

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 2000-CA-000314-MR

COMMONWEALTH OF KENTUCKY

APPELLANT

v. APPEAL FROM JOHNSON CIRCUIT COURT  
HONORABLE STEPHEN N. FRAZIER, JUDGE  
INDICTMENT NO. 99-CR-00014

JOHN A. FITZPATRICK

APPELLEE

### OPINION

### REVERSING AND REMANDING

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BEFORE: BARBER, GUIDUGLI and HUDDLESTON, Judges.

HUDDLESTON, Judge: On February 19, 1999, John A. Fitzpatrick was charged in an indictment with operating a motor vehicle while under the influence, third offense with a blood alcohol concentration over 0.18,<sup>1</sup> operating a motor vehicle on a license suspended for

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<sup>1</sup> See Ky. Rev. Stat. (KRS) 189A.010(4)(c). KRS 189A.010 was amended by 2000 Kentucky Acts Ch. 467, § 2 (effective October 1, 2000). Before it was amended KRS 189A.010(4)(c) provided that:

(4) Any person who violates the provisions of paragraphs (a), (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 fined not less than five hundred dollars (\$500) nor more than one thousand (\$1,000) and shall be imprisoned in the county (continued...)

DUI, second offense, and possession of marijuana. Fitzpatrick moved for an order declaring Kentucky Revised Statute (KRS) 189A.010(4)(c) unconstitutional, to which the Commonwealth of Kentucky responded. On January 10, 2000, the circuit court held KRS 189A.010(4)(c) unconstitutional. The Commonwealth appeals from that order.

The circuit court's January 10, 2000, order declaring KRS 189A.010(4)(c) unconstitutional states that KRS 189A.010(4)(c) is an arbitrary and selective enactment of penalties that is not reasonably or rationally related to a stated criminal justice goal. The Commonwealth argues that, because driving an automobile is not a fundamental right and the statute does not affect a suspect class, a rational basis standard of review must be utilized and the statute should be held rationally related to a legitimate state interest and, therefore, constitutional.

Recent decisions of this Court, with Cornelison v. Commonwealth<sup>2</sup> leading the way, have held KRS 189A.010(4)(c) to be

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<sup>1</sup> (...continued)

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.

Amended, KRS 189A.010(4)(c) no longer provides "If the alcohol concentration is below 0.18" or "If the alcohol concentration is 0.18 or above, he or she shall be guilty of a Class D felony." Further, the language from former section (4)(c) is now section (5)(c). For purposes of this opinion, the challenged section will be referred to as KRS 189A.010(4)(c).

<sup>2</sup> 1999-CA-001825-MR (To be published opinion rendered July 7, 2000), motion for discretionary review granted December 13, 2000, 47 Ky. L. Sum. 7 (2000); see also Barker v. Commonwealth 1999-CA-47 (continued...)

constitutional. We have rejected contentions that KRS 189A.010(4)(c) is arbitrary, violates equal protection rights, constitutes unusual punishment and violates the ex post facto clause. Cornelison, and its progeny are dispositive of the issue in this case, and we adopt the reasoning of these decisions rather than repeating here what was said therein. The circuit court erred in holding that KRS 189A.010(4)(c) is unconstitutional.

The judgment is reversed and this case is remanded to Johnson Circuit Court for further proceedings.

ALL CONCUR.

BRIEF FOR APPELLANT:

Albert B. Chandler III  
Attorney General of Kentucky

Todd D. Ferguson  
Assistant Attorney General  
Frankfort, Kentucky

BRIEF FOR APPELLEE:

David T. Adams  
ED SPENCER'S LAW OFFICE  
Paintsville, Kentucky

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<sup>2</sup> (...continued)  
000500-MR (Unpublished opinion rendered September 29, 2000), 47 Ky.  
L. Sum. 11 (2000)