

IN THE  
SUPREME COURT OF MISSOURI

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HEATHER HAMILTON,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. SC97881
	)	
STATE OF MISSOURI,	)	
	)	
Respondent.	)	

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APPEAL TO THE SUPREME COURT OF MISSOURI  
FROM THE CIRCUIT COURT OF  
LINCOLN COUNTY, MISSOURI  
FORTY-FIFTH JUDICIAL CIRCUIT  
THE HONORABLE JAMES BECK, JUDGE

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APPELLANT'S SUBSTITUTE BRIEF

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## **JURISDICTIONAL STATEMENT**

This is an appeal from the denial of appellant's motion for post-conviction relief pursuant to Rule 24.035 without an evidentiary hearing by the Honorable James Beck, judge of the Circuit Court of Lincoln County, Missouri.

Appellant, Heather Hamilton, pleaded guilty to two counts of the class C felony of stealing, and was sentenced to 5 years in prison. (LF 13:1). On August 4, 2017, Ms. Hamilton timely filed a motion for post-conviction relief pursuant to Rule 24.035. (LF 2:1).

Jurisdiction of this appeal originally was in the Missouri Court of Appeals, Eastern District. Article V, section 3, Mo. Const.; section 477.060. This Court thereafter granted Ms. Hamilton's application for transfer, so this Court has jurisdiction. Article V, sections 3 and 10, Mo. Const. and Rule 83.04.

## STATEMENT OF FACTS

Heather Hamilton was charged by felony information with two counts of the class C felony of stealing. (LF 12:1). Count I of the information alleged that “on or about September 9, 2011, in the County of Lincoln, State of Missouri, the defendant appropriated Hydrocodone, a controlled substance, which was in the possession of Mike Corter[.]” (LF 12:1). Count II of the information alleged the same basic facts, except Ms. Hamilton was alleged to have stolen morphine. (LF 12:1).

On March 26, 2012, Ms. Hamilton pleaded guilty to the charges, receive a Suspended Imposition of Sentence (“SIS”), and was placed on probation. (LF 10:1, 11:9). Ms. Hamilton’s probation was revoked on March 16, 2017, and she was sentenced to five years on both counts, with the counts to run concurrently. (LF 13:3). A final judgment was issued on that same date. (LF 13:3).

On August 4, 2017, Ms. Hamilton timely filed a motion for post-conviction relief pursuant to Rule 24.035. (LF 2:1). Counsel filed a timely amended motion on September 10, 2017. (LF 4:11). Counsel argued in the amended motion that under the holding of *State v. Bazell*,<sup>1</sup> Ms. Hamilton’s sentences should not have been enhanced to class C felonies, but should have instead been class A misdemeanors. (LF 4:2). Counsel argued that Ms. Hamilton’s sentences “exceeded the maximum punishment authorized by law for a class A misdemeanor.” (LF 4:2).

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<sup>1</sup> 497 S.W.3d 263 (Mo. banc 2016).

On February 20, 2018, the motion court issued findings of fact and conclusions of law denying Ms. Hamilton's amended motion. (LF 7:1-3). The motion court stated that [*State ex rel. Windeknecht v. Mesmer*, 530 S.W.3d 500 (Mo. banc 2017)] "held that the *Bazell* holding only applies to cases moving forward, except those cases pending on appeal" (LF 7: 2). "Since the Movant's motion is not a direct appeal, and the Movant received a sentence that was authorized by a different interpretation of section 570.030 without objection, the Movant's request for relief is hereby denied" (LF 7: 2). This appeal follows.

**POINT RELIED ON**

**The motion court clearly erred in denying Ms. Hamilton’s amended motion, in violation of Ms. Hamilton’s right to due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution, because Ms. Hamilton’s sentence of five years in prison for both of her stealing convictions exceeds the maximum sentence authorized by law, in that, under the holding of *State v. Bazell*, 496 S.W.3d 263 (Mo. banc 2016), Ms. Hamilton’s sentences should not have been enhanced to class C felonies but should have instead remained class A misdemeanors; therefore, under Section 558.011, the maximum possible punishment was one year imprisonment in jail for each count of stealing.**

*Bowers v. State*, 330 S.W.3d 832 (Mo. App. W.D. 2011);

*State ex rel. Fite v. Johnson*, 530 S.W.3d 508 (Mo. banc 2017);

*State ex rel. Windeknecht v. Mesmer*, 530 S.W.3d 500 (Mo. banc 2017);

*State v. Bazell*, 497 S.W.3d 263 (Mo. banc 2016);

United States Constitution, Fourteenth Amendment;

Missouri Constitution, Article I, Section 10;

Sections 558.011 and 570.030; and

Rules 24.035.



