The Burger Court Opinion Writing Database

Cain v. Kentucky

397 U.S. 319 (1970)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University
Forrest Maltzman, George Washington University

SUPREME COURT OF THE UNITED STATES

October Term, 1969

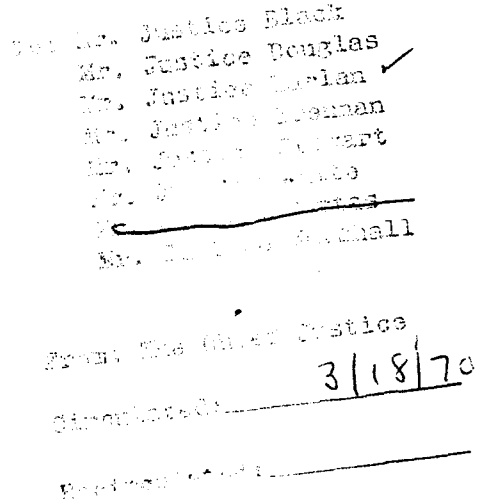
CAIN ET AL. *v.* KENTUCKY

ON APPEAL FROM THE COURT OF APPEALS OF KENTUCKY

No. 347. Decided March —, 1970

MR. CHIEF JUSTICE BURGER, dissenting.

In my view we should not inflexibly deny to each of the States the power to adopt and enforce its own standards as to obscenity and pornographic materials; States ought to be free to deal with varying conditions and problems in this area. I am unwilling to say that Kentucky is without power to bar public showing of this film; therefore, I would affirm the judgment from which the appeal is taken.



ho. 347

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HUGO L. BLACK

December 10, 1969

Dear John,

I have your note advising that arrangements have been made for the Court to see "I, a Woman" and "I Am Curious (Yellow)" at 11 A. M. next Monday morning. I cannot see that looking at the pictures would change my view that the First Amendment would be violated by barring the showing of these pictures. Consequently I shall not be present.

Sincerely,

Hugo

Hugo

Mr. Justice Harlan

cc: Members of the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HUGO L. BLACK

January 28, 1970.

Dear Bill,

Re: No. 347 - Cain, et al. v. Kentucky.

I agree.

Sincerely,

H. L. B.

Mr. Justice Douglas

cc: Members of the Conference

January 24, 1970

MEMORANDUM TO THE CONFERENCE:

Re: No. 347 -- Cain v. Kentucky

If Richardson is not coming down Monday, this case should obviously go over. But I am circulating this dissent to indicate that I am ready in case Richardson is ready.

William O. Douglas

The Chief Justice
Mr. Justice Black
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall

To: The Chief Justice
Mr. Justice Black
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall

SUPREME COURT OF THE UNITED STATES

From: Douglas, J.

October Term, 1969

Circulated:

CAIN ET AL. *v.* KENTUCKY

Recirculated: 1-24

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS OF KENTUCKY

No. 347. Decided January 26, 1970

MR. JUSTICE DOUGLAS, dissenting.

The Court in No. 774, *Richardson* v. *Cole,* decided today, holds that a court opinion, which is a final decision denying an employee's claim to back pay, is not a "judgment" which we can review. But in this case it uses the lower court's opinion as the "judgment" to compute the time within which an appeal can be taken. Each ruling penalizes a litigant on technical grounds. I would think, however, that if a final decision is not usable in *Richardson* to allow our review, a final decision is not usable here to disallow review.

The This was a prosecution under a Kentucky statute for exhibiting that film "I, a Woman." Appellants were convicted after a jury trial and fined. The case is here by way of appeal, 28 U. S. C. § 1257 (2). In the present case the Kentucky court issued its opinion on February 14, 1969, and its mandate on March 20, 1969. Our Rule 10 provides that an appeal is taken from a state court by filing a notice of appeal with the clerk of the court possessed of the record. By Rule 11 the notice of appeal must be filed "within ninety days after the entry of such judgment," and 28 U. S. C. § 2101 (c) provides the same. Notice of appeal was filed with the Kentucky court on June 16, 1969. That notice was timely if March 20, 1969, the date of the judgment, is the starting point. That notice was not timely if February 14, 1969, the date of the opinion, is the starting point.

I dissent from today's holding that the date of the opinion is the starting point. If the principle announced

in *Richardson* governs there, it should govern here. Moreover, the Court today, in its haste to dismiss this appeal, overlooks a long and consistent line of decisions in which we have held that a formal mandate or judgment, and not an opinion, provides the starting point for the time to appeal to this Court. *Scofield* v. *National Labor Relations Board,* 394 U. S. 423, 427; *Commissioner of Internal Revenue* v. *Estate of Bedford,* 325 U. S. 283, 284–288; *United States* v. *F. & M. Schaefer Brewing Co.,* 356 U. S. 227; *United States* v. *Hark,* 320 U. S. 531.

To: The Chief Justice
Mr. Justice Black
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
~~Mr. Justice Fortas~~
Mr. Justice Marshall

From: Douglas, J.

