
IN THE SUPREME COURT OF THE UNITED STATES

JOSHUA HOLMAN,

Petitioner,

vs.

JENNIFER SACHSE, WARDEN, MISSOURI EASTERN CORRECTIONAL
CENTER

Respondent.

**APPLICATION FOR A SIXTY (60) DAY EXTENSION OF TIME IN WHICH
TO FILE PETITION FOR A WRIT OF CERTIORARI**

TO: THE HONORABLE NEIL M. GORSUCH, ASSOCIATE JUSTICE OF
THE UNITED STATES SUPREME COURT, AND CIRCUIT JUSTICE
FOR THE EIGHTH CIRCUIT:

Pursuant to Rule 13.5, Petitioner respectfully requests a sixty (60) day extension of time in which to file his petition for a writ of certiorari in this Court, up to and including March 1, 2017. In support of this application, Petitioner states the following grounds:

1. Petitioner, Joshua Holman, currently serving the second of two consecutive seven year sentences. He intends to seek discretionary review in this Court, pursuant to 28 U.S.C. § 1254(1), of the Missouri Supreme Court denying his petition for writ of habeas corpus. *State ex. Rel. Holman v. Sachse*, 530 S.W.3d 500 (Mo.banc.2017)(decided October 5, 2017). Attached.

2. Pursuant to Rule 13, Petitioner's petition for a writ of certiorari is due on or before January 3, 2017.

3. In this petition, Petitioner intends to advance, among other things, the misapplication of *Wainright v. Stone*, 414 U.S. 21, 23-24 (1973) in a manner that violates one of the most basic principles of due process as applied through the 14th amendment, the idea that, as Missouri Courts themselves historically have repeatedly held, "A sentence which is in excess of that authorized by law is beyond the jurisdiction of the sentencing court." *State ex rel. Dutton v. Sevier*, 336 Mo. 1236, 83 S.W.2d 581 (1935); See also *Merriweather v. Grandison*, 904 SW.2d 485, 486 (Mo. App. W.D. 1995), *LaGore v. Ramsey* 126 S.W.2d 1153 (1939). The idea that a court must have been granted the power by the legislature to take a specific action, in this case an action resulting in a significant deprivation of one's liberty, is a foundational principal of due process. See e.g. *Marbury v. Madison*, 5 U.S. 137 (1803). This expresses itself in the criminal context where a person is ordered imprisoned by a Court or other agency that did not have authority to do so. That law must proscribe such action is firmly established both in the British Common law and in the Federalist papers, which early American Courts and legal scholars heavily relied on in interpreting America's own Constitution. See The Federalist No. 84 (Alexander Hamilton)("[T]he subjecting of men to punishment for things which, when they were done,

were breaches of no law, and the practice of arbitrary imprisonments, have been, in all ages, the favorite and most formidable instruments of tyranny."); *Ex Parte Page*, 249 Mo. 291 (1872)(citing *The King v. Ellis*, 5 Barn. & Cress. 395 and *The King v. Bonne*, 7 Ad. & Ellis, 58 for the idea that: "In England the settled practice is that where the inferior court on a valid indictment transcends its power in passing sentence, by giving one which the law does not authorize, the superior or appellate court will neither pass the proper sentence nor send back the record to the court below, in order that they may do so, but that they will reverse the judgment and discharge the prisoner.")

4. Attorneys Carlyle and Parish did not represent Mr. Holman in his proceedings in State Court. Mr. Holman is currently incarcerated and cannot afford to hire an attorney to file a Petition for Certiorari. Ms. Carlyle and Ms. Parish were recently contacted by Mr. Holman's family and within the last week made an agreement with Mr. Holman to file a Petition for Certiorari for Mr. Holman pro bono. However, as they are new to the case, they have not yet had sufficient time to devote to researching and preparing this certiorari petition.

5. The extension is being filed in good faith and not for purposes of delay. Additionally, because Mr. Holman is currently incarcerated, any prejudice resulting from the delay is to his rights.

WHEREFORE, for the foregoing reasons, petitioner respectfully requests that Justice Gorsuch, in his capacity as Circuit Justice for the Eighth Circuit, issue an order granting petitioner a sixty (60) day extension of time up to and including March 1, 2017, in which to file his petition for a writ of certiorari.

Respectfully Submitted,

/s/ Elizabeth Unger Carlye

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Counsel for Petitioner

530 S.W.3d 500
Supreme Court of Missouri,
en banc.

STATE EX REL. Stephanie WINDEKNECHT, Petitioner,

v.

Angela MESMER, Respondent.

State ex rel. Joshua Holman, Petitioner,

v.

Jennifer Sachse, Respondent.

State ex rel. Summer Robinson, Petitioner,

v.

Angela Mesmer, Respondent.

