No. SC97881

IN THE

Supreme Court of Missouri

HEATHER HAMILTON,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

Appeal from the Lincoln County Circuit Court
Forty-fifth Judicial Circuit
The Honorable James Beck, Judge

RESPONDENT'S SUBSTITUTE BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

STATEMENT OF FACTS

Ms. Hamilton appeals the denial of her Rule 24.035 motion, in which she alleged that she "was denied her right to due process of law . . . because [she] was sentenced to the enhanced class C felony of stealing under § 570.030.1, RSMo, which was actually only a class A misdemeanor offense under the holding in *State v. Bazell*, 497 S.W.3d 263 (Mo. 2016), and as a result, [her] five-year sentences exceeded the maximum punishment authorized by law for a class A misdemeanor" (L.F. 4:2). Relying on *State ex rel. Windeknecht v. Mesmer*, 530 S.W.3d 500 (Mo. 2017), the motion court denied relief, stating that "the *Bazell* holding only applies to cases moving forward, except those cases pending on direct appeal" (L.F. 7:2).

* * *

In December 2011, the State charged Ms. Hamilton with two counts of the class C felony of stealing, based on the theft of two different controlled substances (L.F. 12:1). On March 26, 2012, Ms. Hamilton pleaded guilty in exchange for being sent to drug court (*see* L.F. 1:12; 11:1-9).[1]

In her guilty plea petition, Ms. Hamilton acknowledged that she had the right to a trial, and she stated that she was giving up that right (and

[1] No transcript of the proceedings in the circuit court has been included in the record on appeal.

various associated rights) by pleading guilty (L.F. 11:6-8). She also stated that she was giving up her right to appeal (L.F. 11:8). The court ordered Ms. Hamilton to complete drug court (*see* L.F. 1:12).

Thereafter, on September 26, 2012, the court issued a warrant, and, on October 4, 2012, the sheriff served the warrant (L.F. 1:12). Another warrant issued on October 10, 2012, but it was not served until September 20, 2013 (L.F. 1:12-13). Docket entries in September and October, 2013, indicated that Ms. Hamilton was in the Department of Corrections at that time (L.F. 1:13-14). Defense counsel failed to appear for a "case review" on November 25, 2013 (L.F. 1:15).

Docket entries in March, April, and May, 2014, indicated that the court was considering an "alternative" disposition (L.F. 1:16:17). On May 22, 2014, the trial court suspended imposition of sentence and placed Ms. Hamilton on five years' probation (L.F. 1:17; 10:1-2). The court ordered that she "complete court ordered [sic] under [section] 559.036.4" (L.F. 1:17). A "Probation Order" was entered on June 9, 2014 (L.F. 1:17).

On July 14, 2014, the State filed a motion to suspend probation (L.F. 1:18). A probation violation hearing was scheduled for September 22, 2014, but Ms. Hamilton failed to appear (L.F. 1:18). Another hearing was scheduled for October 27, 2014, but it was later continued to November 24, 2014, and again until December 22, 2014 (L.F. 1:18-20). On December 22, 2014, Ms.

Hamilton again failed to appear, and a warrant issued (L.F. 1:20-21). The warrant was served on January 18, 2015 (L.F. 1:21). Another hearing was eventually scheduled for May 18, 2015 (L.F. 1:22). Ms. Hamilton failed to appear, and a warrant issued (L.F. 1:22).

On May 28, 2015, the warrant was served (L.F. 1:23). A probation violation hearing was held, and Ms. Hamilton confessed to violating two conditions of probation (L.F. 1:23). The court continued her probation, but it ordered her to complete "CODS"[2] (L.F. 1:23).

Probation violation reports were filed on February 19, May 19, July 5, August 19, and September 26, 2016 (L.F. 1:24). The State moved to revoke Ms. Hamilton's probation (L.F. 1:24-25). On December 19, 2016, a probation violation hearing was held, and Ms. Hamilton confessed to violating four conditions of probation (L.F. 1:26). The court set the case for sentencing on February 2, 2017, and that date was later continued (L.F. 1:26-27).

On March 16, 2017, the court revoked Ms. Hamilton's probation and sentenced her to five years' imprisonment on each count of stealing (L.F. 1:27; 13:1-2). Ms. Hamilton was delivered to the department of corrections on

[2] The term "CODS" refers to a court-ordered detention sanction, or a 120-day program in the Department of Corrections, under § 559.036. *See Propst v. State*, 535 S.W.3d 733, 734 n. 1 (Mo. 2017).

