

IN THE CIRCUIT COURT OF GREENE COUNTY
STATE OF MISSOURI

STATE OF MISSOURI,) Cause No. [REDACTED]
Plaintiff)
) Division No.
v.)
)
[REDACTED])
Defendant)

**MOTION TO CORRECT JUDGMENT AND RESENTENCE DEFENDANT
AND DISCHARGE HER FROM PROBATION**

COMES NOW, [REDACTED] by and through counsel, and states the following:

1. On June 6, 2014, defendant plead guilty to two counts of theft/stealing of property valued greater \$500 but less than \$25,000 as a class C felony under Section 570.030, RSMo, and on August 22, 2014, was sentenced to four years in the Missouri Department of Corrections. The Court suspended execution of that sentence and placed defendant on probation for a term of five years.
2. Section 575.030.1, RSMo, provides that "a person commits the crime of stealing if he or she appropriates property or services of another with the purpose to deprive him or her thereof, either without his or her consent or by means of deceit or coercion."
3. Section 570.030.3 provides for the enhancement to a class C felony of stealing of "any offense in which the value of property or services is an element," if certain conditions are met.
4. The Missouri Supreme Court recently held in *State v. Bazell* 2016 WL 4444392

(Mo. banc 2016) that the definition of stealing in section 575.030.1 is "clear and unambiguous," and that the value of property or services appropriated are not included as an element of the offense. *Id.* at 2.

5. As a result of the Missouri Supreme Court's finding, enhancement pursuant to section 570.030.3 is inapplicable to ██████████'s case, and the judgment must be corrected to classify the stealing offense as a misdemeanor and that ██████████ has become entitled to be re-sentenced to a misdemeanor.
6. Defendant anticipates that the State will argue that the opinion of *Bazell* does not apply to defendant's case because in his case, the value of what defendant stole was an element of the offense. Defendant anticipates the State will support its argument by arguing that the convictions that were reversed in *Bazell* were the convictions for the theft of the firearms, which are a felony because of the fact that the value of the firearms is not relevant in determining whether the theft is a misdemeanor or felony. The convictions for the theft of the rings, which were enhanced to a felony based on their value, were not overturned.
7. Defendant's arguments fail for three reasons. First the language of the opinion and as well as the statute are clear. Stealing can *only* be enhanced to a felony where the value of the property is an element of the offense. *See* §570.030.3 Stealing, however, is defined in §570.030.1 and as the Missouri Supreme Court clearly stated in *Bazell*: "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." *State v. Bazell* 2016

WL 4444392 at 2. "The value of the property or services appropriated is not an element of the offense of stealing." *Id.*

8. Second, the Court clearly stated that the reason it did not reverse the convictions for the theft of the rings was because the issue had not been preserved since the defendant had not made the argument when the case was in front of the court of appeals. *State v. Bazell* 2016 WL 4444392 at 3, n. 4.
9. Finally, the Missouri Court of Appeals, in *State v. McMillian*, 2016 WL 6081923 (Mo. App. W.D. 2016), the Missouri Court of Appeals, Western District, held that the *Bazell* case did apply to thefts of property or services with a value greater than \$500. *Id.* at 2-3.
10. Another argument defendant anticipates the State will make is that *Bazell* is not retroactive. Defendant anticipates the State will argue that substantive decisions only apply prospectively.
11. This argument, however, fails because no retroactivity issues arise by such a correction of judgment because the Supreme Court did not make new law, but merely interpreted a statute that was in effect at the time of [REDACTED]'s guilty plea. *See Thornton v. Denney*, 467 S.W.3d 292, 298 (Mo. App. W.D. 2015).
12. In *Thornton*, the defendant pleaded guilty to the Class D felony of Driving While Intoxicated as a Persistent offender based on two alcohol related offenses and was sentenced to four years in prison. *Id.* at 294. While serving his term, the Missouri Supreme Court decided *Turner v. State*, 245 S.W.3d 826 (Mo. banc 2008), in which it held, based on its reading of the DWI statute in effect at the time of the

plea, that "the use of prior municipal offenses resulting in an SIS cannot be used to enhance punishment under section 577.023." 245 S.W.3d at 829.