State ex rel. Scarlett R. Adams, Petitioner,

v.

Angela Mesmer, Respondent.

No. SC 96159, No. SC 96160, No. SC 96165, No. SC 96187

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Opinion issued October 5, 2017

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Rehearing Denied October 31, 2017

Synopsis

Background: Defendants, who had pled guilty to stealing property worth \$500 or more but less than \$25,000, petitioned for habeas-corpus relief based on their claims that they were given sentences in excess of the maximum authorized by law.

[Holding:] The Supreme Court held that the holding in *State v. Bazell*, 497 S.W.3d 263, only applies forward, except to those cases pending on direct appeal.

Petitions denied.

West Headnotes (2)

[1] **Courts**🔑 In general; retroactive or prospective operation

106Courts
106IIEstablishment, Organization, and Procedure
106II(H)Effect of Reversal or Overruling
106k100In General
106k100(1)In general; retroactive or prospective operation

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.

2 Cases that cite this headnote

[2] **Courts**🔑 In general; retroactive or prospective operation

106Courts
106IIEstablishment, Organization, and Procedure
106II(H)Effect of Reversal or Overruling
106k100In General
106k100(1)In general; retroactive or prospective operation

The holding in *State v. Bazell*, 497 S.W.3d 263, which held that the value of the property or services appropriated was not an element of the offense of stealing and thus prior statutory provision on enhancement to a felony did not apply to the offense of stealing, only applies forward, except to those cases pending on direct appeal. Mo. Ann. Stat. §§ 570.030.1 (2016), 570.030.3 (2016).

8 Cases that cite this headnote

Attorneys and Law Firms

*501 Scott Thompson of the public defender's office in St. Louis, (314) 340-7662, represented Windeknecht in SC96159 and Robinson in SC96165; W. Scott Rose of Rose Legal Services in St. Louis, (314) 462-0200, represented Holman in SC96160; and Danieal H. Miller of Miller Law LLC in Columbia, (573) 443-1645, represented Adams in SC96187.

D. John Sauer and Patrick J. Logan of the attorney general's office in Jefferson City, (573) 751-

3321, represented the state in all four cases; they were joined by Michael J. Spillane of the attorney general's office in representing the state in SC96159 and 96165.

ORIGINAL PROCEEDINGS IN HABEAS CORPUS

PER CURIAM

Stephanie Windeknecht, Joshua Holman, Summer Robinson, and Scarlett R. Adams (collectively, “Petitioners”) were each charged pursuant to section 570.030.3(1)¹ with a class C felony for stealing property worth \$500 dollars or more but less than \$25,000 dollars. Each pleaded guilty and was sentenced to either six or seven years’ imprisonment based on the felony classification. Petitioners, who are each still incarcerated,² now seek habeas corpus relief, relying on this Court’s decision in *State v. Bazell*, 497 S.W.3d 263 (Mo. banc 2016) (per curiam). Petitioners claim they were sentenced in excess of the maximum sentence authorized by law because the offense of stealing is a class A misdemeanor that could not have been enhanced to a felony pursuant to the statute then in effect. Habeas relief is denied.

I.

At all times relevant to Petitioners’ claims, section 570.030.1 provided: “A person commits the crime of stealing if he or she appropriates property or services of another with the purpose to deprive him or *502 her thereof, either without his or her consent or by means of deceit or coercion.” Section 570.030.9 provided: “Any violation of this section for which no other penalty is specified in this section is a class A misdemeanor.” However, section 570.030.3(1), pursuant to which Petitioners were charged and convicted, provided: “Notwithstanding any other provision of law, any offense in which the value of property or services is an element is a class C felony if ... [t]he value of the property or services appropriated is five hundred dollars or more but less than twenty-five thousand dollars[.]”

In 2012, the court of appeals addressed a direct appeal wherein the appellant argued the offense of stealing could not be enhanced to a class C felony pursuant to section 570.030.3 because “the value of the property or services” simply is not an element of the offense of stealing as defined by section 570.030.1—and thus the stealing conviction had to be classified as a class A misdemeanor. *State v. Passley*, 389 S.W.3d 180, 182-83 (Mo. App. 2012), *abrogated by Bazell*, 497 S.W.3d at 267 n.3. The court of appeals rejected this argument in *Passley*, holding it would lead “to the absurd and illogical result that the legislature chose to amend the stealing statute to provide an

enhanced punishment for some other offense or offenses but not for the offense [of stealing] mentioned in that very statute.” *Id.* at 184. Transfer of *Passley* to this Court was not sought. Four years later, this Court considered the same argument for the first time. *See Bazell*, 497 S.W.3d at 266-67. In *Bazell*, this Court came to the opposite conclusion of the court of appeals in *Passley*, explaining:

Stealing is defined in section 570.030.1 as “appropriat[ing] property or services of another with the purpose to deprive him or her thereof, either without his consent or by means of deceit or coercion.” The value of the property or services appropriated is not an element of the offense of stealing.