## ARGUMENT

The motion court clearly erred in denying Ms. Hamilton's amended motion, in violation of Ms. Hamilton's right to due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution, because Ms. Hamilton's sentence of five years in prison for both of her stealing convictions exceeds the maximum sentence authorized by law, in that, under the holding of *State v. Bazell*, 496 S.W.3d 263 (Mo. banc 2016), Ms. Hamilton's sentences should not have been enhanced to class C felonies but should have instead remained class A misdemeanors; therefore, under Section 558.011, the maximum possible punishment was one year imprisonment in jail for each count of stealing.

*"In a case involving the suspension of the imposition of sentence, there is an active criminal proceeding which is suspended."*

--*Bowers v. State*, 330 S.W.3d 832, 834 (Mo. App. W.D. 2011).

### **A. Standard of Review**

Review on appeal of a Rule 24.035 motion is limited to a determination of whether the findings, conclusions, and judgment of the motion are clearly erroneous. *Latham v. State*, 554 S.W.3d 397, 401 (Mo. banc 2018). They are clearly erroneous only if a review of the entire record leaves the reviewing court with a definite and firm impression that a mistake has been made. *Id.*

## B. Analysis

### 1. The issue of whether Ms. Hamilton was sentenced in excess of what the law allows is properly addressed in a 24.035 motion.

Pursuant to Rule 24.035(a), a “person convicted of a felony on plea of guilty . . . including claims . . . that the sentence imposed was in excess of the maximum sentence authorized by law may seek relief in the sentencing court[.]” In *State ex rel. Fite v. Johnson*, 530 S.W.3d 508, 510 (Mo. banc 2017), this Court reaffirmed that when a defendant pleads guilty, Rule 24.035 is the “exclusive procedure” that a defendant can utilize to argue that his or her sentence “exceeds the maximum sentence authorized by law.” “Being sentenced to a punishment greater than the maximum sentence for an offense constitutes plain error resulting in manifest injustice.” *State v. Severe*, 307 S.W.3d 640, 642 (Mo. banc 2010).

Heather Hamilton was charged by felony information with two counts of the class C felony of stealing. (LF 12:1). Count I of the information alleged that “on or about September 9, 2011, in the County of Lincoln, State of Missouri, the defendant appropriated Hydrocodone, a controlled substance, which was in the possession of Mike Corter[.]” (LF 12:1). Count II of the information alleged the same basic facts, except Ms. Hamilton was alleged to have stolen morphine. (LF 12:1). On March 26, 2012, Ms. Hamilton pleaded guilty to the charges, received a Suspended Imposition of Sentence (“SIS”) and was placed on probation. (LF 10:1, 11:9). Ms. Hamilton’s probation was revoked on March 16, 2017, and she was sentenced to five years on both counts, with the counts to run concurrently. (LF 13:3). A final judgment was issued on that same date. (LF

13:3). Thus, Rule 24.035 was Ms. Hamilton's only means for relief. On August 4, 2017, Ms. Hamilton timely filed a motion for post-conviction relief pursuant to Rule 24.035. (LF 2:1). Counsel filed a timely amended motion on September 10, 2017. (LF 4:11).

## **2. Ms. Hamilton's argument for relief.**

Section 570.030.1 RSMo. (Cum Supp. 2011), states that "[a] person commits the crime of stealing if he or she appropriates property or services of another with the purpose to deprive him or her thereof, either without his or her consent or by means of deceit or coercion." Section 570.030.3 states that "[n]otwithstanding any other provision of law, any offense in which the value of property or services is an element is a class C felony if: . . . (3)(m) "[t]he property appropriated consists of [a]ny controlled substance." Section 570.030.9 states that "[a]ny violation of this section for which no other penalty is specified in this section is a class A misdemeanor."

