

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-000919-MR

SCOTT G. BASHAM

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE GREGORY M. BARTLETT, JUDGE
ACTION NO. 99-CR-00623

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING
** **

BEFORE: BUCKINGHAM, EMBERTON, AND TACKETT, JUDGES.

BUCKINGHAM, JUDGE: Scott G. Basham appeals from a judgment of the Kenton Circuit Court wherein he entered a conditional guilty plea and was sentenced to five years in prison for the offense of operating a motor vehicle under the influence of alcohol or other substances (DUI), third offense, enhanced to felony status due to a blood alcohol level of 0.18 or greater. In this appeal, Basham challenges the constitutionality of the statute under which he was convicted, KRS¹ 189A.010(4)(c). Because we hold the statute to be constitutional, we affirm.

¹ Kentucky Revised Statutes.

Basham was arrested at the scene of a vehicle accident on October 22, 1999, and was charged with third-offense DUI. He was read an implied consent warning and was administered a breathalyzer test which registered a blood alcohol content of 0.336. Although third-offense DUI is normally a misdemeanor under the statute, it becomes a Class D felony if the blood alcohol level is 0.18 or higher. KRS 189A.010(4)(c). Thus, Basham's case went before the grand jury, and he was subsequently indicted on the felony charge.

Prior to entering his conditional guilty plea, Basham moved the trial court to find the statute to be unconstitutional. The trial court denied Basham's motion, and he subsequently entered a conditional guilty plea reserving his right to challenge the statute's constitutionality. On April 5, 2000, Basham was sentenced to five years in prison for the offense, but his sentence was probated for a five-year period on various conditions, including that he serve ninety days in the Kenton County Detention Center. This appeal followed.

Basham has raised several constitutional challenges to the statute. He contends that it violates equal protection rights, is arbitrary, constitutes cruel and excessive punishment, and violates the proscription against *ex post facto* laws. These same constitutional challenges to KRS 189A.010(4)(c) were raised in Cornelison v. Com., 1999-CA-001825-MR, an opinion rendered by this court on July 7, 2000.² Therein, a panel of this court held

² A motion for discretionary review was granted by the Kentucky Supreme Court on December 13, 2000. See 2000-SC-0646-

the statute to be constitutional. The Cornelison case is dispositive of the issue in this case, and we adopt the reasoning and holding of the court in that case.

Basham raises an additional argument that the implied consent warning was deficient in that it failed to inform him that by refusing to submit to a blood alcohol test he would have avoided the enhancing effect of registering an intoxication level of 0.18 or greater. This court addressed the argument that the implied consent warning was deficient as it applies to third-offense DUI offenders in Barker v. Com., 32 S.W.3d 515 (2000). Therein, we rejected the constitutional challenge and likewise reject it herein for the reasons set forth in that case.

The judgment of the Kenton Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

John G. Arnett
Florence, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler III
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²(...continued)
DG.