March 17, 2017 (L.F. 4:2).

On August 4, 2017, Ms. Hamilton filed a *pro se* motion pursuant to Rule 24.035 (L.F. 2:1). On August 8, 2017, the motion court appointed the public defender and granted a thirty-day extension of time to file an amended motion (L.F. 3:1). A transcript of the guilty plea and sentencing hearings was not filed (*see* L.F. 4:2).[3]

On September 10, 2017, Ms. Hamilton timely filed an amended motion (L.F. 4:1). She alleged that she "was denied her right to due process of law . . . because [she] was sentenced to the enhanced class C felony of stealing under § 570.030.1, RSMo, which was actually only a class A misdemeanor offense under the holding in *State v. Bazell*, 497 S.W.3d 263 (Mo. 2016), and as a result, [her] five-year sentences exceeded the maximum punishment authorized by law for a class A misdemeanor" (L.F. 4:2).

On February 20, 2018, the motion court denied Ms. Hamilton's motion (L.F. 7:1-3). The motion court observed that in *State ex rel. Windeknecht v. Mesmer*, 530 S.W.3d 500 (Mo. 2017), "the Supreme Court held that the *Bazell*

[3] In her amended motion, Ms. Hamilton stated that transcripts had not been requested as of September 10, 2017, but that, "[g]iven the nature of the claim being presented, and the time served already, [she was] proceeding without the transcript" (L.F. 4:2).

holding only applies to cases moving forward, except those cases pending on direct appeal" (L.F. 7:2). The motion court concluded, "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" (L.F. 7:2).

Ms. Hamilton appealed, and, notwithstanding the State's concession that she was entitled to a forward application of *Bazell* (inasmuch as she was sentenced after *Bazell* was decided), the Court of Appeals, Eastern District, affirmed the motion court's judgment. *State v. Hamilton*, No. ED106540, slip op. (Mo.App. E.D. 2019).

The Court of Appeals observed that, even though Ms. Hamilton had been sentenced after the decision in *Bazell*, she had "pleaded guilty nearly four and a half years *prior* to *Bazell*." *Id*. at 6-7. The Court stated that, "a[t] the time [she] committed the crimes and pleaded guilty, her stealing offenses were classified as class C felonies under Section 570.030.3." *Id*. at 7. The Court of Appeals observed that Ms. Hamilton did not object to the trial court's sentence, and it further observed that she "knowingly, intelligently, and voluntarily pleaded guilty under a prior interpretation of Section 570.030." *Id*. The Court of Appeals concluded that Ms. Hamilton " 'received a sentence that was authorized by a different interpretation of [S]ection 570.030 without objection and should not receive the benefit of retroactive

application of [the Missouri Supreme Court's] decision in *Bazell*.' " *Id*.

This Court granted Ms. Hamilton's application for transfer.

ARGUMENT

I.

The Court should continue to limit, or further limit, the retroactive application of *Bazell* and affirm the judgment of the motion court.

Ms. Hamilton asserts that the motion court clearly erred in denying her claim that her five-year sentences for stealing exceeded the maximum authorized sentence (App.Sub.Br. 9). She asserts that, under the holding of *State v. Bazell*, 497 S.W.3d 263 (Mo. 2016), she should have been sentenced within the range of punishment for a class A misdemeanor (App.Sub.Br. 9).

A. The standard of review

"Appellate review of the denial of a post-conviction motion is limited to a determination of whether the findings of fact and conclusions of law of the motion court are clearly erroneous." *Moss v. State*, 10 S.W.3d 510, 511 (Mo. 2000). "Findings and conclusions are clearly erroneous if, after a review of the entire record, the court is left with the definite and firm impression that a mistake has been made." *Id.*

B. The holding of *Bazell* has limited application

In 2016, in *Bazell*, this Court announced a new interpretation of section 570.030, RSMo, and thereby changed the law with regard to the stealing statute as it existed from August 28, 2002, until December 31, 2016. *See*

Bazell, 497 S.W.3d at 266-67; *see also State ex rel. Windeknecht v. Mesmer*, 530 S.W.3d 500, 503 (Mo. 2017) (making plain that the Court in *Bazell* announced "a different interpretation of a state statute"). The Court observed in *Bazell* that "the legislature, in 2002, decided to amend section 570.030.3 to add the requirement that only offenses for which 'the value of property or services is an element' may be enhanced to a felony." 497 S.W.3d at 267. The Court observed that the offense of stealing was not an offense "in which the value of property or services [was] an element," and, accordingly, the Court held—contrary to prior case law—that the felony enhancements listed in subsection three did not apply to the offense of stealing. *Id.*

Under *Bazell*'s new interpretation of § 570.030, from August 28, 2002, until December 31, 2016, the offense of stealing could not be enhanced to the class C felony and was, instead, a class A misdemeanor. *Id.* at 266-67.[4] In announcing this new interpretation, this Court acknowledged a directly contrary decision from the Court of Appeals in *State v. Passley*, 389 S.W.3d 180 (Mo.App. S.D. 2012), and the Court stated that *Passley* "should no longer be followed." *Id.* at 267 n. 3.

