.

This Court considered the limitation supposedly imposed by prior decisions in State v. Severe, 307 S.W.3d 640 (Mo. banc 2010). In that case, the State argued that at the time of Ms. Severe's trial it was merely following the interpretation of § 577.023 made in State v. Meggs, 950 S.W.2d 608 (Mo. App. S.D. 1997). This Court noted the Turner case effectively overruled Meggs and granted relief on direct appeal. Severe, 307 S.W.3d at 643. More to the point, Mr. Turner secured relief following denial of post-conviction relief, despite the fact that Meggs had interpreted the statute otherwise some eleven years before. Turner, *supra*. Likewise, in State ex. rel, Koster v. Jackson, 301 S.W.3d 586 (Mo. banc 2010), the habeas petitioner secured relief despite having been convicted six years prior to the decision in Turner.

This Court did not Create New Law in the Bazell Case

Ultimately, Respondent attempts to limit relief by insinuating this Court did more than clarify the plain language statute in Bazell, but that it made new law. Respondent writes,

> Rather than simply interpreting a statute for the first time, Bazell overruled a prior, contrary judicial interpretation of that statute that had statewide binding effect. Bazell also overruled Missouri approved jury instructions and charges that had been approved and distributed by this Court. In fact, everything available to the State, the courts, and criminal defendants before Bazell plainly suggested that stealing crimes *could* be enhanced to felonies under Section 570.030.3.

(Respondent's Brief at p. 29, emphasis in original). Of course, the primary reference available to the State, courts, and defendants was § 570.030, the language of which this Court merely clarified. The State made similar arguments in Turner and its progeny, but to no avail.

The notion that this Court can make new criminal law is mistaken and misleading. It is the legislature's job to fix crime and punishment. "It is fundamental that to declare what shall constitute a crime *and the punishment therefor is a power vested solely in the legislature* and may not be delegated to any other body or agency. State v. Raccagno, 539

S.W.2d 699, 703 (Mo. banc 1976) (emphasis added, citations omitted). This Court lacks the authority to do other than hold subordinate courts to the plain language of the statute.

This Court's decision in the Bazell case is the very definition of a substantive decision because it interpreted Missouri's stealing statute and the decision affects, if not the scope of the stealing statute, the punishment which the law can impose on persons so convicted. However, the Court did not announce "new law" in Bazell (nor could it), but rather it held the plain language of the stealing statute did not apply to Ms. Bazell and others whose misdemeanors were errantly enhanced to felonies. Due process, as guaranteed by Art. I, § 10 of the Mo. Const., and the V and XIV amendments to the U.S. Const., requires this Court grant the writ of habeas corpus and order Ms. Windeknecht released.

CONCLUSION

This Court should grant Ms. Windeknecht's writ of habeas corpus and order her discharged from her sentence for stealing, a misdemeanor, for which she has served well over two years in the Department of Corrections. Due process, as guaranteed by Art. I, § 10 of the Mo. Const., and the V and XIV amendments to the U.S. Const., requires Ms. Windeknecht's conviction to be amended to misdemeanor stealing and her six-year sentence to be vacated.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I, Scott Thompson, hereby certify: The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word 2010, in Times New Roman size 13 point font, and includes the information required by Rule 55.03. According to the word-count function of Microsoft Word, excluding the cover page, the signature block, and this certificate of compliance and service, the brief contains 3,232 words, which does not exceed 25% of the 31,000 words allowed for an appellant's opening brief. I hereby certify that this document is in PDF-searchable format and has been scanned for viruses with Symantec Endpoint Protection Anti-Virus software, with updated virus definitions, and has been found virus-free. And, on this 27th day of April, 2017, electronic copies of Petitioner's Reply Brief, were sent through the Missouri e-Filing System to Patrick J. Logan, Assistant Attorney General, at patrick.logan[at]ago.mo.gov, Michael J. Spillane, Assistant Attorney General, at michael.spillane[at]ago.mo.gov, and Dean J. Sauer, at dean.sauer[at]ago.mo.gov.

Respectfully submitted,

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