In *State v. Bazell*, this Court determined that the provisions of Section 570.030.3 could not be used to enhance a defendant's conviction for stealing firearms pursuant to Section 570.030.1. 497 S.W.3d 263, 267 (Mo. banc 2016). This Court reasoned that "value" was not an element of stealing, as defined in Section 570.030.1. *Id.* at 266-67. In *State v. Smith*, this Court determined that Section 570.030.3 as a whole does not apply to Section 570.030.1. 522 S.W.3d 221, 230 (Mo. banc 2017). This Court stated, "unless the offense contains the value of property or services as an element, section 570.030.3, in its entirety, cannot be used to enhance the offense to a felony." *Id.* The Court remanded the case "for resentencing as misdemeanors." *Id.* at 231.

Because Ms. Hamilton was given a sentence that was in excess of the maximum sentence authorized by law, the motion court's findings of fact and conclusions of law are clearly erroneous and should be reversed. The motion court failed to apply an avenue for relief created by Rule 24.035(a); this failure was a deprivation of Ms. Hamilton's due process rights. *Vitek v. Jones*, 445 U.S. 480, 488 (1980). This case should be remanded so that the motion court can vacate Ms. Hamilton's judgment and resentence her to a sentence authorized by § 558.011 RSMo. (Cum. Supp. 2011), which is maximum of one year imprisonment in jail for each count on the class A misdemeanor of stealing.

### **3. The rationale for the motion court's and Eastern District's denial of relief.**

The motion court's denial of relief was based on this Court's holding in *State ex rel. Windeknecht v. Mesmer*, 530 S.W.3d 500, 503 (Mo. banc 2017), which held that the relief afforded to defendants from this Court's holding in *Bazell* would only apply prospectively. In *Windeknecht*, this Court stated that "the *Bazell* holding only applies forward, except those cases pending on direct appeal." *Id.* Since this Court's decision in *Windeknecht*, all three districts of the Court of Appeals have rejected claims of defendants seeking *Bazell* relief through a Rule 24.035 motion. In addition to Ms. Hamilton's case (Eastern District), there is also *Abrams v. State*, 550 S.W.3d 557 (Mo. App. S.D. 2018), and *Watson v. State*, 545 S.W.3d 909 (Mo. App. W.D. 2018). The rationale for denying relief in those cases was this Court's language in *Fite* that the defendant's substantive claim that he had been sentenced in excess of what the law allowed had no merit because the relief afforded in *Bazell* only applied prospectively.

*Fite*, 530 S.W.3d at 511. See also *Abrams*, 550 S.W.3d at 558; *Watson*, 545 S.W.3d at 915.

**4. This Court’s holdings in *Windeknecht* and *Fite* do not prevent Ms. Hamilton from getting *Bazell* relief since Ms. Hamilton was sentenced after this Court’s decision in *Bazell*.**

Assuming, *arguendo*, that: (1) the holding in *Windeknecht* that *Bazell* only applies prospectively applies in Rule 24.035 motions as well as petitions for habeas corpus; and (2) the language in *Fite* that the defendant’s claim was substantively meritless was not dicta, Ms. Hamilton’s case is distinguishable because she originally received an SIS and was sentenced *after* this Court’s decision in *State v. Bazell*. This fact highlights the clear error of the motion court’s finding that Ms. Hamilton received a sentence that was authorized by a different interpretation of § 570.030 without objection. This is patently inaccurate. Ms. Hamilton was *sentenced* on March 16, 2017, more than six months after this Court’s holding in *Bazell* (LF 1: 27; 13: 1-2)). When she received her sentence, she was receiving a sentence that was *no longer* authorized by a prior interpretation of § 570.030. Since the sentence imposed was no longer authorized, it is irrelevant that Ms. Hamilton made no objection. See *State v. Severe*, 307 S.W.3d at 642.

