Supreme Court of Kentucky

2006-03

IN RE: ADOPTION OF COMMENTARY TO SCR 4.300 KENTUCKY CODE OF JUDICIAL CONDUCT – CANON 5(B)(1)(C)

ORDER

The Commentary to SCR 4.300 Kentucky Code of Judicial Conduct – Canon 5(B)(1)(c) shall read as follows:

COMMENTARY

Section 5(B)(1)(C) prohibits a candidate for judicial office from intentionally or recklessly making a commitment, or creating the appearance of a commitment, to rule in a certain way on cases, controversies or issues likely to come before the court. The section was changed in 2005 to conform to the United States Supreme Court's holding in Republican Party of Minnesota v. White, 536 U.S. 765 (2002), and the federal district court's holding in Family Trust Foundation of Kentucky v. Wolnitzek, 345 F. Supp. 2d 672 (E.D.Ky 2004).

An independent judiciary requires judges to be open-minded, in the sense of not pre-judging matters that might come before them. A candidate who promises the electorate to rule in a certain way on a case or matter is in effect saying to the electorate that the judge is "spoken for' on that matter and will not decide it on the facts and law presented at the time the case arises. The electorate has no legitimate interest in such promises, and candidates may not make them. Candidates may, however, inform the electorate of their judicial and political philosophies and their thinking on points of law so long as the candidates make clear that they will decide matters on the facts and law as presented and developed in the cases that come before them.

The canon applies to those who intend to commit, or create the appearance of a commitment, and those who recklessly create the appearance of a commitment. As used in the canon, recklessly is used as the Supreme Court used the word in New York Times v. Sullivan, 376 U.S. 254 and as it is commonly used in the criminal law – a conscious disregard of a substantial and unjustifiable risk that the result will occur. A candidate who make a public statement that the candidate intends to be taken as a commitment (i.e. "If elected I will never probate a defendant in a drug case") violates the canon. In addition a candidate violates the canon if the candidate knows that the statement may reasonably be perceived as a commitment. (cf. Kirschner v. Louisville Gas & Electric Co., 743 S.W.2d 840 (Ky. 1987). However a candidate who innocently or negligently makes such a statement does not violate the canon. Summe v. Judicial Retirement and Removal Commission, 947 S.W.2d 42 (1997), Justice Graves dissenting.

The second clause of the canon, which was not amended in 2005, should also be construed to require the mental state of intent or recklessness. The First Amendment protects innocent or negligent false statements about an opponent made in the course of a campaign. Weaver v. Bonner, 309 F.3d 1312 (11th Cir. 2002).

All sitting. All concur.

ENTERED: February 16, 2006.

CHIEF JUSTICE

Supreme Court of Kentucky

2005-9

IN RE: AMENDMENT TO THE RULES OF SCR 4.300 KENTUCKY CODE OF JUDICIAL CONDUCT – CANON 5(B)(1)(C)

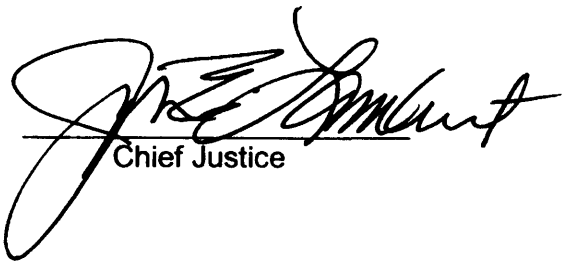
The following rule amendment shall become effective upon the date of the entry of this order.

SCR 4.300 Kentucky Code of Judicial Conduct – Canon 5(B)(1)(c) shall read:

> A judge or candidate for election to judicial office shall not intentionally or recklessly make a statement that a reasonable person would perceive as committing the judge or candidate to rule a certain way on a case, controversy, or issue that is likely to come before the court; and shall not misrepresent any candidate's identity, qualifications, present position, or other facts.

All sitting. All concur.

ENTERED: September 15, 2005.



Chief Justice