Circulated:

Recirculated: 1-27

SUPREME COURT OF THE UNITED STATES

October Term, 1969

CAIN ET AL. *v.* KENTUCKY

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS OF KENTUCKY

No. 347. Decided January —, 1970

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE STEWART concurs, dissenting.

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January 15, 1970

MEMORANDUM TO THE CONFERENCE

Dear Brethren:

This is to advise you (and I am sure you will be glad to know) that "I, a Woman" (No. 347 - Cain v. Kentucky) and "I Am Curious (Yellow)" (No. 905 - Grove Press v. Maryland) will be shown in Room 22-B on Monday, January 19, beginning at three o'clock. For your own domestic arrangements, I might say that I am told that if you sit through the entire performances, you will be here well into the evening.

Sincerely,

J.M.H.

January 28, 1970

MEMORANDUM TO THE CONFERENCE:

Re: No. 347 - Cain v. Kentucky

Dear Brethren:

Having read Justice Douglas' dissent, I am satisfied that we moved too quickly in disposing of this case on the score of untimeliness and, like Justices Brennan and Stewart, I shall withdraw my vote for that disposition. I certainly think that the case is not worthy of plenary consideration and if the case is "Redrupped," I shall simply file a short dissent, voting to affirm.

Sincerely,

J. M. H.

January 28, 1970

MEMORANDUM TO THE CONFERENCE

Re: No. 347 - Cain v. Kentucky

Dear Brethren:

In anticipation that this case will be "Redrupped," I am circulating this dissent at this time.

Sincerely,

J. M. H.

SUPREME COURT OF THE UNITED STATES

October Term, 1969

CAIN ET AL. *v.* KENTUCKY

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS OF KENTUCKY

No. 347. Decided January —, 1970

MR. JUSTICE HARLAN, dissenting.

If this case involved obscenity regulation by the Federal Government, I would unhesitatingly reverse the conviction, for the reasons stated in my separate opinion in *Roth* v. *United States*, 354 U. S. 476, 496 (1957). Even in light of the much greater flexibility that I have always thought should be accorded to the States in this field, see, *e. g.*, my dissenting opinion in *Jacobellis* v. *Ohio*, 378 U. S. 184, 203 (1964), suppression of this particular film presents a borderline question. However, laying aside my own personal estimate of the film, I cannot say that Kentucky has exceeded the constitutional speed limit in banning public showing of the film within its borders, and accordingly I vote to affirm the judgment below.

February 24, 1970

MEMORANDUM TO THE CONFERENCE

Re: No. 347 - Cain v. Kentucky
No. 905 - Grove Press v. Md. State Bd. of Censors

Dear Brethren:

On the understanding that per curiams will be circulated reversing each of these cases on the basis of Redrup, I am circulating at this time these identical short dissents.

Sincerely,

J. M. H.

To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Fortas
Mr. Justice Marshall

From: Harlan, J.

Circulated:

Recirculated: FEB 24 1970

SUPREME COURT OF THE UNITED STATES

October Term, 1969

CAIN ET AL. *v.* KENTUCKY

ON APPEAL FROM THE COURT OF APPEALS OF KENTUCKY

No. 347. Decided February —, 1970

MR. JUSTICE HARLAN, dissenting.

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

January 27, 1970

RE: No. 347 - Cain v. Kentucky

Dear Chief:

I joined those who voted to dismiss the appeal in the above as out of time. Bill Douglas has circulated a dissent and Potter has joined him. The Clerk's Office took the view that the 90 day period began to run from February 14, when the Court of Appeals opinion was filed. On that basis the filing of the Notice of Appeal on June 16 would be out of time by 32 days. However, our decision cited by Bill Douglas holds that the test of an appealable state judgment is determined by resort to local law. Kentucky law seems to be that the judgments of the Court of Appeals do not become final until the Mandate is issued. Chesapeake and Ohio Railroad v. Kelly, etc. 161 Ky. 660, 662, 171 S.W. 182, 183. The Mandate in this case issued on March 20. Therefore, dating the time for appeal from that day, the filing on June 16 was timely. On this basis I am changing my vote to my original disposition of noting and reversing on Redrup.

Sincerely,

Bill

W.J.B. Jr.

The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

January 27, 1970

No. 347 - Cain v. Kentucky

Dear Bill,

After reading your proposed dissent, and doing some independent research of my own, I am convinced that I was quite wrong in thinking that the notice of appeal in this case was not timely. I therefore join your dissenting opinion, with the hope that others will also review their tentative conclusions that the appeal in this case was out of time.

Sincerely yours,

P.S.

Mr. Justice Douglas

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

January 28, 1970

Re: No. 347 - Cain v. Kentucky

Dear Chief:

As a result of the memorandum of Bill Douglas and the subsequent agreements by Brennan and Stewart, I feel that I, too, am obliged to change my vote to reversing on Redrup.

Sincerely,

T.M.

The Chief Justice

cc: The Conference