RENDERED: JULY 7, 2000; 10:00 a.m.
TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-001825-MR

GILBERT CORNELISON — APPELLANT

v.

APPEAL FROM MADISON CIRCUIT COURT
HONORABLE WILLIAM JENNINGS, JUDGE
ACTION NO. 99-CR-00053

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: BARBER, JOHNSON, AND KNOPF, JUDGES.

JOHNSON, JUDGE: Gilbert Cornelison appeals from the judgment of conviction entered by the Madison Circuit Court on July 28, 1999, for operating a motor vehicle while under the influence, third offense,[1] a Class D felony. Cornelison entered a conditional plea of guilty pursuant to RCr[2] 8.09 claiming that KRS 189A.010(4)(c) is arbitrary as contemplated by Section 2 of the

[1]Kentucky Revised Statutes (KRS) 189A.010(4)(c).

[2]Kentucky Rules of Criminal Procedure.

Kentucky Constitution[3], and/or violates both the state and federal constitutional guarantees of equal protection.[4] Since we agree with the trial court's determination that the statute is constitutional, we affirm.

The facts underpinning this appeal are not in dispute. On April 26, 1999, at about 5:20 in the afternoon, Cornelison was observed operating a motor vehicle by an officer who believed Cornelison's driver's license to have been suspended. After confirming his suspicions in this regard, the officer stopped Cornelison, who emitted a strong odor of alcohol. Cornelison agreed to submit to a field sobriety test, which he failed. He was placed under arrest and, over an hour later, was administered a breath test which indicated his blood alcohol content to be 0.274. Cornelison was indicted on May 27, 1999, on the felony DUI offense,[5] as well as for operating a motor vehicle while license is suspended for DUI, second offense, a class A misdemeanor.[6]

Cornelison originally entered a plea of not guilty to both offenses and moved the trial court to declare KRS

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[3]Section 2 of the Kentucky Constitution provides, "Absolute and arbitrary power over the lives, liberty and property of freemen exits nowhere in a republic, not even in the largest majority."

[4]The Fourteenth Amendment to the United States Constitution provides, in part, that no State shall "deny to any person within its jurisdiction the equal protection of the laws."

[5]Cornelison had two previous convictions for driving under the influence on June 15, 1998, and July 16, 1998.

[6]KRS 189A.090.

189A.010(4)(c) unconstitutional.[7] After the trial court denied the motion, Cornelison changed his plea to guilty on the misdemeanor charge and entered a conditional guilty plea on the felony DUI charge. Cornelison was sentenced to jail for three months on the conviction for operating a motor vehicle on a suspended license, and to prison for one year on the DUI conviction, with the sentences to run concurrently. The trial court stated that after Cornelison spent the 120-day minimum mandatory time in jail, it would consider Cornelison's request to be placed on probation in order to attend an alcohol rehabilitation program. This appeal followed.

It is axiomatic that under our system of government, the power to define and redefine crimes, and to prescribe the appropriate punishments therefor, is entrusted to the legislative branch.[8] "The legislature has broad discretion to determine what is harmful to the public health and welfare [citation omitted]."[9] Whether a statute is unconstitutional is a question of law and, in addressing that issue, "the courts will take judicial notice

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[7]Another division of the Madison Circuit Court had previously found the statute to be unconstitutional on the basis that it was arbitrary and not rationally related to the legislative goals of deterring and punishing offenders whose blood alcohol levels are extremely high. As of this writing, the appeal styled Commonwealth v. Gadd, No. 1999-CA-000645-MR, which has been assigned to another panel of this Court and is also from the Madison Circuit Court, is still pending.

[8]Mullins v. Commonwealth, Ky.App., 956 S.W.2d 222, 223 (1997).

[9]Commonwealth v. Harrelson, Ky., 14 S.W.3d 541, 548 (2000).

of all pertinent facts that are matters of common knowledge."[10] It is a settled principle that when the Legislature "has enacted a statute, [it] is presumed to have done so in accordance with the constitutional requirements, and that its provisions are not contrary to any constitutional right. . . ."[11] A statute will not be struck down as unconstitutional "unless its violation of the Constitution is clear, complete and unequivocal."[12] Further, the Commonwealth does not bear the burden of establishing the statute's constitutionality.[13] Rather, "[t]he one who questions the validity of an act bears the burden to sustain such a contention."[14]

It is with these principles in mind that we now consider Cornelison's claim that KRS 189A.010(4)(c), is unconstitutional. This statute reads:

> Any person who violates the provisions of paragraph (a), (b), (c) or (d) of subsection (1)[15] of this section shall:
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> . . . .

