

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-002668-MR

KATHLEEN L. NORTON

APPELLANT

v. APPEAL FROM BULLITT CIRCUIT COURT
HONORABLE THOMAS L. WALLER, JUDGE
INDICTMENT NO. 99-CR-00108

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * *

BEFORE: HUDDLESTON, JOHNSON and SCHRODER, Judges.

HUDDLESTON, Judge: Kathleen L. Norton was convicted of driving under the influence, third offense, with a blood alcohol level concentration of 0.18 or higher and was sentenced to two years in prison.¹ Norton challenges the constitutionality of Kentucky

¹ Ky. Rev. Stat. (KRS) 189A.040(3) requires that "[i]n addition to any other penalty prescribed by subsection (4)(c) or (d) of KRS 189A.010, the court shall sentence the person to an alcohol or substance abuse treatment program[.]" The circuit court did sentence Norton according to KRS 189A.010(4)(c), but did not sentence Norton to the required treatment program according to the legislative mandate of KRS 189A.040(3). Arguably an additional sentence could be viewed as additional punishment; therefore, we will not remand this case for additional sentencing. However, we do not approve of the trial court's neglect. Alcohol or substance
(continued...)

Revised Statute (KRS) 189A.010 – the statute under which she was convicted.

A State Police Trooper arrested Norton following a traffic stop on May 11, 1999, in Lebanon Junction, Kentucky. Norton was cited for violating KRS 189A.010. When given a blood alcohol analysis examination, Norton registered a measured reading of .224 grams of alcohol per 210 liters of breath.² Norton had two prior driving under the influence convictions within the past five years at the time of her arrest.

By motion, Norton challenged the constitutionality of KRS 189A.010 as a violation of equal protection rights and as cruel and unusual punishment. After the circuit court denied Norton's motion, she entered a guilty plea to the charge of driving under the influence, third offense, with a blood alcohol level greater than 0.18 under KRS 189A.010(4)(c). Norton conditioned her plea on her right to appeal the constitutionality of KRS 189A.010, and this challenge is the basis of her appeal.

Norton makes three arguments in support of her assertion that KRS 189A.010(4)(c) is unconstitutional. First, Norton argues that KRS 189A.010(4)(c) violates her right to due process and equal protection guaranteed under the United States Constitution and the

¹ (...continued)
abuse treatment provides the person convicted and the Commonwealth with an opportunity to reap the benefits associated with rehabilitation. Failure to abide by this legislative mandate deprives all parties of this opportunity.

² KRS 189A.005 provides that alcohol concentration can be measured as grams of alcohol per 100 milliliters of blood or grams of alcohol per 210 liters of breath.

Kentucky Constitution.³ Second, Norton argues that application of KRS 189A.010(4)(c) constitutes cruel and unusual punishment in violation of the United States Constitution and the Kentucky Constitution.⁴ Finally, Norton argues that KRS 189A.010(4)(c) is a constitutionally prohibited ex post facto⁵ law.

Norton's argument that KRS 189A.010(4)(c) violates constitutional prohibitions against ex post facto laws was not preserved for review. Even if Norton had properly preserved this argument, it is wholly without merit. The statute had been effective for almost ten months prior to her third offense. Norton had fair warning that a third offense of driving under the influence was potentially a felony offense. In amending KRS 189A.010(4)(c), the General Assembly did not create a new offense, but merely enhanced the penalties for first and third time offenders with excessive levels of alcohol in their systems. Norton cannot avoid the statute's application.⁶

Norton's arguments concerning due process, equal protection, cruel and unusual punishment have been considered in

³ According to Norton her rights are guaranteed under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Sections 1, 2, 3 and 11 of the Kentucky Constitution.

⁴ According to Norton the statute violates the Eighth Amendment to the United States Constitution and Section 17 of the Kentucky Constitution.

⁵ Article 1, Section 10 of the United States Constitution and Section 19 of the Kentucky Constitution.

⁶ Botkin v. Commonwealth, Ky., 890 S.W.2d 292 (1994).

recent decisions rendered by this Court.⁷ While these decisions are not yet final, we adopt the reasoning of these decisions rather than repeat what was said therein.

The judgment is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Paul J. Neel, Jr.
Louisville, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler III
Attorney General
Frankfort, Kentucky

Todd D. Ferguson
Assistant Attorney General
Frankfort, Kentucky

⁷ Cornelison v. Commonwealth, 1999-CA-001825-MR, (opinion rendered 7/7/00), motion for discretionary review pending, 47 Ky. L. Sum. 7 (2000); Barker v. Commonwealth, 1999-CA-000500-MR, (opinion rendered 9/29/00), 47 Ky. L. Sum. 11 (2000).