No. 125889

IN THE

SUPREME COURT OF ILLINOIS

| | | |
|---|---|---|
| PEOPLE OF THE STATE OF ILLINOIS,<br><br>Respondent-Appellee,<br><br>-vs-<br><br>DOMINIK K. BOCHENEK,<br><br>Respondent-Appellant. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | Appeal from the Appellate Court of Illinois, No. 2-17-0545.<br><br>There on appeal from the Circuit Court of the Eighteenth Judicial Circuit, DuPage County, Illinois, No. 16 CF 497.<br><br>Honorable John J. Kinsella, Judge Presiding. |

# REPLY BRIEF FOR RESPONDENT-APPELLANT

JAMES E. CHADD
State Appellate Defender

THOMAS A. LILIEN
Deputy Defender
Office of the State Appellate Defender
Second Judicial District
One Douglas Avenue, Second Floor
Elgin, IL 60120
(847) 695-8822
2nddistrict.eserve@osad.state.il.us

BRYAN G. LESSER
Of counsel, Pro Bono
Gordon Rees Scully Mansukhani, LLP
One North Franklin Suite 800
Chicago, IL 60606
(312) 565-1400
Blesser@GRSM.com

COUNSEL FOR DEFENDANT-APPELLANT



**ORAL ARGUMENT REQUESTED**

## ARGUMENT

**The Illinois venue provision for prosecution of identity theft, 720 ILCS 5/1-6(t)(3), allowing for proper venue in the county where the victim resides, violates a defendant's constitutional right to be tried in the county where the alleged offense occurred when the defendant is accused of violating 720 ILCS 5/16-30(a)(1).**

Dominik Bochenek was charged with "using" the personal identification information of another person to fraudulent obtain goods under section 16-30(a)(1) of the identity theft statute. He was alleged to have committed this offense in Lake County. However, a special venue provision – 725 ILCS 5/1-6(t)(3) – allows the State to prosecute a defendant for identity theft in the county in which the victim resides. Based on this statute, the State tried Bochenek in DuPage County, where the victim's residence was located, even though no element of the alleged identity theft was connected to that location. The issue Bochenek raises is whether, when a defendant is charged with identity theft under section 16-30(a)(1), the special venue provision of 1-6(t)(3) violates a defendant's constitutional right to be tried in the county where the offense is alleged to have occurred. Ill. Const. 1970, Art. I, § 8.

The State failed to address the issue before the Court. The State does not mention the elements of section 16-30(a)(1), or attempt to make any connection between those elements that define where the offense occurs, and the victim's residence. Further, the State fails to recognize any difference between a prosecution for identity theft under 720 ILCS 5/16-30(a)(1) and sections (a)(3) or (a)(4). Instead, the State relies on mischaracterizing Bochenek's position, and puts forth a dangerous argument in favor of unchecked legislative authority.

The State incorrectly claims that 720 ILCS 5/1-6(t)(3) ("the Statute") is

capable of a valid, constitutional, application. The State puts forth a situation in which the entire offense occurs intra-county, as in, the defendant unlawfully uses the personal identifying information of a victim to fraudulently obtain goods all within the same county, and that county is also where the victim resides. The State incorrectly claims that this situation would be a valid application of 720 ILCS 5/1-6(t)(3).

When applying the facially unconstitutional standard, courts are to consider "only applications of the statute in which it actually authorizes or prohibits conduct." *City of Los Angeles, Calif. v. Patel*, 135 S. Ct. 2443, 2451 (2015) (hotel record search statute was facially unconstitutional, even though factual circumstances existed under which statute would be constitutional, such as exigent circumstances or a warrant, because the conduct actually being authorized or prohibited by the statute violated the Fourth Amendment); *see e.g. Planned Parenthood of Southeastern Pa. v. Casey*, 112 S.Ct. 2791, 2791 (1992) (statute requiring a woman to notify her husband before getting an abortion was facially unconstitutional, even though factual situations existed under which the statute did not impose an undue burden as required to make the statute unconstitutional, that conduct, such as discussing with husband before abortion, did not invoke the statute's authorized or prohibited conduct); *Kakos v. Butler*, 2016 IL 120377, ¶29 (statute changing right to jury trial from twelve to six person jury was facially unconstitutional, even if situations existed in which six person jury was constitutional, such as if parties consented to a jury of six, because that factual circumstance does not invoke the statute's prohibited or allowed conduct).

This facial challenge should succeed because there is no set of circumstances

under which section 1-6(t)(3) provides proper venue for prosecution under section 16-30(a)(1). In the situation put forth by the State, venue would be proper pursuant to a different provision of the Place of Trial statute – section 1-6(t)(1) (providing venue where "the offense occurred") – thus, the conduct being authorized by the Statute would not be invoked and is therefore irrelevant to the constitutional analysis. *See Patel*, 135 S. Ct. at 2451 (even if factual circumstances exist that make a statute constitutional, those factual circumstances have to necessarily invoke the conduct being prohibited or authorized by the allegedly facially unconstitutional statute).