....

Here, there is no need to resort to tools of interpretation because the language of section 570.030.3 is clear. We cannot know why 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, but this is what the legislature clearly and unambiguously did. As a result, section 570.030.3 does not apply here. Defendant’s offenses must be classified as misdemeanors because they cannot be enhanced to felonies by the terms of section 570.030.3.

Id. (footnotes omitted). This Court also stated *Passley* “should no longer be followed.” *Id.* at 267 n.3.³

Recently, this Court in *State v. Smith*, 522 S.W.3d 221 (Mo. banc 2017), reaffirmed its holding in *Bazell*. In rejecting the State’s argument that this Court’s holding in *Bazell* was limited to a felony enhancement made pursuant to section 570.030.3(3), this Court explained:

This argument misconstrues the holding of *Bazell* and the structure of section 570.030. *Bazell*’s analysis regarding the applicability of section 570.030.3 to the offense of stealing does not depend on which particular enhancement provision is at issue. Instead, *Bazell* looked at the definition of the offense of stealing in section 570.030.1 and held that, because the definition does not contain as an element “the value of property or services,” “section 570.030.3 does not apply here.” *Bazell* draws no distinction *503 among the numerous subcategories enumerated within section 570.030.3.

Furthermore, the structure of the statute compels this conclusion because, 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. To argue one of the subcategories for enhancement under section 570.030.3 can be used to supply the value element for an offense otherwise lacking that element is flawed and circular reasoning. Appropriation of property or services worth more than \$500 may be charged as a felony under section 570.030.3(1) *only* if the underlying offense contains as an element “the value of property or services.”

[Furthermore,] Judge Stith’s [dissenting] opinion understates the importance of this operative language in the introductory clause of section 570.030.3. This language conditions the application of *all* the subdivisions enumerated below it—including section 570.030.3(1)—on the presence of a value element in the offense for which enhancement is sought. In other words, enhancement pursuant to one of those subdivisions is available “*if*” “the value of property or services” is an element. According to this plain and unambiguous statutory language, an offense must contain the “value” element *before* considering whether additional facts justifying enhancement under one of the subdivisions of subsection .3 is available. As this Court concluded in *Bazell*, because of this language, “section 570.030.3 does not apply here.”

Smith, 522 S.W.3d at 230 (internal citations omitted).

Based on this Court’s decision in *Bazell*, each of the Petitioners sought habeas relief in the appropriate lower courts. See Rules 84.22(a), 91.02(a). After being denied by the lower courts, Petitioners sought habeas relief in this Court. Petitioners argue their sentences are, according to *Bazell*, in excess of the maximum authorized by law because the sentences should have been based on a class A misdemeanor rather than a class C felony.⁴

II.

^[1] ^[2] The 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. *Wainwright v. Stone*, 414 U.S. 21, 23-24, 94 S.Ct. 190, 38 L.Ed.2d 179 (1973) (per curiam).⁵ “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 24, 94 S.Ct. 190 (internal quotation marks omitted); see also *State v. Nunley*, 341 S.W.3d 611, 623-24 (Mo. banc 2011). Exercising this authority, the Court orders the *Bazell* holding only applies forward, except those cases pending on direct appeal.

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*. Habeas relief is, therefore, denied.

All concur.

All Citations

530 S.W.3d 500

Footnotes

- 1 Statutory citations are to RSMo Cum. Supp. 2013.
- 2 Windeknecht pleaded guilty in January 2014. She was sentenced to six years and her sentence was executed in March 2014. She is currently incarcerated in Audrain County. Holman pleaded guilty and was sentenced to two consecutive seven-year terms in July 2008, with the latter sentence for class C felony stealing. His sentences were executed in December 2010 and he is currently incarcerated in St. Louis County. Robinson pleaded guilty in August 2011. She was sentenced to seven years and her sentence was executed in May 2012. She is currently incarcerated in Audrain County. Adams pleaded guilty in September 2012. She was sentenced to seven years and her sentence was executed in November 2012. She is currently incarcerated in Audrain County.
- 3 Section 570.030 has been amended and, effective January 1, 2017, no longer contains the same language addressed in *Passley* and *Bazell*.
- 4 The sentence for a class A misdemeanor cannot exceed one year. Section 558.011.1(5).
- 5 Although *Wainwright* dealt with a state supreme court reversing its own prior interpretation of a state statute there is no basis to assume this same principle of federalism would not apply to a state supreme court's authority to choose to prospectively apply a different interpretation than a prior subordinate appellate court.