

**[J-99-2009] [M.O. - GREENSPAN, J.]  
IN THE SUPREME COURT OF PENNSYLVANIA  
MIDDLE DISTRICT**

COMMONWEALTH OF PENNSYLVANIA,	:	No. 52 MAP 2009
	:	
Appellee	:	Appeal from the Opinion and Order of the
	:	Superior Court dated October 15, 2008 at
	:	No. 1502 MDA 2007 Vacating and
v.	:	Remanding the Order of the Court of
	:	Common Pleas of Dauphin County,
	:	Criminal Division, dated August 8, 2007 at
DENNIS KEITH DIXON,	:	No. CP-22-MD-790-2006
	:	
Appellant	:	959 A.2d 399 (Pa.Super. 2008)

SUBMITTED: July 27, 2009

**DISSENTING OPINION**

**MR. JUSTICE EAKIN**

**DECIDED: December 28, 2009**

I respectfully disagree with the majority's determination that proper venue is in Berks County. Appellant is charged with failure to pay personal income tax, clearly a crime of omission. Venue for "crimes of omission ... [is] properly vested in the court of the county in which performance of the acts was due." Commonwealth v. Boyle, 532 A.2d 306, 311 (Pa. 1987). The Superior Court has consistently and properly held venue is proper in Dauphin County in these types of cases because "the locus of [defendant's] failure to act was Dauphin County." Commonwealth v. Bershada, 693 A.2d 1303, 1306 (Pa. Super. 1997); see also Commonwealth v. Bennardo, 535 A.2d 185, 186 (Pa. Super. 1987) (venue for failure to file sales tax was in Dauphin County). Appellant's personal income taxes were owing to the Department of Revenue, in Dauphin County. He did not owe anything to an entity in Berks County. Venue lies in the county where his omission occurred, not his obligation. That is Dauphin County.

The majority's reliance on Boyle is imprudent, as Boyle concerned the trial court's jurisdiction, not just venue, and conflated these two distinct concepts. See Commonwealth v. McPhail, 692 A.2d 139, 144 (Pa. 1997) (plurality) (noting Boyle confused jurisdiction and venue), superseded as recognized by Commonwealth v. Fithian, 961 A.2d 66, 76 (Pa. 2008) (Legislature overruled McPhail's holding). Nonetheless, the majority, disapproving Bershad and Bennardo, embarks on a fact-intensive analysis of where the acts creating Appellant's obligation to pay taxes arose. As Appellant both lives and works in Berks County, the majority correctly concludes Appellant's obligation to pay personal income taxes arose in Berks County. However, creation of the obligation to pay tax is not a crime — failure to pay is the crime, and the one and only place a person can pay it is in Harrisburg, not Reading.

Focusing on where the obligation arises is at best confusing. Where is venue if a Montgomery County resident, who works in Philadelphia County for a company headquartered in Allegheny County (from whence his checks come), has a part-time job in Chester County, and earns interest from a bank in Bucks County? The resident earned income from or in all of these counties, and his obligation to pay personal income taxes arose in all of these counties. According to the majority's rationale, which focuses on the acts creating the obligation to pay tax, the Commonwealth could bring charges in any of these counties. See Pa.R.Crim.P. 130(A)(3) ("When charges arising from the same criminal episode occur in more than one judicial district, [venue lies in any of the judicial districts] in which the charges arising from the same criminal episode occurred."). One might query whether an obligation to pay, which as above accrues in different ways and at different times, can be the product of a single criminal episode, and if not, serial prosecutions in each county would be permitted. Such an outcome is plainly absurd, yet focusing on the debt rather than the failure to pay exposes parties to

criminal charges in each county where they earn income, at the discretion of the Commonwealth.

With due respect for the appealing reasoning of my colleagues, the crime here can only be committed in one place. The crime is the singular act of failure to pay tax, and since the only place a person can possibly pay that tax is in Dauphin County, the only place the failure to do so can occur is likewise Dauphin County. You couldn't commit this crime in Berks County if you tried.

Accordingly, I respectfully dissent.