Further, this appeal is properly brought as a facial challenge rather than an as-applied challenge. The alleged constitutional violation applied to Bochenek because he was forced to stand trial in the county where the victim resided, even though the offense as alleged occurred in a different county. This gives him proper standing to challenge the Statute. *People v. Rogers*, 133 Ill.2d 1, 10 (1989). When a constitutional challenge is to a legislative act rather than the trial court's use of the act, the challenge is facial. See *People v. Harris*, 2018 IL 121932, ¶ 70 (Burke, J., concurring) (Defendant's constitutional challenge to statutory minimum sentence was facial rather than as-applied because the minimum was set by the legislature, and the requested remedy required amending the statute to comply with the Constitution). Here, the trial court denied Bochenek's motion to dismiss because the legislature had authorized venue in the county where the victim resides. The trial court applied the Statute as written, and Bochenek's appellate challenge is to the statute itself. Therefore, this appeal is properly brought as a facial challenge to the Statute.

Next, the State claims that the Illinois Constitution "imposes no constraint" on the legislature's ability to confer proper venue. (St. Br. 10). This is a dangerous proposition and would allow unchecked legislative authority. The State asserts that the legislature has the power "to define where an offense occurs," but the State does not provide any authority supporting this proposition. (St. Br. 20). Also, the State goes to great lengths to show the legislature's intent that the victim's residence be a valid venue.

Bochenek recognizes that the legislature has wide latitude in determining what conduct is criminal, and the elements of those offenses. However, the legislature has not defined identity theft as occurring where the victim resides. The General Assembly has "the power to declare and define *conduct* constituting a crime." *People v. Clark*, 2019 IL 122891 ¶ 22 (emphasis added). The criminal conduct, as defined by the legislature, would be the elements of the offense. No element of section 16-30(a)(1) occurs at the victim's residence. Although the venue statute states, "criminal actions shall be tried in the county where the offense was committed, *except as provided by law,*" (720 ILCS 5/1-6(a) (emphasis added)) Bochenek maintains that the General Assembly does not have the authority to arbitrarily provide venue in counties where no aspect of the criminal conduct was alleged to have occurred because that would violate Article I, Section 8 of the Illinois Constitution. *People v. Aguilar*, 2013 IL 112116, ¶ 21 (a statute that conflicts with "a personal right that is specifically named in and guaranteed" by the Constitution is facially unconstitutional and void).

The vicinage-locus delicti requirement that criminal trials only occur in the jurisdiction where the criminal conduct allegedly occurred was a part of the

common law, and is an important aspect of due process that has been enshrined in both the Illinois and Federal Constitutions. *Watt v. People*, 126 Ill. 9 (1888); *Mapes v. Hulcher*, 363 Ill. 227, 230 (1936); *U.S. v. Cores*, 356 U.S. 405, 407 (1958). Contrary to the State's argument, Bochenek has not requested that the Federal Sixth Amendment right be incorporated here. (St. Br. 26). Bochenek cited Federal cases discussing the purpose of this vicinage requirement because the reasoning behind this aspect of due process, and its inclusion in both state and federal constitutions, is relevant to the matter before the Court. *Samano v. Temple of Kriya*, 2020 IL App (1st) 190699 ¶ 48 (analogous federal law is persuasive authority). The defendant's right to be tried in the same jurisdiction where the crime allegedly occurred is well established, and a "safeguard against the unfairness and hardship involved when an accused is prosecuted in a remote place." *U.S. v. Cores*, 356 U.S. 405, 407 (1958).

The State relies on *Watt v. People*, 126 Ill. 9 (1988), to argue that "the constitutional principle that defendant relies upon here – article I, section 8 of the Illinois Constitution – guarantees only that a defendant's trial occur in the county alleged in the charging instrument." (St. Br. 18) The State then declares that "Defendant has presented no meaningful argument for *Watt* to be overturned." (St. Br. 19) But, Bochenek has not made an argument to overturn *Watt* because striking down this venue provision would be entirely consistent with *Watt*. Until 1995, the State was required to prove venue as a substantive element of the offense, and failure to do so was cause for vacating a conviction. See *People v. Gallegos*, 293 Ill. App. 3d 873, 876–77 (3rd Dist.1997). In *Watt*, the defendant allegedly committed a murder on a moving train, and it was indeterminable which county

the murder occurred in. *Watt*, 126 Ill. at 17. Because the State was required to prove proper venue at the time, it would have been impossible to convict the defendant, so the Court recognized the General Assembly's ability to define which crimes were strictly local, and which crimes were transitory. *Id*. at 19 (finding that the General Assembly rightfully conveyed venue to all counties in which the train passed through).

