IN THE
SUPREME COURT OF MISSOURI
No. SC97916

STATE OF MISSOURI,

Respondent,

vs.

JASON RUSSELL,

Appellant.

Appeal from the Circuit Court of Lincoln County, Missouri
Forty-Fifth Judicial Circuit, Lincoln County No. 13L6-CR00841-01
The Honorable James D. Beck, Judge

SUBSTITUTE REPLY BRIEF

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This Court in *State ex rel. Windeknecht v. Mesmer*, 530 S.W.3d 500 (Mo. banc 2017) held that "the *Bazell* holding only applies forward, except those cases pending on direct appeal," and a defendant who "received a sentence authorized by a different interpretation of section 570.030 without objection … should not receive the benefit of retroactive application of" *Bazell*. Russell is entitled to the forward application of *Bazell* because his case was not yet final since he had not been sentenced until a year after *Bazell* was decided and he objected to his prison sentence for a felony.

Further, Russell is entitled to a direct appeal because Missouri allows appeals in criminal cases in "*all* cases of final judgment" § 547.070; Rule 30.01(a) ("After the rendition of final judgment in a criminal case, every party shall be entitled to any appeal permitted by law.")."

Finally, Russell's guilty plea did not waive his *Bazell* claim because there was no explicit waiver, the court had no power to impose the prison sentence, Russell objected to the sentence, which occurred after the guilty plea proceeding, and a guilty plea does not bar a defendant from appealing an excessive sentence.

A. Russell is entitled to the forward application of *Bazell*:

On August 23, 2016, this Court decided *State v. Bazell*, 497 S.W.3d 263 (Mo. banc 2016). It reversed two of defendant's felony stealing convictions, holding that the plain language of § 570.030.3 barred defendant's stealing offenses from being enhanced from

misdemeanors to felonies. *Id*. at 266-67.[1] On July 11, 2017, this Court held that *Bazell* applied to cases involving stealing more than $500. *State v. Smith*, 522 S.W.3d 221, 230 (Mo. banc 2017).

On October 5, 2017, this Court in *State ex rel. Windeknecht v. Mesmer*, 530 S.W.3d 500, 503 (Mo. banc 2017) held that "the *Bazell* holding only applies forward, except those cases pending on direct appeal," and a defendant who "received a sentence authorized by a different interpretation of section 570.030 without objection … should not receive the benefit of retroactive application of" *Bazell*.

The brief filed by the Missouri Attorney General in that case sheds some light on the forward application announced by *Windeknecht*.[2] That brief noted that when a new substantive decision is silent as to its retroactive application, the decision "is limited to those cases *subject to direct appeal or to all pending cases not finally adjudicated*, and is sometimes further limited to those cases where the issue has been preserved." *State ex rel. Stephanie Windeknecht, Petitioner, v. Angela Mesmer*, Respondent, 2017 WL 1535805 (Mo.), 26-28, quoting *State v. Ferguson*, 887 S.W.2d 585, 587 (Mo. banc 1994).

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[1] Effective January 1, 2017, § 570.030 no longer contains the language addressed in *Bazell*. *State ex rel. Fite v. Johnson*, 530 S.W.3d 508, 511 n.6 (Mo. banc 2017).

[2] *Windeknecht* indicates that the forward application of *Bazell* applies to a defendant who has not been sentenced yet, if there is an objection: a defendant who "received a sentence authorized by a different interpretation of section 570.030 without objection… should not receive the benefit of retroactive application of" *Bazell*." 530 S.W.3d at 503. Implicit in this statement is that if a defendant objects to receiving the sentence, then the defendant should receive the benefit of retroactive application of *Bazell*.

(citations and internal quotations omitted; emphasis added). Respondent's brief concluded that it did not dispute that the *Bazell* decision involved substantive law; accordingly, under the rule that this Court announced in *Ferguson*, "retroactive application of *Bazell* is limited to the cases that were pending at the time of its decision and to cases which were still subject to direct appeal." *Id.*