[4] As this Court noted in *Bazell*, subsection 3 was again amended, effective January 1, 2017, to remove the requirement that the offense include "value" as an element. 497 S.W.3d at 267 n. 2.

In the wake of *Bazell*, various individuals who had pleaded guilty to, or been found guilty of, felony stealing based on conduct committed between August 28, 2002, and December 16, 2016, challenged the validity of their sentences. *See*, *e.g.*, *State ex rel. Windeknecht v. Mesmer*, 530 S.W.3d 500 (Mo. 2017); *State ex rel. Fite v. Johnson*, 530 S.W.3d 508 (Mo. 2017). For example, in *Windeknecht*, four petitioners challenged their sentences by filing petitions for a writ of habeas corpus. All four of the petitioners had been sentenced between August 28, 2002, and December 31, 2016. 530 S.W.3d at 501 n. 2.

However, the Court declined to retroactively apply the holding of *Bazell* to the petitioners' cases. *Id.* at 503. The Court contrasted *Bazell*'s "different interpretation" of § 570.030 with *Passley*'s previous interpretation and observed that "[t]he Supreme Court of the United States has held a state supreme court is not constitutionally compelled to make retroactive a different interpretation of a state statute." *Id.* at 502-03 (citing *Wainwright v. Stone*, 414 U.S. 21, 23-24 (1973)). The Court continued, " 'A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward.' " *Id.* at 503.

The Court then held, "Exercising this authority, the Court orders the *Bazell* holding only applies forward, except those cases pending on direct appeal." *Id.* The Court concluded, "Petitioners received a sentence that was authorized by a different interpretation of section 570.030 without objection

and should not receive the benefit of retroactive application of this Court's decision in *Bazell*." *Id.*

In *Fite*, a movant sought resentencing for felony stealing by filing a Rule 29.07(d) motion to withdraw his guilty plea. The trial court granted the motion, and the State sought a writ of prohibition. In issuing the writ and making it permanent, this Court observed that "[a] criminal judgment becomes final when a sentence is entered." 530 S.W.3d at 510. The Court then observed that, while the trial court had jurisdiction to adjudicate the Rule 29.07(d) motion, the court lacked authority to sustain the motion. *Id.* The Court stated that "Rule 24.035 . . . was the exclusive procedure by which [the movant] could have collaterally attacked the final judgment based on his claim his sentence exceeds the maximum sentence authorized by law." *Id.*

The Court also made plain, however, that the movant would not have prevailed on his claim if he had asserted it under Rule 24.035. The Court observed that the trial court had "compounded" its error in granting relief, in that the movant's claim was "substantively meritless." *Id.* at 511. The Court cited to *Windeknecht* and stated that "this Court's interpretation of § 570.030.3(1) first enunciated in *Bazell* applies prospectively only, except in those cases pending on direct appeal." *Id.* In other words, the circuit court had "erroneously assumed *Bazell* applie[d] retroactively." *Id.*

Consistent with *Windeknecht* and *Fite*, the Court of Appeals has held in

several cases that *Bazell* does not retroactively apply in post-conviction cases where the movant was sentenced for felony stealing before *Bazell* was decided. *See Amsden v. State*, 567 S.W.3d 241, 246 (Mo.App. S.D. 2018); *Valley v. State*, 563 S.W.3d 159, 161 (Mo.App. S.D. 2018); *Harris v. State*, 562 S.W.3d 363, 365-66 (Mo.App. S.D. 2018); *Whittley v. State*, 559 S.W.3d 401, 403-05 (Mo.App. E.D. 2018); *Bosworth v. State*, 559 S.W.3d 5, 9-10 (Mo.App. E.D. 2018); *May v. State*, 558 S.W.3d 122, 126 (Mo.App. S.D. 2018); *Abrams v. State*, 550 S.W.3d 557, 558 (Mo.App. S.D. 2018); *Watson v. State*, 545 S.W.3d 909, 915-16 (Mo.App. W.D. 2018). The conclusion in *Watson* is representative of the holdings in these cases: "As was the case with the habeas petitioner in *State ex rel. Windeknecht*, "[Watson] received a sentence that was authorized by a different interpretation of section 570.030 without objection and should not receive the benefit of retroactive application of this Court's decision in *Bazell*." *Id*. at 916.