In Bochenek's situation, unlike *Watt*, the State, and the trial court, knew exactly where the alleged crime occurred; at a gas station in Lake County, not DuPage County. While the State no longer needs to prove venue, it is still required to bring the case in the county where the crime is alleged to have occurred, and the case is subject to a motion to dismiss if the crime as alleged occurred in a different county. 725 ILCS 5/114-1(a)(7) (2017) (defendant must make a *prima facie* showing that venue is improper and the motion will be granted if the State fails to show by a preponderance of the evidence that venue is proper); *Gallegos*, 293 Ill. App. 3d at 879.

Here, the indictment asserted that the offenses occurred within DuPage County, but it also stated that the crime was based on Bochenek's use of Fatigato's JP Morgan Chase Bank credit card. (C. 29-30). There was no question that the Chase card was used solely at the Marathon Gas Station at 20235 N. Rand Road, Palatine, Illinois, and there is no question that this gas station is in Lake County. (C. 29-30). Thus, the indictment alleged that the crime occurred in Lake County, not DuPage County. Based on these facts, trial counsel properly moved to dismiss. (C. 120; R 65).

All in all, the State misrepresents Bochenek's argument as requesting a

reversal of *Watt*, and a guarantee that trials will occur where the offense actually occurred. (St. Br. 19). But, Bochenek's argument is entirely consistent with *Watt*, and the proposition that venue is proper where the offense is *alleged* to have occurred. Bochenek's argument is focused on the fact that, here, the offense, as alleged, occurred in Lake County, yet he was tried in DuPage County based solely on the victim's residence when no aspect of the alleged offense occurred in DuPage.

The State also mischaracterizes Bochenek's argument as limiting venue only to the defendant's physical location. (St. Br. 25). There are numerous examples in Section 1-6 that allow proper venue even when the defendant was never physically present in the county. However, all other place of trial provisions connect an element of the criminal conduct to the venue. See e.g. 720 ILCS 5/1-6(q) (2017) ("money laundering may be tried in any county where any part of a financial transaction in criminally derived property took place or in any county where any money or monetary instrument which is the basis for the offense was acquired, used, sold, transferred or distributed to, from or through"). Thus, a defendant does not have to be physically present for an element of the criminal conduct to have occurred in a jurisdiction.

Bochenek agrees with the State that Illinois has an interest in protecting its citizens from the commission of identity theft. (St. Br. 19-25). However, this venue provision is not necessary for that purpose. For example, in the case at hand, the crime could have been prosecuted in Lake County, where the crime actually occurred. Also, the State ignores the fact that there are other methods of charging identity theft. Prosecutions brought under sections 16-30(a)(3) and (a)(4) could potentially have proper venue in the county where the victim resides because the

obtaining of the personal identifying information is an element of those offenses. 720 ILCS 5/16-30(a)(3), (a)(4). When obtaining the personal identifying information is an element of the offense, and the victim's residence is the location of that personal identifying information, then an aspect of the offense would occur where the victim resides. Further, local police and county prosecutors are not the only law enforcement fighting against identity theft; identity theft can also be prosecuted in federal court by the Department of Justice. 18 U.S.C. § 1028 (identification fraud); 18 U.S.C. § 1029 (credit card fraud); 18 U.S.C. § 1030 (computer fraud); 18 U.S.C. § 1341(mail fraud); 18 U.S.C. § 1343 (wire fraud); 18 U.S.C. § 1344 (financial institution fraud).

Lastly, the State claims that 720 ILCS 5/16-36 provides an independent statutory basis to prosecute Bochenek, and that therefore, any ruling about the constitutionality of section 1-6(t)(3) would be an advisory opinion. (St. Br. 30). Bochenek specifically challenged the constitutionality of section 1-6(t)(3) in his motion to dismiss, and this appeal is from the trial court's ruling on that motion. (C. 120-121; R. 63). In contrast, the State did not argue that section 16-36 provided an alternative basis for venue, either in the trial court or on appeal. It has, therefore, forfeited this argument. *People v. Wells*, 182 Ill. 2d 471, 490 (1998) (the State waived an argument that "could and should have been raised before a lower court"); *People v. Carter*, 208 Ill. 2d 309, 318 (2003) (State forfeited issue where it did not make the argument in the appellate court); *People v. Cherry,* 2016 IL 118728, ¶ 30 ("it is well settled that arguments raised for the first time in this [C]ourt are forfeited").

