

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-001914-MR

TINA MICHELE EVANS

APPELLANT

v.

APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE JAMES DANIELS, JUDGE
ACTION NO. 99-CR-00011

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, EMBERTON AND GUIDUGLI, JUDGES.

GUIDUGLI, JUDGE. Tina Michele Evans (Evans) appeals from a judgment of the McCracken Circuit Court entered July 6, 1999, finding her guilty of violation of Kentucky Revised Statute (KRS) 189A.010(4)(c) and sentencing her to two and one-half (2 1/2) years' imprisonment.

On June 4, 1999, Evans entered a conditional plea of guilty pursuant to Kentucky Rules of Criminal Procedure (RCr) 8.09 to the charge of driving under the influence (DUI) third offense, with a blood alcohol of 0.18 or above. We affirm.

The sole issue in this appeal is whether KRS 189A.010(4)(c) is unconstitutional as it violates the Fifth,

Eighth, and Fourteenth Amendments of the United States Constitution and Sections 2, 11, and 17 of the Kentucky Constitution. KRS 189A.010(4)(c) provides as follows:

(4) Any person who violates the provisions of paragraphs (1), (b), (c) or (d) of subsection (1) of this section shall:

....

(c) If the alcohol concentration is below 0.18, for a third offense within a five (5) year period, be find 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 or 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. (Emphasis added.)

Under the above statute, the severity of punishment for an individual charged with a third-offense DUI is dependent upon his level of intoxication. Simply put, if one has an alcohol concentration below 0.18, the offense is a misdemeanor (a potential penalty of 12 months), but if the alcohol concentration is 0.18 or above, the offense is a felony (facing a sentence of one year to five years in prison). Because Evans faces the potential of a much greater sentence as a felon due to her alcohol concentration being 0.20 at the time of arrest, she asserts the statute is unconstitutional for numerous reasons. These constitutional attacks amount to but one assertion--that a government may not subject its citizens to arbitrary, capricious, and unreasonable legislation. This Court recently addressed the constitutional issues raised in this appeal in Cornelison v.

Commonwealth, Appeal No. 1999-CA-001825-MR, rendered July 7, 2000 (motion for discretionary review pending). In Cornelison, the Court thoroughly discussed the issues and constitutional attacks raised by Evans herein and rejected them. Although Evans raises several interesting and challenging arguments in her motion before the trial court and brief before this Court, she has failed to maintain her burden of establishing that KRS 189A.010(4)(c) is unconstitutional.¹ See Commonwealth v. Howard, Ky., 969 S.W.2d 700 (1998).

For the foregoing reasons, the judgment of the McCracken Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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¹See Barker v. Commonwealth, Appeal No. 1999-CA-000500-MR, rendered September 29, 2000, which also rejected a constitutional challenge aimed at KRS 189A.010(4)(c).