C. The Court should clarify and, if necessary, further limit the retroactive application of *Bazell*

The question, then, is whether Ms. Hamilton—who was sentenced for felony stealing *after Bazell* was decided—is similarly barred from receiving the benefit of the new rule announced in *Bazell*. The motion court concluded that she was not, and it observed that, in *Windeknecht*, this Court "held that the *Bazell* holding only applies to cases moving forward, except those cases

pending on direct appeal" (L.F. 7:2). The motion court then concluded, "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" (L.F. 7:2).

In the Court of Appeals, respondent took the position that the motion court erred in denying relief (Resp.Br. 6). Respondent pointed out that, in the various cases cited above, the petitioners and movants had all been sentenced before *Bazell* was decided, i.e., the judgments in their criminal cases were final before *Bazell*'s new interpretation of the statute took effect (Resp.Br. 7). In other words, consistent with some of the analysis in *Windeknecht* and *Fite*, respondent took the position that because the underlying criminal cases were final in those post-conviction cases, the petitioners and movants were not entitled to a retroactive application of *Bazell*.

Ms. Hamilton, however, had been sentenced several months *after* *Bazell* was decided, i.e., her criminal case was not final when *Bazell* was decided (L.F. 1:27; 13:1-2). Accordingly, respondent viewed Ms. Hamilton's case as involving a forward application of *Bazell* at the time of her sentencing (*see* Resp.Br. 8).

Notwithstanding the State's concession, the Court of Appeals affirmed the motion court's judgment, concluding that Ms. Hamilton was not entitled to the benefit of the rule announced in *Bazell*. The Court of Appeals observed

that, even though Ms. Hamilton had been sentenced after *Bazell*, she had "pleaded guilty nearly four and a half years *prior* to *Bazell*." *State v. Hamilton*, No. ED106540, slip op. 6-7 (Mo.App. E.D. 2019). The Court stated that, "a[t] the time [she] committed the crimes and pleaded guilty, her stealing offenses were classified as class C felonies under Section 570.030.3." *Id.* at 7. The Court observed that Ms. Hamilton did not object to the trial court's sentence, and it further observed that she "knowingly, intelligently, and voluntarily pleaded guilty under a prior interpretation of Section 570.030." *Id.* The Court concluded that Ms. Hamilton " 'received a sentence that was authorized by a different interpretation of [S]ection 570.030 without objection and should not receive the benefit of retroactive application of [the Missouri Supreme Court's] decision in *Bazell*.' " *Id.*

In light of the contrary decision reached by the Court of Appeals, and after further reflection, respondent acknowledges that its previous position may not have accurately interpreted the decisions in *Windeknecht* and *Fite*. While finality of the judgment in the underlying criminal cases was an aspect of the Court's decisions in those cases, it was only part of the Court's rulings, and respondent's previous reading of the rule may have been more expansive than the Court intended. Moreover, even if respondent's previous reading of *Windeknecht* and *Fite* was reasonable, that would not preclude further clarification (or limitation) of the retroactivity of *Bazell* by this Court. As the

Court stated in *Windeknecht*, this Court has discretion to dictate the retroactivity of *Bazell*'s new rule. 530 S.W.3d at 503. Accordingly, respondent submits that the Court should not apply *Bazell* in Ms. Hamilton's case.

As outlined above, with regard to retroactivity, this Court expressly limited the retroactive application of *Bazell* to "cases pending on direct appeal." *Id*. As the motion court noted, Ms. Hamilton's case was not pending on direct appeal; thus, her case did not fall within the limited category of cases that were entitled to a retroactive application of *Bazell*'s new rule.

The remaining question, then, is whether Ms. Hamilton's case falls within *Windeknecht*'s holding that *Bazell* applies "forward." 530 S.W.3d at 503. As outlined above, Ms. Hamilton was sentenced several months after *Bazell* was decided (L.F. 1:27; 13:1-2). Thus, arguably, *Bazell* would apply forward to her sentencing hearing.