Moreover, this Court’s holding in *Windeknecht* that its holding in *Bazell* only applied forward except for cases on appeal meant that any *active* case that had not yet been fully disposed was subject to this Court’s holding *Bazell*. “In a case involving the *suspension of the imposition of sentence*, there is an *active criminal proceeding* which is suspended.” *Bowers v. State*, 330 S.W.3d 832, 834 (Mo. App. W.D. 2011)(citation

omitted)(emphasis added); *see also Edwards v. State*, 215 S.W.3d 292, 294 (Mo. App. S.D. 2007). The case is active because there is no final judgment. Since a case where a defendant has received an SIS is an active criminal case, any defendant, whose SIS was revoked, and who had a sentence imposed after *Bazell* was decided, is entitled to receive the benefit of *Bazell's* holding because the application of *Bazell's* holding would be a prospective application, not a retroactive one. *See Windeknecht*, 530 S.W.3d at 503. Contrary to creating an exception, as the Eastern District stated,<sup>2</sup> granting Ms. Hamilton relief would be consistent with this Court's holding in *Windeknecht*. *See Id.*

Here, Ms. Hamilton was sentenced to five years imprisonment on two counts of stealing under § 570.030 RSMo. (Cum. Supp. 2011) on March 26, 2017, over six months after *Bazell* was decided. Prior to that imposition of sentence, Ms. Hamilton's case was an active criminal case entitled to receive the benefit of *Bazell's* holding since her sentence would be a forward application of the holding from *Bazell*. *See Windeknecht*, 530 S.W.3d at 503. Thus, Ms. Hamilton's circumstances were much different than the defendant in *Windeknecht*, who had already been sentenced and whose case was already a final judgment. *See Id.*

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<sup>2</sup> *Hamilton v. State*, ED106540 WL 1339462 at \*4 (Mo. App. E.D. March, 26, 2019)(Slip Op.).

**5. While Ms. Hamilton's is entitled to relief because her sentence was not imposed until after *Bazell*, this Court should reconsider its holdings from *Windeknecht* and *Fite*.**

While the grounds for granting Ms. Hamilton relief lie in the fact that her sentence was not imposed until after this Court's decision in *Bazell*, Ms. Hamilton respectfully submits that this Court should reconsider its holdings from both *Windeknecht* and *Fite* for two reasons. First, Ms. Hamilton believes this Court's holding in *Windeknecht* is not applicable to Ms. Hamilton's case because *Windekencht* sought relief on a motion for a writ of habeas corpus. *See* 530 S.W.3d at 501. Further, the part of *Fite* stating the defendant's claim was substantively meritless was dicta since it was not necessary in determining the merits of the defendant's claim.

Second, and more importantly, there is no justification for treating post-conviction movants who timely file their requests for relief following pleas of guilty to stealing charges differently than those who were sentenced on stealing convictions following a bench or jury trial. Many defendants went to trial for stealing when it was classified as a felony and did so without any objection. Additionally, when they were convicted and sentenced, they raised no objection to receiving the sentence of a felony. Yet on appeal, they have been granted relief. *See State v. Filbeck*, 502 S.W.3d 764, 765-66 (Mo. App. S.D. 2016)(defendant's convictions reversed and remanded pursuant to *Bazell* after Missouri Supreme Court accepted transfer and then retransferred case back to Court of Appeals to reconsider in light of *Bazell*); *State v. Bowen*, 523 S.W.3d 483, 485 (Mo. App. E.D. 2017)(defendant convicted for felony stealing does not raise "*Bazell*" issue in trial

court but gets relief under plain error standard). It defies logic that defendants would get the benefit of *Bazell* if they make the State expend time and resources on a trial, but they not when they take responsibility for her actions and plead guilty.

**6. Ms. Hamilton is entitled to relief from this Court.**

Whether or not this Court chooses to reconsider its holdings from *Windeknecht* and *Fite*, however, does not change the fact that these two cases are not applicable to Ms. Hamilton's case since her sentence was not imposed until after this Court's holding in *Bazell*, and because an SIS is an active case that has been suspended. Thus, while she still had an SIS, Ms. Hamilton's case was an active case that had been suspended and when the trial court imposed sentence, it was doing so *after* this Court's holding in *Bazell*. Therefore, the application of *Bazell* to Ms. Hamilton's case was a forward application.



**CONCLUSION**

For the foregoing reasons, the findings of fact and conclusions of law of the motion court are clearly erroneous and should be reversed. Furthermore, this case should be remanded so that the motion court can vacate Ms. Hamilton's judgment and resentence her to a maximum of one year imprisonment for each count on the class A misdemeanor of stealing.

Respectfully submitted,

/s/ James Egan

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**Certificate of Compliance**

I, James Egan, 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 2010, 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 3,002 words, which does not exceed the 31,000 words allowed for an appellant's brief.

/s/ James Egan

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James Egan