The State's argument in *Windeknecht*, as well as the subsequent opinion in *Windeknecht*, involving the forward application of *Bazell* and to those cases on direct appeal, is consistent with prior cases from this Court which apply substantive changes in law to cases pending on appeal, as well as to all pending case not finally adjudicated. *E.g.*, *State v. Stewart*, 832 S.W.2d 911, 914 (Mo. banc 1992) ("Because this opinion results in an extended burden upon the state in charging and sentencing under the intoxication-related recidivist provisions, this Court deems the decision to be substantive; therefore it has both retrospective and prospective application. … The retrospective application is as to all pending cases not finally adjudicated as to the date of this opinion"); *T.C.H. v. K.M.H.,* 693 S.W.2d 802, 805 (Mo. banc 1985) ("This ruling's retrospective application is to all such pending cases not finally adjudicated as of the date of the final disposition of the motion for re-hearing in this court. The ruling shall apply prospectively to all future trials where the custody of a child is at issue.").[3]

[3] A case is final when a judgment has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied. *Griffith v. Kentucky*, 479 U.S. 314, 321 (1987). A case is "pending" until direct review is exhausted. *State v. Sumlin*, 820 S.W.2d 487, 490 (Mo. banc 1991).

Here, Russell's case was still pending and not finally adjudicated when *Bazell* was decided. He had received a suspended imposition of sentence, there was no final judgment, thus, he could not file an appeal due to the lack of a final judgment. *State v. Lynch*, 679 S.W.2d 858, 860 (Mo. banc 1984), overruled on other grounds by *Yale v. City of Independence*, 846 S.W.2d 193 (Mo. banc 1993).

Further, on December 7, 2017, Russell did object to being sentenced to a felony based on *Bazell* (D10). Consistent with *Windeknecht*, Russell is entitled to the forward application of *Bazell*, because his case was not yet final since he had not been sentenced until after *Bazell* was decided, and he *did object* to being sentenced to a felony based on *Bazell* (D10; Tr. 16). *Windeknecht* did not hold that *Bazell* would only apply forward to those cases that went to trial. All defendants are entitled to the forward application of *Bazell* as long as they were not final or were still on direct appeal.[4]

Respondent also argues that § 1.160 supports its argument that *Bazell* should not apply in this case. It does not. That section provides:

> 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.

§ 1.160 (emphasis added).

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[4] It is noteworthy that the defendants in *Windeknecht* had pled guilty, yet there is no mention of waiver in this Court's opinion.

There was no repeal or amendment to § 570.030 regarding the issue in question until 2017. What occurred was a change in decisional law. Thus, § 1.160 does not apply. Cf. *Henderson v. U.S.*, 566 U.S. 266 (2013), citing *Thorpe v. Hous. Auth. of City of Durham*, 393 U.S. 268, 282 (1969) (a change in law between what occurred in the trial court and an appellate decision requires the appellate court to apply the changed law).

But even if § 1.160 would apply, as Respondent argues in its brief, the relevant time period is "the law that existed at the time of the offense." (Resp. Br. at 24, citing *State v. Pierce*, 433 S.W.3d 424, 427 n.1 (Mo. banc 2014)). Here, it was alleged that between March 26, 2011 and October 29, 2011, Russell appropriated at least $500 from the State of Missouri, by deceit, when he falsely claimed that he was unemployed (D2).

But *State v. Passley*, 389 S.W.3d 180 (Mo. App. S.D. 2012) was decided the year *after* the charged offense; thus, the law announced in *Passley* would not apply. And, as this Court stated in *Bazell*, "the language of section 570.030.3 is clear…section 570.030.3 does not apply …Defendant's offenses must be classified as misdemeanors because they cannot to enhanced to felonies by the terms of section 570.030.3." *Bazell*, 497 S.W.3d at 266.

Thus, at the time of the charged offense, the language of section 570.030.3 was "clear." *Id*. Also, at the time of the offense, Missouri courts had consistently held that the "value of the appropriated property is not an element of the offense of stealing." *State v. Ruth*, 830 S.W.2d 24, 27 Mo. App. S.D. 1992); *State v. Bradshaw*, 643 S.W.2d 834, 836 (Mo. App. E.D. 1982). Thus, even if § 1.160 applied, which it does not, then Russell would be entitled to relief because the decisional law

at the time of the offense clearly stated that value was not an element of the offense of stealing, and the felony sentencing enhancement in § 570.030.3 only applied to "any offense in which the value of property or services is an element."