13. One of Thornton's prior offenses was "prior municipal offense resulting in an SIS," so he filed a petition for writ of habeas corpus. And just as the State might argue that *Bazell* should not be applied retroactively, the State in *Thornton* argued that *Turner* should not be applied retroactively. *Thornton v. Denny*, 467 S.W.3d at 296.
14. In rejecting the State's position, the Court of Appeals held that "[i]n these circumstances, where Thornton's plea relies on a judicial opinion interpreting a statute which was in effect at the time of his conviction, and that judicial opinion 'created no new law,' no retroactivity issue arises." *Id.* at 298. "Put another way, ██████████ does not seek retroactive application of a new rule of law; rather, she seeks application of the statute - properly construed - that was in effect at the time of the plea." *Id.* at 298-99.
15. The Court of Appeals further noted that its decision was consistent with the United States Supreme Court's decisions on retroactivity in *Fiore v. White*, 531 U.S. 225 (2001), and *Bunkley v. Florida*, 538 U.S. 835 (2003). *Id.* at 299.
16. There are no material differences between *Thornton* and this case. Both involve a defendant who pleaded guilty to a felony that should have been a misdemeanor. Both involve a prior Missouri Supreme Court decision that clarified the meaning of a statute. *Thornton* involved *Turner*, which clarified the DWI statute, and this case involves *Bazell*, which clarified the Stealing statute.

17. *Turner* and *Bazell* are similar in that they "merely clarified the language of an existing statute." *Id.* at 298.
18. Accordingly, *Thornton* is controlling on the issue of retroactivity, and [REDACTED] need not seek retroactive application of a new rule of law. The statute interpreted by the Missouri Supreme Court in *Bazell* has been in effect since 2002. *State v. Bazell* 2016 WL 4444392 at 3.
19. Even if an issue of retroactivity exists, Missouri case law is clear that when the law has been changed through judicial action, it is to be applied retroactively if the change is substantive. *State v. Walker*, 616 S.W.2d 48, 49 (Mo. banc 1981); *State v. Reeder*, 182 S.W.3d 569, 575 (Mo. App. E.D. 2005).
20. Clearly, the change (assuming it can be viewed as such) is substantive in nature and is to be applied retroactively.
21. Additionally, the State cannot move to set aside the guilty plea. Rule 29.07(d) allows for a defendant to withdraw his guilty plea, not the State or the trial court. *State ex rel. Williamson v. Wilson*, 63 S.W.3d 650, 653 (Mo. banc 2002).
22. Finally, any argument that defendant's proper remedy is through a 24.035 motion has no merit. In order for defendant to file for relief under 24.035, she would first have to be sent to the Department of Corrections and then wait for her case to work through the system. This process can take several months or sometimes up to two years. The notion that anyone would have to actually go to prison and wait there for more than her sentence allows is undeniably a manifest injustice.
23. *Bazell* is clear that Stealing has been a misdemeanor since 2002. When defendant

was placed on probation in 2014, she should have been sentenced to a misdemeanor. This Court should simply correct the judgment and re-sentence her for a misdemeanor.

24. Any concern of the Court that it does not have jurisdiction is not warranted. "A sentence that does not comply with the statute is void and cannot constitute a final judgment." *State v. Ferrier*, 86 S.W.3d 125, 127 (Mo. App. E.D. 2002)(citing *State v. Morris*, 719 S.W.2d 761, 763 (Mo. banc 1986)). "In order to constitute a final judgment, it is axiomatic that the sentence not be contrary to law." *Ossana v. State*, 699 S.W.2d 72, 73 (Mo. App. E.D. 1985). "Since the original sentences in this case did not comply with the statute, the trial court did not exhaust its jurisdiction until it rendered sentences in accordance with the law." *Id.*
25. When this Court sentenced defendant, it did not do so in accordance with the law. Therefore, it did not lose jurisdiction and has the authority to re-sentence the defendant.
26. Upon doing this, the Court should discharge her from probation. She has been on probation for more than two years. Section 559.016 specifically states that the term of probation cannot be longer than two years.

WHEREFORE, [REDACTED] respectfully moves this Court to correct the judgment and re-sentence her for the offense of a misdemeanor and discharge her from probation.

NOTICE

COMES NOW defendant, by and through counsel, and gives notice of his

intent to call up the above and foregoing motion for hearing on November 16, 2016 at 8:30 AM, or as soon thereafter as counsel may be heard.

Respectfully submitted,

/s/ James Egan

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Certificate of Service

I hereby certify that on this 10th day of October, 2016, an electronic copy of the foregoing was sent through the Missouri e-Filing system to counsel of record.

/s/ James Egan

James Egan