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[10]Kohler v. Benckart, Ky., 252 S.W.2d 854, 857 (1952).

[11]Lakes v. Goodloe, 195 Ky. 240, 242 S.W. 632, 635 (1922).

[12]Sasaki v. Commonwealth, Ky., 485 S.W.2d 897, 902 (1972), vacated on other grounds, 410 U.S. 951, 93 S.Ct. 1422, 35 L.Ed.2d 684 (1973).

[13]Commonwealth v. Howard, Ky., 969 S.W.2d 700, 703 (1998).

[14]Stephens v. State Farm Mutual Auto Insurance Co., Ky., 894 S.W.2d 624, 626 (1995).

[15]KRS 189A.010(1) prescribes operating a motor vehicle while under the influence of alcohol, while the "alcohol concentration in [one's] blood or breath is 0.10 [.08 effective October 1, 2000]," or while under the influence of alcohol "and any other substance which impairs one's driving ability[.]"

> (c) If the alcohol concentration is below 0.18, for a third offense within a five (5) year period, be fined not less than five hundred dollars ($500) nor more than one thousand ($1,000) and shall be imprisoned in the county jail for not less than thirty (30) days nor more than twelve (12) months and may, in addition to fine and imprisonment, be sentenced to community labor for not less than ten (10) days nor more than twelve (12) months. If the alcohol concentration is 0.18 or above, he or she shall be guilty of a Class D felony.

This subsection and the other subsections in KRS 189A.010(4), provide a comprehensive scheme of escalating penalties to be imposed on individuals who engage in the inherently dangerous activity of driving under the influence of alcohol. Prior to the 1998 amendments to KRS 189A.010(4), the sanctions progressed in severity predicated solely on the number of offenses within a five-year period. Effective July 15, 1998, the Legislature amended the statute and chose, in the case of first-time and third-time offenders, to further classify offenders according to their degree of intoxication and to enhance the penalty for those driving while extremely impaired.[16]

Under the scheme at issue, a first-time offender whose

[16]Since Cornelison's conviction, the Legislature has made further refinements to KRS 189A.010(4). The amended statute, renumbered as 189A.010(5), which becomes effective October 1, 2000, will subject all offenders to enhanced penalties if certain "aggravating circumstances" are present. Those "aggravating circumstances," listed at KRS 189A.010(11), include operating a motor vehicle with a blood alcohol content of 0.18 or more. However, after these revisions go into effect, a third time offender, like Cornelison, will no longer be subject to felony sanctions. Instead, a third time offender with a blood alcohol level of 0.18, could be sentenced to a term of imprisonment in the county jail for twelve months, and such an offender must serve at least 60 days in jail before being eligible for any type of release.

blood alcohol level is less than 0.18 can be given a fine of between $200 and $500, and be imprisoned "for not less than forty-eight (48) hours nor more than thirty (30) days," or receive both a fine and a sentence of imprisonment.[17] A first-time offender whose blood alcohol level is 0.18 or more is subjected to the same fines, but must be sentenced to jail for at least seven days, five of which may be probated.[18] A second offense can result in a fine in the range of $350 to $500, and imprisonment for seven days to six months, and in addition, a sentence of community labor for ten days to six months may be imposed.[19] The minimum sentence of seven days cannot be "suspended, probated, or subject to conditional discharge or other form of early release."[20] A third offense committed within five years by one whose blood alcohol level is less than 0.18 can result in a fine or between $500 and $1,000, and imprisonment for 30 days to 12 months.[21] The minimum 30-day jail sentence must be served and again, in addition to a fine and imprisonment,[22] community labor is also a possible consequence.[23] As set forth above, that portion of the statute under which Cornelison was convicted provides that a third offense within five years by a

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[17]KRS 189A.010(4)(a).

[18]Id.

[19]KRS 189A.010(b).

[20]KRS 189A.010(7).

[21]KRS 189A.010(4)(c).

[22]Id.

[23]KRS 189A.010(7).

driver whose blood alcohol level is 0.18 or more, elevates the offense to a class D felony, which carries a penalty of imprisonment of one to five years.[24] Finally, all fourth or subsequent DUI offenses are classified as Class D felonies, regardless of the driver's degree of intoxication.[25] Any person convicted of a felony DUI offense must serve at least 120 days in jail.[26]

Cornelison first argues that the statute is arbitrary and offends Section 2 of the Kentucky Constitution. Essentially, he is critical of the Legislature's selection of a blood alcohol level of 0.18 as being the "magical level" beyond which a third-time offender is treated as a felon. He insists that the 0.18 line of demarcation is "arbitrary and seeks to penalize third time offenders more severely for absolutely no reason at all." In his criticism of the Legislature's choice of 0.18 as the line establishing the status of the offense to be applied to third-time offenders, Cornelison argues that there is "no reliable scientific evidence that drivers whose blood alcohol level is 0.18 or greater pose greater risk to society than those whose blood alcohol is 0.16."

