

Commonwealth Of Kentucky

Court of Appeals

NO. 1999-CA-002870-MR

MICHAEL C. MILLS

APPELLANT

v. APPEAL FROM UNION CIRCUIT COURT
HONORABLE TOMMY W. CHANDLER, JUDGE
ACTION NO. 99-CR-00020

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING
** ** * * * * *

BEFORE: GUIDUGLI, McANULTY, AND TACKETT, JUDGES.

TACKETT, JUDGE: Michael C. Mills appeals from a judgment entered on a conditional plea of guilty to driving under the influence, third offense, with a blood alcohol level over 0.18, pursuant to Kentucky Revised Statute (KRS) 189A.010(4)(c). Mills was sentenced to one year in prison for the offense. He argues on appeal that the statute is unconstitutional, violating the Eighth Amendment to the United States Constitution and the

Equal Protection Clause in the federal and state constitutions.
We affirm.

The case of Cornelison v. Commonwealth, Ky., 52 S.W.3d 570 (2001), is dispositive. In Cornelison the equal protection argument was rejected by the Kentucky Supreme Court, wherein it held that there was a rational basis for the law's disparate treatment of offenders. Mills argues that the statute is arbitrary and is not rationally related to a legitimate state goal; he points out that the likelihood that an offender will simply refuse a breath or blood test is actually increased by the stiffer penalties for higher blood alcohol levels. However, as the Cornelison court noted, citing Howard v. Commonwealth¹, a statute does not have to be perfect to pass constitutional muster. The Legislature had the authority to address the problem of greatly intoxicated drivers by increasing the penalty. The Legislature also had the authority to treat third offenders differently from second offenders. The fact that the Legislature chose not to enact an enhanced penalty for second offenders whose blood alcohol level exceeds 0.18 is of no consequence here.

With respect to the claim that the statute violates the Eighth Amendment, we find this argument lacks merit. The Supreme Court of Kentucky has adopted the three-prong test of

¹ Ky., 969 S.W.2d 700 (1998)

Solem v. Helm, 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637

(1983). Under this test, this Court must consider the following factors:

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

We are not satisfied that Mills' felony conviction violates the principle expressed in Solem. It is clear the Legislature, in amending KRS 189A.010(4)(c), intended to treat more severely those offenders who have two prior convictions for driving under the influence, and who, as exhibited by their high level of intoxication, are apparently unwilling or unable to conform to the prohibition against drunk driving. As discussed in Cornelison, both in the Supreme Court's opinion and in this Court's opinion, the General Assembly clearly has the authority to do so. The penalty is neither disproportionate to the gravity of the offense, nor is the penalty out of line with penalties imposed on other offenders within the Commonwealth. Mills simply cannot satisfy the Solem test, and therefore we reject the argument that the punishment he received is grossly disproportionate to the seriousness of his crime, or that the statute, which allows for the imposition of a sentence of up to

five years, violates the prohibition against cruel and unusual punishment.

The judgment of the union Circuit Court is affirmed.

ALL CONCUR.

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