Summary of SC97916, *State of Missouri v. Jason Russell*
Appeal from the Lincoln County circuit court, Judge James D. Beck
Argued and submitted November 5, 2019; opinion issued April 28, 2020

Attorneys: Russell was represented by Craig Johnston of the public defender's office in Columbia, (573) 777-9977. The state was represented by Gregory L. Barnes of the attorney general's office in Jefferson City, (573) 751-3321.

This summary is not part of the opinion of the Court. It has been prepared by communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.

Overview: A man who originally pleaded guilty to stealing appeals the subsequent judgment, after the circuit court revoked his probation, sentencing him for felony stealing. In a 4-3 decision written by Judge Laura Denvir Stith, the Supreme Court of Missouri reverses the judgment and remands (sends back) the case for resentencing for misdemeanor stealing. A defendant not yet sentenced at the time this Court held, in *State v. Bazell*, that misdemeanor stealing could not be enhanced to a felony is entitled to application of *Bazell*. The statute governing the right of appeal, this Court's procedural rules and prior decisions do not preclude the man from bringing a direct appeal challenging the excessiveness of his sentence.

Judge W. Brent Powell dissents. He would hold the only avenue for the man to challenge the legality of his sentence is through a postconviction relief proceeding. Under this Court's precedent, by pleading guilty, the man waived all substantive legal claims regarding the judgment, including the claim his sentence is excessive.

Facts: In 2013, Jason Russell pleaded guilty to stealing; the circuit court suspended imposition of sentence and placed him on probation for four years. In 2017, the circuit court revoked his probation and sentenced him to seven years for felony stealing despite his timely objection that, under this Court's 2016 decision in *State v. Bazell*, he could be sentenced only for a misdemeanor, not a felony. Russell appeals.

REVERSED AND REMANDED.

Court en banc holds: The circuit court erred in sentencing Russell for a felony when *Bazell* held stealing under the statute in effect at the time was a misdemeanor that cannot be enhanced to a felony. As this Court clarified in SC97881, *Hamilton v. State*, also decided today, *Bazell* applies to all cases in which sentences had not yet been imposed and, therefore, were not yet final at the time *Bazell* was decided. The fact Russell pleaded guilty does not preclude him from claiming, on direct appeal, that his sentence is excessive under *Bazell*. The statute governing the right of appeal does not restrict such a right for a defendant who pleads guilty, and this Court's constitutional authority to establish procedural rules shall not change substantive rights or the right of appeal. Further, Rule 24.035, governing postconviction relief claims, expressly recognizes the right of a defendant pleading guilty to a felony to challenge the excessiveness of a sentence but does not bar a defendant from raising such claims on direct appeal. To the extent prior decisions of this Court make broad statements that a guilty plea waives the right to raise

nonjurisdictional claims on appeal, including statutory and constitutional guarantees, the facts of those cases did not involve excessive sentences and are not controlling as to raising an excessive sentence on appeal. Because sentences are not imposed until after the guilty plea is made, they are not impliedly waived by the plea. Because excessive sentences are not waived, therefore, the only issue is whether they can be raised on appeal as well as in a postconviction motion.

Dissenting opinion by Judge Powell: Because Russell pleaded guilty, the author would hold he cannot claim on direct appeal his sentence was excessive but, instead, must raise his claim in a Rule 24.035 motion for postconviction relief. Under this Court's prior decisions, pleading guilty effectively waives all substantive legal arguments the defendant could have raised about the criminal process or the resulting judgment of conviction (including the sentence). The settled rule is that this waiver applies to all nonjurisdictional claims, regardless of whether they occurred before or after the plea is entered. Because an excessive sentence claim is a substantive legal claim, not a jurisdictional defect, the only avenue for Russell to challenge the legality of his sentence pursuant to Rule 24.035.