More importantly, section 16-36 presents the same basis for venue as section 1-6(t)(3) in that it provides, for purposes of identity theft, that venue "shall be

proper in any county where the person described in the personal identification information or personal identification document in question resides or has his or her principal place of business." 720 ILCS 5/16-36 (2017). In other words, both statutes say essentially the same thing but one is located in the "Place of Trial" statute and the other is found within the identity theft statutes. Neither are based on any aspect of the offense of identity theft when charged under section 16-30(a)(1).

For that reason, the State's argument that 16-36 provides an independent statutory basis for venue in this case is incorrect. Both sections are inconsistent with a defendant's constitutional right to be tried in the county where the offense is alleged to have occurred. Therefore, if section 1-6(t)(3) is found to be an unconstitutional venue provision for a defendant charged under section 16-30(a)(1), then 16-36 would also be unconstitutional and could not provide a valid, independent basis for venue.

In conclusion, criminal defendants have a constitutional right to be tried in the county where the crime allegedly occurred, and the General Assembly cannot obfuscate that right by legislative act. The statutory provision providing venue for prosecution of identity theft in the county where the victim resides – 720 ILCS 1-6(t)(3) – is facially unconstitutional because no element of identity theft under section 16-30(a)(1) occurs where the victim resides. Thus, there are no facts or circumstances that constitutionally invoke section 1-6(t)(3) when a defendant is charged with violating section 16-30(a)(1). Bochenek allegedly committed identity theft in Lake County, yet this case was tried in Dupage County based solely upon the victim's residence. Therefore, the trial court erred when it denied Bochenek's motion to dismiss. For all these reasons, this Court should reverse Bochenek's

conviction for identity theft and find that section 1-6(t)(3) is unconstitutional when the prosecution is brought under section 16-30(a)(1).

## CONCLUSION

For the foregoing reasons, Dominik Bochenek, respondent-appellant, respectfully requests that this Court dismiss Bochenek's conviction for identity theft, and declare 720 ILCS 5/1-6(t)(3) void as unconstitutional whenever a defendant is charged with violating 720 ILCS 5/16-30(a)(1).

Respectfully submitted,

THOMAS A. LILIEN
Deputy Defender
Office of the State Appellate Defender
Second Judicial District
One Douglas Avenue, Second Floor
Elgin, IL 60120
(847) 695-8822
2nddistrict.eserve@osad.state.il.us

BRYAN G. LESSER
Of counsel, Pro Bono
Gordon Rees Scully Mansukhani, LLP
One North Franklin Suite 800
Chicago, IL 60606
(312) 565-1400
Blesser@GRSM.com

COUNSEL FOR RESPONDENT-APPELLANT

## CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages contained in the Rule 341(d) cover, and the certificate of service, is 11 pages.

/s/Bryan G. Lesser
BRYAN G. LESSER

No. 125889

IN THE

SUPREME COURT OF ILLINOIS

| | | |
|---|---|---|
| PEOPLE OF THE STATE OF ILLINOIS,<br><br>Respondent-Appellee,<br><br>-vs-<br><br>DOMINIK K. BOCHENEK<br><br>Respondent-Appellant | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | Appeal from the Appellate Court of Illinois, No. 2-17-0545.<br><br>There on appeal from the Circuit Court of the Eighteenth Judicial Circuit, DuPage County, Illinois, No. 16 CF 497.<br><br>Honorable John J. Kinsella, Judge Presiding. |

**NOTICE AND PROOF OF SERVICE**

Mr. Kwame Raoul, Attorney General, 100 W. Randolph St., 12th Floor, Chicago, IL 60601, eserve.criminalappeals@atg.state.il.us;

Ms. Lisa Ann Hoffman, Supervisor of Appeals, DuPage County State's Attorney Office, 503 North County Farm Road, Wheaton, IL 60187, SAO.Appeals@dupageco.org;

Mr. Robert Berlin, DuPage County State's Attorney, 503 N. County Farm Rd., Wheaton, IL 60187, SAO.Appeals@dupageco.org;

Mr. Dominik Bochenek, 1504 Brittania Way, Roselle, IL 60172

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On December 1, 2020, the Reply Brief was filed with the Clerk of the Supreme Court of Illinois using the court's electronic filing system in the above-entitled cause. Upon acceptance of the filing from this Court, persons named above with identified email addresses will be served using the court's electronic filing system and one copy is being mailed to the respondent-appellant in an envelope deposited in a U.S. mail box in Elgin, Illinois, with proper postage prepaid. Additionally, upon its acceptance by the court's electronic filing system, the undersigned will send 13 copies of the Reply Brief to the Clerk of the above Court.

/s/Vinette Mistretta
LEGAL SECRETARY
Office of the State Appellate Defender
One Douglas Avenue, Second Floor
Elgin, IL 60120
(847) 695-8822
Service via email will be accepted at
2nddistrict.eserve@osad.state.il.us