State v. Smith, 522 S.W.3d 221 (Mo. banc 2017) involved a case where the defendant was tried and sentenced after *Passley* had been decided, but before *Bazell* was decided.[5] Thus, there was no *Bazell* objection. The brief filed in the Western District Court of Appeals did not raise a *Bazell* claim. After the case was transferred to this Court, Smith's substitute brief did not contain a *Bazell* claim. Rather, it was not until a Motion to Remand for Resentencing was filed in this Court, followed by court-ordered supplemental briefing, that a *Bazell* claim was raised. Yet Smith received *Bazell* relief by this Court.

Here, Russell raised the issue prior to being sentenced, and again raised the issue in the court of appeals. Respondent's argument that Russell is not entitled to the forward application of *Bazell* would result in the illogical outcome that Russell would not get *Bazell* relief even though he raised a specific *Bazell* objection *prior to sentencing*, whereas other defendants, like Smith, received *Bazell* relief on appeal, even though those defendants did not raise a *Bazell* objection prior to sentencing, rather the issue was raised for the first time on appeal, even belatedly in Smith's case. Russell is entitled to the forward application of *Bazell*.

[5] Russell requests that this Court take judicial notice of its records.

B. If a court enters a sentence that is contrary to law, then a direct appeal is an appropriate remedy, even after a guilty plea:

Having shown that Russell is entitled to the forward application of *Bazell*, the question remains whether he can raise the issue on direct appeal or whether he must litigate it on a Rule 24.035 motion, as argued by Respondent (Resp. Br. at 7) ("Defendant's [*Bazell*] claim … is a claim that must be brought under Rule 24.035, which provides the exclusive remedy for such claims after a voluntary plea of guilty.").

Respondent argues that "[t]here is no right to appeal without statutory authority." (Resp. Br. at 12, quoting *State v. Larson*, 79 S.W.3d 891, 892-93 (Mo. banc 2002)). There is such authority for an appeal of a guilty plea in Missouri. Section 547.070 provides that "[i]n all cases of final judgment rendered upon any indictment or information, an appeal to the proper appellate court shall be allowed to the defendant …", and Rule 30.01(a) provides that "[a]fter the rendition of final judgment in a criminal case, every party shall be entitled to any appeal permitted by law." The only limitation is that there be a final judgment. Neither statute nor rule limit appeals in a criminal cases to only final judgments occurring after trials.

Further, Rule 24.035, contemplates that a direct appeal of a guilty plea can be taken because the timing requirements set out in Rule 24.035(b) includes time limits for such a motion after "an appeal of such judgment or sentences … is taken …."

Some cases have wrongly held that in a direct appeal of a judgment and sentence entered as a result of a guilty plea, the appellate court's review is restricted to claims involving "the subject matter of the trial court and the sufficiency of the information or

indictment." E.g., *State v. Onate*, 398 S.W.3d 102, 105 (Mo. App. W.D. 2013). That holding is contrary to § 547.070 and Rule 30.01(a), which contain no such limitations.

It appears that this erroneous holding originated from *State v. LePage*, 536 S.W.2d 834, 835 (Mo. App. K.C.D. 1976), which is the earliest case that Russell could find using such or similar language. In *LePage*, the appellate court held that "[t]he scope of review of this direct appeal is restricted to the question of the jurisdiction of the subject matter and the sufficiency of the criminal charge," *id*., citing this Court's opinion in *Kansas City v. Stricklin*, 428 S.W.2d 721 (Mo. banc 1968).

But this Court in *Stricklin* merely held that these two matters "may be raised at any stage of the proceedings, even after a plea of guilty, and for the first time in the appellate court," *Stricklin*, 428 S.W.2d at 724. It did not hold that those were the only two issues that could be raised on a direct appeal after a guilty plea. In fact, as noted by Russell in earlier filings with this Court, this Court in *Stricklin* reviewed other claims other than subject matter jurisdiction and the sufficiency of the indictment, when it addressed the appellant's contentions that the "sentence was excessive," it was imposed for a different offense, and it "was the result of bias and prejudice of the court." *Stricklin*, 428 S.W.2d at 723, 726. Although this Court ultimately rejected these sentencing claims on the merits, it did address them. *Also see*, *State ex rel. Zahnd v. Van Amburg*, 533 S.W.3d 227, 231 (Mo. banc 2017), which stated that if a circuit court "enters a sentence that is contrary to law," then "the appropriate remedy is a direct appeal."

Thus, the real issue is not whether a defendant can appeal after a guilty plea; rather, the issue is whether the defendant waived any challenges by entry of a guilty plea, and thus would not be entitled to relief on appeal.

