MISSOURI COURT OF APPEALS
WESTERN DISTRICT

COMPLETE TITLE OF CASE:

STANLEY BARBER

Appellant

v.

STATE OF MISSOURI

Respondent

DOCKET NUMBER WD82714

DATE: July 14, 2020

Appeal From:

Circuit Court of Clay County, MO
The Honorable Shane Terril Alexander, Judge

Appellate Judges:

Division Four
Karen King Mitchell, Presiding Judge, Thomas H. Newton, and Lisa White Hardwick, Judges

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Attorneys:

Kathryn Merwald, Kansas City, MO — Counsel for Appellant

Attorneys:

Gregory Barnes, Jefferson City, Mo — Counsel for Respondent

MISSOURI APPELLATE COURT OPINION SUMMARY
MISSOURI COURT OF APPEALS, WESTERN DISTRICT

STANLEY BARBER, Appellant, v.
STATE OF MISSOURI, Respondent

WD82714 **Clay County**

Before Division Four Judges: Mitchell, P.J., Newton, and Hardwick, JJ.

Barber was charged in 2015 with C felony stealing for an offense that occurred in 2012. The Missouri Supreme Court ruled in 2016 (*State v. Bazell*) that stealing in certain circumstances could not be enhanced to a felony charge, but could be charged as a misdemeanor only. This Court ruled in 2016 (*State v. McMillian*) that, under *Bazell*, a trial court correctly dismissed a felony stealing charge that had been brought beyond the one-year statute of limitations for a misdemeanor. Thereafter, Barber agreed, on the advice of counsel, to accept a plea agreement whereby he would be charged with C felony receiving stolen property rather than felony stealing. Barber entered a guilty plea to the amended information in January 2017 and was sentenced under the agreement to three years in prison. Since *Bazell* was decided, the Missouri Supreme Court has consistently ruled that it applies retroactively to any case that was pending, i.e., where direct appeal had not been exhausted, when *Bazell* was handed down.

Barber filed a post-conviction relief motion under Rule 24.035, claiming that his plea was unknowing in that his counsel did not advise him of his rights under *Bazell* and he would have gone to trial rather than plead guilty. The amended post-conviction relief motion addressed both the stealing and amended receiving-stolen-property charges, arguing that trial counsel was ineffective in failing to advise Barber that the felony stealing charge should have been dismissed under *Bazell* and advising him instead to enter a plea to a different felony charge and a three-year prison sentence. During the evidentiary hearing on the motion, trial counsel testified that he did not know what impact *Bazell* would have on the case, he would not have investigated any potential defenses after a plea agreement had been negotiated, and he did not advise Barber that he had a potential statute-of-limitations defense or that the amended charge would not be tolled by the misdemeanor stealing charge, which had been filed long after the statute of limitations had run. Barber testified that he would not have taken the plea but for counsel's ineffectiveness and would instead have gone to trial. The motion court denied the Rule 24.035 motion. Barber appeals.

REVERSED AND REMANDED.

<u>Judge Newton's Majority Opinion Holds:</u>

The first point contends that counsel was ineffective for failing to advise Barber and raise a statute-of-limitations defense to the felony stealing charge under *Bazell* and this ineffectiveness resulted in an unknowing and involuntary plea. Barber claims that the defense was meritorious because the offense could be charged as a misdemeanor only and was filed beyond the one-year statute of limitations. In the second point, Barber argues that counsel was ineffective for not objecting to or seeking to amend the first amended information because the statute of limitations is not tolled for a different charge and the amended information was filed beyond the three-year statute of limitations for felony receiving stolen property. We analyze the points together because

they arise from counsel representing Barber during a single plea negotiation that began with one charge going in and ended with another to which he agreed to enter a guilty plea.

The felony stealing charge in Barber's case was still pending when *Bazell* was decided, so *Bazell* applies to his case. We find that counsel rendered ineffective assistance by failing to advise Barber that felony stealing was an unlawful charge under *Bazell* and, as a misdemeanor, the charge was filed too late. We also find that counsel rendered ineffective assistance by failing to seek dismissal of the charge and instead advising Barber to enter a plea to a different felony charge that was also filed too late. Counsel lacked any strategic reason for failing to investigate and consider case law of significance to his client's case thus failing to exercise the skill and diligence of a reasonably competent counsel. The motion court erred in finding that *Bazell* would have applied to a felony-stealing sentence only and would have had no effect on the statute of limitations, ignoring contrary case law stating that where felony stealing is improperly charged outside the statute of limitations for misdemeanor stealing, the charge must be dismissed. The motion court also erred in finding that the stealing charge tolled the statute of limitations for the amended information that charged Barber with felony receiving stolen property in that they both arose from the same offense and have recently been combined under a single statute. When the offense occurred, however, stealing and receiving stolen property were set forth as separate offenses with different elements in different statutes. And misdemeanor stealing is not the same level of offense as felony receiving stolen property. Accordingly, the stealing charge could not toll the charge for receiving stolen property. The motion court also erred in finding the statute-of-limitations defense waived due to the entry of a guilty plea. The defense was raised in the context of counsel's ineffectiveness in investigating whether the defense applied before negotiating the plea on Barber's behalf.

We grant both points and remand the matter for the motion court to permit Barber to withdraw his guilty plea.

Majority Opinion by Thomas H. Newton, Judge July 14, 2020

Judge Mitchell's Dissenting Opinion Holds:

1. Barber's amended motion failed to sufficiently plead his claims for relief, and pleading defects cannot be remedied by the presentation of evidence and refinement of a claim on appeal.

2. In Barber's first claim, he failed to plead how counsel's allegedly deficient performance with respect to the original charge affected the voluntariness of his plea to the amended charge.

3. Claims from a pro se motion are superseded once an amended motion is filed. And all claims for relief must be raised in the amended motion, itself, as incorporation is no longer allowed.

4. Barber cannot, for the first time on appeal, fault counsel for failing to rely on a case that Barber, himself, never raised before the motion court.

5. In the context of Rule 24.035 motion, non-sentencing claims of ineffective assistance must affect the voluntariness of the plea to afford any relief to a post-conviction movant. And a claim that the movant would have received a lower sentence but for counsel's alleged error must be based upon an alleged error in sentencing.

6. In his second claim, Barber failed to make a proper allegation of prejudice insofar as he did not allege that, but for counsel's alleged non-sentencing error, he would not have pled guilty but would have gone to trial.

Dissenting Opinion by Karen King Mitchell, Presiding Judge July 14, 2020

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