However, as outlined above, Ms. Hamilton pleaded guilty more than four years *before Bazell* was decided. And, at that time, the pre-*Bazell* interpretation of § 570.030—as stated in *Passley*, *supra*—authorized the felony enhancements listed in § 570.030.3. Thus, at the time of her guilty plea, a factual basis was established for the class C felony of stealing, and the trial court found that she was guilty of the class C felony. To conclude four years later, at sentencing, that Ms. Hamilton was guilty only of a class A misdemeanor requires a retroactive application of *Bazell* to the trial court's

previous finding of guilt.

The general rule in criminal cases is that "a defendant must be tried for the offense as defined by the law that existed at the time of the offense." *State v. Pierce*, 433 S.W.3d 424, 427 n. 1 (Mo. 2014); *see* § 1.160, RSMo 2016. Here, under the law that existed at the time of the offense, Ms. Hamilton's conduct constituted a class C felony. Accordingly, the State charged her with a class C felony, she pleaded guilty to a class C felony, and the trial court found her guilty of a class C felony. In imposing sentence consistent with the earlier finding of guilt, the trial court merely followed the general rule that the trial and punishment of an offense shall not be affected by an intervening change in the law. *See* § 1.160, RSMo 2016 ("No offense committed and no fine, penalty or forfeiture incurred, or prosecution commenced or pending previous to or at the time when any statutory provision is repealed or amended, shall be affected by the repeal or amendment, but the trial and punishment of all such offenses, and the recovery of the fines, penalties or forfeitures shall be had, in all respects, as if the provision had not been repealed or amended, except that all such proceedings shall be conducted according to existing procedural laws.").

In short, because *Windeknecht* limited the retroactive application of *Bazell* to "cases pending on direct appeal," 530 S.W.3d at 503, the Court should hold that Ms. Hamilton cannot rely on *Bazell* to retroactively alter the

nature of her guilty plea and the trial court's finding of guilt. Ms. Hamilton did not contest her criminal liability under the previous interpretation of the statute; the record does not reflect that she objected to her sentence when it was imposed; and Ms. Hamilton waived her right to appeal.

Consistent with such a rule, the Court should also clarify that the retroactive reach of *Bazell* is limited to "cases pending on direct appeal" *after a trial*. In *Windeknecht*, rather than focusing on the finality of the underlying criminal cases, the Court observed, "Petitioners received a sentence that was authorized by a different interpretation of section 570.030 *without objection* and should not receive the benefit of retroactive application of this Court's decision in *Bazell*." 530 S.W.3d at 503 (emphasis added). In light of this observation, it appears that a significant aspect of the Court's reasoning was the lack of any objection to the sentence imposed.

Some support for this conclusion can also be found in *Bazell*. There, although the defendant had been found guilty of two counts of felony stealing, the Court vacated only one of the felony convictions, notwithstanding the defendant's belated request to have both convictions vacated. *See Bazell*, 497 S.W.3d at 267 n. 4. The Court noted that the defendant "did not seek such relief in the court of appeals or in her original briefs to this Court." *Id*. Accordingly, the Court refused to consider the defendant's "newly added request for relief." *Id*.

Here, where Ms. Hamilton did not contest her guilt and instead waived her right to trial and pleaded guilty, she "should not receive the benefit of retroactive application of this Court's decision in *Bazell*." This Court should, in the exercise of its discretion, limit the retroactive application of *Bazell* to cases pending on direct appeal after trial.[5] And, to the extent that the Court did not already do so in *Windeknecht*, the Court should exercise its discretion to deny the retroactive application of *Bazell* to cases in which the defendant pleaded guilty to, and was found guilty of, felony stealing before *Bazell* was decided.

In sum, the motion court did not clearly err in denying Ms. Hamilton's post-conviction motion. Ms. Hamilton did not contest her criminal liability for the class C felony of stealing, and, having waived her right to trial and appeal (with the exception of jurisdictional defects), she should not receive the benefit of a retroactive application of *Bazell*.

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[5] Such a rule would also be consistent with Missouri's general rule that " 'a guilty plea waives all nonjurisdictional defects, including statutory and constitutional guaranties.' " *See Feldhaus v. State*, 311 S.W.3d 802, 804 (Mo. 2010).

CONCLUSION

The Court should affirm the judgment of the motion court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached brief complies with Rule 84.06(b) and contains 4,039 words, excluding the cover, this certification, and the signature block, as counted by Microsoft Word; and that pursuant to Rule 103.08, the brief was served upon all other parties through the electronic filing system.

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