The Commonwealth responds to this argument by asserting that the Legislature must frequently draw lines to determine the appropriate sanctions for various degrees of antisocial behavior. It correctly insists that it is the Legislature's prerogative to

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[24]KRS 532.060.

[25]KRS 189A.010(d).

[26]KRS 189A.010(7).

decide what sanction should be imposed for a certain level of intoxication of a driver. It is commonly known that as a person's level of intoxication increases, his reaction time, judgment, and general ability to safely operate a motor vehicle decreases. In any event, the Commonwealth is not obliged "to produce evidence to sustain the rationality of statutory classifications."[27] On the other hand, Cornelison, whose burden it is to establish the arbitrariness of the statute, has not demonstrated that those with a blood alcohol level of 0.18 are not seriously impaired, or that they do not impose a greater threat to themselves and others than less intoxicated drivers of motor vehicles.

The Supreme Court of Kentucky recently rejected a similar claim of arbitrariness with respect to the Legislature's definition of marijuana and reiterated that the concept of arbitrariness in this context embraces those things which are "contrary to democratic ideals, customs, and maxims," and includes whatever "is essentially unjust and unequal" or "exceeds the reasonable and legitimate interests of the people."[28] Clearly, it cannot be questioned that the Legislature's 1998 amendments to 189A.010(4)(a) and (c) were intended to further address the serious societal problem of drunk driving. Despite numerous campaigns by various groups to educate the public about the dangers of driving while intoxicated, the problem is

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[27]Howard, 969 S.W.2d at 703.

[28]Harrelson, 14 S.W.3d at 547 (citing Commonwealth v. Foley, Ky., 798 S.W.2d 947 (1990)).

pervasive. Thousands of people have been injured or killed in this Commonwealth as a result of the criminal behavior of individuals whose driving skills have been impaired by alcohol. Thus, there is, we believe, nothing "essentially unjust or unequal" in establishing different classifications of multiple offenders based on their level of intoxication.

Cornelison also argues that the statute offends the equal protection guarantees found in the United States and Kentucky Constitutions. He acknowledges that the issue does not warrant a strict scrutiny analysis, but rather is one that should be viewed under the rational basis test.[29] Cornelison insists that treating some third offenders as felons, and others as misdemeanants "is not rationally related to a legitimate government purpose." Again, we disagree.

In Howard, the Supreme Court ruled that the "juvenile" DUI statute (KRS 189A.010(1)(e)) did not violate the equal protection clause. The Court explained that under the rational basis test

> a classification must be upheld against an equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification [citation omitted].
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> . . .
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> Legislative classification is not subject to a court-room fact-finding process and "may be based on rational speculation unsupported by evidence or empirical data

[29]It is settled that driving is not a "fundamental constitutional right" and it is obvious that third-time DUI offenders do not comprise a "suspect class" warranting the higher level of scrutiny. See Howard, 969 S.W.2d at 702.

> [citation omitted]." Merely because the statute may result in some practical inequity does not cause it to fail the rational basis test for review.
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> So long as the statute's generalization is rationally related to the achievement of a legitimate purpose; the statute is constitutional.[30]

In amending 189A.010(4)(c), the Legislature was obviously concerned not only about the danger to society created by intoxicated drivers with multiple DUI convictions, but also, as discussed earlier, about the level of intoxication/impairment presented by those drivers. Cornelison insists that if the purpose of the statute was to protect the public from harm for extremely intoxicated drivers, then all offenders whose blood alcohol reaches 0.18 or higher should be subject to the same penalty. Granted, the Legislature did not impose greater sanctions for second-time offenders who are caught driving with the higher level of alcohol in their systems. However, as Howard makes clear, the statute does not have to be perfect to pass constitutional muster.[31] In any event, the Legislature apparently believed that the sanctions for second-time offenders were severe enough. Clearly, the discretion to define the level of harm and the appropriate punishment is within the purview of the Legislature, not the courts.

Cornelison, who points out that he was not stopped for driving erratically and that he "hurt no one," nor "caused [] damage to the property of another," makes the absurd argument

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[30] Id. at 703.

