



**MISSOURI COURT OF APPEALS  
WESTERN DISTRICT**

**STATE OF MISSOURI,** )  
 ) **WD80438**  
 ) **Appellant,** )  
 ) **v.** ) **OPINION FILED:**  
 ) )  
 ) **KAREN A. BACKUES,** ) **July 3, 2018**  
 ) )  
 ) **Respondent.** )

**Appeal from the Circuit Court of Platte County, Missouri  
Honorable James Walter Van Amburg, Judge**

**Before Division One:  
Lisa White Hardwick, P.J., Thomas H. Newton, and Edward R. Ardini, JJ.**

The State of Missouri appeals a Platte County judgment granting Rule 29.07 relief to Ms. Karen A. Backues and, thereby, altering the sentences imposed against her after she pleaded guilty to stealing and forgery in 2011. It challenges the trial court's authority, the application of *Bazell*, and the lack of conformity between the court's oral and written sentencing pronouncements. We reverse.

On March 31, 2011, Ms. Backues pleaded guilty to three counts of then-felony stealing and three counts of forgery. On June 2, 2011, the court sentenced Ms. Backues to nine years in prison on each stealing count, to be served concurrently with one another, and to six years in prison on each forgery count, to be served concurrently with one another but consecutive to the stealing counts.

On October 13, 2016, five years after the judgment became final, Ms. Backues filed a motion to set aside the guilty plea under Rule 29.07(d). Ms. Backues argued that relief was warranted under 29.07(d) because of the holding in *State v. Bazell*, 497 S.W.3d 263 (Mo. banc 2016).<sup>1</sup>

On January 19, 2017, the trial court sustained the Rule 29.07 motion and permitted the withdrawal of Ms. Backues's guilty pleas to three counts of felony stealing. The court amended the judgment and re-sentenced Ms. Backues to one year in the Platte County jail on each of the three counts of Class A misdemeanor stealing to be served concurrently. The court stated that counts IV, V, and VI would remain unchanged. In the written amended judgment, however, the court stated that those counts would run concurrently with the altered sentences for stealing, rather than consecutively as had been previously announced.

The State filed this timely appeal on January 24, 2017.<sup>2</sup>

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<sup>1</sup> The court in *Bazell* held that stealing offenses could not be enhanced to felonies unless the value of the property was an element of the crime, because it was not, the court clarified, offenses of misdemeanors. *State v. Bazell*, 497 S.W.3d 263, 266-67 (Mo. banc 2016).

<sup>2</sup> The State also filed a writ of mandamus in this case. Because of the holding in *State ex rel. Fite v. Johnson*, 530 S.W.3d 508 (Mo. banc 2017), there was some discussion in the briefing about whether this case should be resolved via appeal or via writ. In *Fite*, the Missouri Supreme Court held that the trial court had erred in granting the Defendant's Rule 29.07(d) motion and, thereby, allowing the Defendant to withdraw his plea of guilty for felony stealing. *Id.* at 510. The State filed an appeal and a writ of prohibition simultaneously. *Id.* at 509-10. The court decided to dismiss the appeal and resolve the issue via writ but provided no explanation for its decision. *Id.* at 509. Ms. Backues argued that, because the court in *Fite* decided its case via a writ, we are obligated to do the same here. We disagree. The Missouri Supreme Court did not expressly say in its opinion that a writ was the exclusive remedy, nor did the State make this argument in its writ. A writ is "an extraordinary remedy and ought to be reserved for those cases in which no alternative measure will be effective." *State ex rel. Freeway Media, L.L.C v. City of Kansas City*, 14 S.W.3d 169, 173 (Mo. App. W.D. 2000). It was the opinion of this Court that an alternative measure existed, and therefore, we will resolve this issue on appeal rather than via the writ.

## Legal Analysis

In the first point on appeal, the State argues that the trial court abused its discretion by granting the Rule 29.07 motion because it lacked the authority to do so and Ms. Backues should have filed her claims in a timely Rule 24.035 motion.

“[O]nce judgment and sentencing occur in a criminal proceeding, the trial court has exhausted its jurisdiction. It can take no further action in that case except when otherwise expressly provided by statute or rule.” *State ex rel. Fite v. Johnson*, 530 S.W.3d 508, 510 (Mo. banc 2017) (citation omitted). Rule 29.07 states that, “[a] motion to withdraw a plea of guilty may be made only before sentence is imposed or when imposition of sentence is suspended; but to correct manifest injustice the court *after sentence* may set aside the judgment of conviction and permit the defendant to withdraw his plea.” § 29.07(d) RSMo. (2016) (emphasis added). Rule 29.07(d) allows the court to consider a post-sentence civil matter, and therefore, the motion court had *jurisdiction* to adjudicate Ms. Backues’s Rule 29.07(d) motion. *Id.*