As noted by this Court, and by Respondent's Brief (Resp. Br. at 12), "*the general rule* is that a guilty plea waives all nonjurisdictional defects, including statutory and constitutional guarantees." *Garris v. State*, 389 S.W.3d 648, 651 (Mo. banc 2012) (emphasis added). This is because a guilty plea "represents a break in the chain of events *which has preceded it* in the criminal process." *Id.* (emphasis added; citation omitted). A defendant who has pleaded guilty "may not thereafter raise independent claims relating to the deprivation of constitutional rights *that occurred prior to* the entry of the guilty plea." *Id.* at 651-52 (citation omitted; emphasis added). Here, the sentencing, which Russell objected to, occurred *after* the guilty plea – it did not precede it.

Further, what Respondent's Brief omits is that this Court in a footnote following the quoted passage specifically stated that an exception to this general rule of waiver "exists when it can be determined on the face of the record that the court had no power to enter the conviction *or impose the sentence*." *Garris*, 389 S.W.3d at 651, fn 4. (emphasis added, citation omitted). *In accord, U.S. v. Broce*, 488 U.S. 563, 569 (1989), noting that although normally a guilty plea forecloses a collateral attack on a conviction, there "are exceptions where on the face of the record the court had no power to enter the conviction or impose the sentence."

In *Class v. U.S.*, 138 S.Ct. 798 (2018), the Supreme Court of the United States held that a guilty plea does not bar a criminal defendant

from later appealing his conviction on the ground that the statute of conviction violates the Constitution. *Id.* at 801-02.

In reaching that conclusion, the Court relied upon several factors. For instance, the plea agreement in that case said nothing about the right to raise on direct appeal a claim that the statute of conviction was unconstitutional. *Id.* at 802.[6]

Also, the Court noted that while a valid guilty plea foregoes not only a fair trial, but also other accompanying constitutional guarantees, those simultaneous relinquished rights do not include a waiver of privileges that exist beyond the confines of the trial. *Id.* at 805. Class' statutory right directly to appeal his conviction could not in any way be characterized as part of the trial. *Id.*

While a valid guilty plea also renders irrelevant – and thereby prevents the defendant from appealing – the constitutionality of case-related government conduct that takes place *before* the plea is entered, those kind of claims were not at issue in *Class*. *Id.* Similarly, here, the sentencing, which Russell objected to, occurred *after* the guilty plea.

This Court's prior opinions also support that no waiver occurred as a result of a guilty plea as to an excessive sentence. In *State ex rel. Osowski v. Purkett*, 908 S.W.2d 690, 690-91 (Mo. banc 1995), this Court granted habeas corpus relief after a guilty plea to an information charging a "class B felony," whereas it should have only charged a "class C felony" for an attempted sodomy, because defendant's sentence exceeded the maximum authorized sentence. In doing so, this Court rejected the state's claim that the defendant waived any objection as to

[6] In Russell's case, there was no explicit waiver of his right to appeal (Tr. 5-6; D3)

the propriety of his sentence because he did not previously raise this issue:

> It may be true that his objections as to the effective representation of his trial counsel are waived; it may also be true that his complaints as to the voluntariness of his guilty plea are waived. However, those waivers do not affect his objection that the sentence exceeds the maximum allowed by law.

Id. at 691.

Here, under *Bazell* and its progeny, the sentencing court had no power to impose a prison sentence on Russell. And Russell did not waive the issue because, prior to being sentenced, he specifically objected under *Bazell* to receiving a prison sentence (D10).

C. **Conclusion:**

Russell's judgment on the class C felony of stealing and seven year prison sentence was improper under *Bazell*. The greatest sentence he should have received was one year in jail for misdemeanor stealing. As a result, the trial court erred when it overruled Russell's objection and sentenced him to seven years in prison for felony stealing. Russell requests that this Court vacate his judgment and sentence for the class C felony of stealing, and remand so that the circuit court may enter a conviction and sentence for misdemeanor stealing.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached substitute reply brief complies with Rule 84.06(b) and contains 3,508 words as counted by Microsoft Word, excluding the cover page, the signature block, and this certificate of compliance, which does not exceed the 7,750 words allowed for an appellant's substitute reply brief; and that pursuant to Rule 103.08, the substitute reply brief was served upon all other parties through the electronic filing system.

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