[31] Id. at 704.

that he was denied equal protection of the laws because it is possible for a third-time offender with a blood alcohol of less than 0.18 to be treated as a misdemeanant "even though [his] actions may have caused greater harm to the community." Driving negligently or erratically, or causing injury or damage, have never been elements of the offense defined in KRS 189A.010(1). Obviously, if a third-time offender inflicts injury on another while driving under the influence, or causes damage to property, he can be subjected to other criminal or civil sanctions in addition to the penalties for DUI regardless of his blood alcohol level. Stated differently, the offense of driving under the influence does not require proof that the driving caused any direct negative consequences to a third party.[32] Thus, there is nothing inherently unfair in treating the same class of multiple offenders differently based on their level of intoxication.

Next, Cornelison contends that the statute is unconstitutional as it subjects him to cruel and unusual punishment. He correctly states that the Supreme Court of Kentucky has adopted the three-prong test of Solem v. Helm,[33] as applicable to such a claim.[34] Under this test, this Court must consider the following factors:

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[32]Again, the revisions to the statute which will become effective on October 1, 2000, change the current scheme in this regard as well. In the future, one of the "aggravating circumstances" which can enhance the penalties for drunk driving is "operating a motor vehicle that causes an accident resulting in death or serious physical injury." KRS 189A.010(11)(c).

[33]463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983).

[34]See Commonwealth v. Fint, Ky., 940 S.W.2d 896, 898 (1997).

> (1) The gravity of the offense and harshness of the penalty;
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> (2) The sentences imposed on other criminals in the same jurisdiction;
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> (3) The sentences imposed for commission of the same crime in other jurisdictions.[35]

Cornelison argues that while he "deserves to be punished," his crime was not so grave as to fit the penalty he received. He further contends that the second prong of the Solem test is implicated as sentences imposed on other third-time offenders "will be greatly disproportionate . . . depending on the individual's blood alcohol content." Cornelison makes no argument with respect to the third prong.

Cornelison, who was arrested and convicted for driving under the influence of alcohol on three different occasions within a ten-month period, fails to impress this Court that his sentence of one year, of which he was required to serve 120 days, constituted "punishment which shocks the general conscience and violates the principle of fundamental fairness."[36] The fact that Cornelison caused harm to no one is simply irrelevant as the offense proscribed is one with a potential for grievous harm. The Legislature, in amending KRS 189A.010(4)(c), exhibited its intent to treat more severely those offenders who have two prior DUI convictions and who, as exhibited by their high level of intoxication, are apparently unwilling or unable to conform to

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[35] Id.

[36] Cutrer v. Commonwealth, Ky.App., 697 S.W.2d 156, 158 (1985) (citing Workman v. Commonwealth, Ky., 429 S.W.2d 374 (1968)).

the prohibition against drunk driving. Cornelison, who admitted to having a problem with alcohol, was driving with a blood alcohol level that was nearly three times the legal limit. We soundly reject any argument that the punishment he received is at all grossly disproportionate to the seriousness of his crime,[37] or that the statute, which allows for the imposition of a sentence of up to five years, so clearly violates the prohibition against cruel and unusual punishment as to be unconstitutional.

Finally, Cornelison argues that the application of the amended statute to his third offense violates the ex post facto clause of the United States Constitution. Although recognizing that the statute had been effective for more than nine months prior to his third offense, and thereby conceding that an "argument could be made that [he] had fair warning that a third offense DUI is potentially a felony offense," Cornelison contends that "there is no evidence in the record that he knew this at the time of his second conviction." He complains that the judge did not warn him after his second conviction that his next offense could possibly be a felony.

Under the facts of this case, there clearly are no ex post facto implications. The statute as amended effective July 15, 1998, was in effect one day prior to Cornelison's second DUI offense, and several months prior to his third offense. The Legislature in amending KRS 189A.010(4)(c) did not create a new offense, but merely enhanced the penalties for third offenders

[37]See Covington v. Commonwealth, Ky.App., 849 S.W.2d 560, 563 (1992).

with excessive amounts of alcohol in their system. Cornelison cannot avoid the statute's application merely because the trial court failed to warn him of the consequences of a third offense.[38]

Accordingly, the judgment of the Madison Circuit Court is affirmed.

ALL CONCUR.

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[38]See Botkin v. Commonwealth, Ky., 890 S.W.2d 292 (1994); Commonwealth v. Ball, Ky., 691 S.W.2d 207 (1985).