The court, however, lacked the *authority* to sustain the motion in this case. In *Fite*, the Missouri Supreme Court held that, because the Defendant had pleaded guilty, any claims for post-conviction relief were governed by Rule 24.035. *Id.* Rule 24.035 was the “exclusive procedure” by which the Defendant “could have collaterally attacked the final judgment based on his claim [that] his sentence exceed[ed] the maximum sentence authorized by law.” *Id.*

Like the Defendant in *Fite*, Ms. Backues pleaded guilty to stealing under section 570.030. Because Ms. Backues pleaded guilty, her claims for post-conviction relief are governed by Rule 24.035(a). Ms. Backues’s claim that her sentence was in excess

of the maximum authorized by statute falls under the purview of 24.035 and, therefore, cannot be raised under 29.07(d). Like the trial court in *Fite*, the trial court here lacked the authority to grant relief. Point one is granted which resolves this matter. And even though a discussion of points two and three is unnecessary, we will briefly discuss the issues.

In point two, the State argues that the motion court erred in amending the judgment and reducing Ms. Backues's sentence because *Bazell* did not apply retroactively. When reviewing the grant of a motion to withdraw a guilty plea under 29.07(d), we must determine whether the trial court abused its discretion or its ruling was clearly erroneous; the State has the burden to prove by a preponderance of the evidence that the motion court erred. *McCoy v. State*, 456 S.W.3d 887, 890-91 (Mo. App. W.D. 2015).

Ms. Backues was charged with stealing in 2011 under section 570.030.1. At that time, the statute stated 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." § 570.030.1 (Cum. Supp. 2009). This section further stated that, "[n]otwithstanding any other provision of law, any offense in which the value of property or services is an element is a class C felony if....(1) The value of the property or services appropriated is five hundred dollars or more but less than twenty-five thousand dollars." § 570.030.3 (Cum. Supp. 2009).

In *Bazell*, the Missouri Supreme Court held that a person sentenced under section 570.030 could not have his or her conviction enhanced to a felony because "value" was

not an element of stealing. *State v. Bazell*, 497 S.W.3d 263, 266-67 (Mo. banc 2016). While we agree that in theory this holding would entitle Ms. Backues to an amended sentence, *Bazell* does not apply retroactively.

In *State ex rel. Windeknecht v. Mesmer*, 530 S.W.3d 500 (Mo. banc 2017), the court held that 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 backwards.” *Id.* at 503 (citations omitted). The court chose to exercise this authority and in doing so determined that the holding in *Bazell* would only apply going forward, except in those cases pending on direct appeal. *Id.*

This holding was further enforced in *State ex rel Fite v. Johnson*, which Ms. Backues cited in her brief to this Court. The Missouri Supreme Court in *Fite* extended the *Windeknecht* holding and stated that the *Bazell* interpretation applied prospectively only and the trial court had erred when it assumed that *Bazell* applied retroactively. *Fite*, 530 S.W.3d at 511.

In response to the State’s second point, Ms. Backues argues that we should dismiss this appeal because, according to her, under section 27.050 the attorney general is prohibited from representing the State of Missouri in cases on appeal involving misdemeanor convictions.

According to section 27.050, “[t]he attorney general shall appear on behalf of the state in the court of appeals and in the supreme court and have the management of and represent the state in all appeals to which the state is a party other than misdemeanors and those cases in which the name of the state is used as nominal plaintiff in the trial court.”

Ms. Backues interprets the statute to mean that the attorney general is not permitted to represent the State in any misdemeanor matters. We disagree. The use of the word “shall” indicates that this statute is meant to detail which cases the attorney general is *required* to handle. The language “other than misdemeanors” creates an exception to the requirements but still allows the attorney general to handle those cases if he/she so chooses because he/she is the “chief legal officer of the State” and “various offices of the prosecuting attorney are carved out of this overriding authority...” *State v. Todd*, 433 S.W.2d 550, 554 (Mo. 1968).

In the final point on appeal, the State argues that trial court’s written amended judgment did not conform to the oral pronouncement of the sentence and the oral pronouncement should control when there is a discrepancy.

At the motion hearing, the court amended the sentencing and announced that the amended three one-year sentences would run concurrently with one another and Counts IV, V, and VI would remain unchanged.<sup>3</sup> However, in the written amended judgment the court wrote that those counts (IV, V, and VI) would run concurrently with the sentences for stealing rather than consecutively.

The State asks that we correct this judgment and restore the oral pronouncement. Given that we have granted the first point on appeal, this point is now moot.

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<sup>3</sup> The original order stated that Counts IV, V, and VI would run concurrently with one another and consecutive with the stealing counts.

## Conclusion

The trial court lacked the authority to grant Ms. Backues's 29.07 motion because her claims should have been brought under section 24.035. Additionally, *Bazell* does not apply retroactively and was only intended to apply prospectively or to those cases still pending on direct appeal. For these reasons, we reverse and direct the trial court to reinstate the original conviction and sentence.

/s/ Thomas H. Newton  
Thomas H. Newton, Judge

Lisa White Hardwick, P.J., and Edward R. Ardini, J. concur.