

CONTEMPT:
WORKMEN'S COMPENSATION:
WITNESSES:
VENUE:

Venue of offense of witness not appearing
in Workmen's Compensation hearing is in
county where witness was to appear.

OPINION NO. 328

August 17, 1967

Honorable James N. Foley
Prosecuting Attorney
Macon County
Macon, Missouri 63552



Dear Mr. Foley:

This is in response to your letter of July 10, 1967, in which you request an opinion from this office as to whether the venue is in Boone County or Macon County of an offense committed by a witness for failure to respond to a subpoena issued by a referee for the Division of Workmen's Compensation for the witness to appear and testify at a hearing to be held in the Courthouse in Macon County when the witness was subpoenaed in Boone County, Missouri.

Section 287.570, RSMo, provides:

"If any person subpoenaed to appear at any hearing or proceeding, fails to obey the command of such subpoena without reasonable cause, or if any person at attendance at any hearing or proceeding shall without reasonable cause, refuse to be sworn, or to be examined, or to answer a question, or to produce a book or paper or to subscribe or swear to his deposition, he shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not more than five hundred dollars, or by imprisonment in the county jail for not more than one year, or by both such fine and imprisonment, and may be prosecuted therefor in any court of competent jurisdiction, and in case of a continuing violation, each day's continuance thereof shall be, and deemed to be, a separate and distinct offense."

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Under this statute a person who is duly subpoenaed as a witness to testify before the Division of Workmen's Compensation at a hearing or any proceeding and fails to respond is guilty of a misdemeanor and subject to a fine or jail sentence or both. The failure to appear constitutes a crime under this statute.

Article I, Section 18(a), Constitution of Missouri, provides that in criminal prosecutions the accused shall have the right to a speedy public trial by an impartial jury of the county.

Section 541.030, RSMo, provides that offenses committed against the laws of this state shall be prosecuted in the county in which the offense is committed except as may be otherwise provided by law.

Assuming for the purposes of this opinion that under the facts submitted, Section 287.040, supra, was violated and an offense was committed, the question then arises where the offense was committed, whether in Macon County where the witness was summoned to appear and failed to appear or in Boone County where the subpoena was served on the witness.

In *State v. Civella*, 368 S.W.2d 444, the defendant was charged for failure to file an income tax return. Failure to file such return constitutes a misdemeanor. Under the statute the defendant was authorized to file his income tax return with the Director of Revenue, Jefferson City, Missouri, or in several district offices including Jackson County. In holding that the offense was committed in Jackson County and that venue was in Jackson County and after quoting Section 541.030, supra, the court stated:

" * * * It has long been the uniformly accepted rule that 'Where the offense consists of a failure or omission to act, the crime is usually regarded as committed in the district [or county] where the act should have been performed. Thus, where one is required by a penal law to file a document in a certain district [or county], the failure to do so is a crime committed in the district [or county] in which the document was required to be filed.' 22 C.J.S. Criminal Law §182 (1), pp. 443-445. * * * "

In *State v. Bruster*, 93 A. 189 (Supreme Court of New Jersey) the defendant failed to appear as a witness after being summoned to appear before a legislative committee. The statute provided that any witness summoned to appear before any such committee who

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shall willfully neglect or refuse to appear in obedience to the summons or refuse to be sworn he shall be guilty of a misdemeanor. This defendant was served with a subpoena in Bergen County, New Jersey, to appear before the committee in Mercer County, New Jersey. The indictment was returned by a grand jury in Mercer County and in discussing the question of venue the court stated l.c. 190:

"[1] The first is that the indictment does not show where the summons was served, and that if not served in the county of Mercer, then no offense was committed in that county, but in the county where the service was made, and over which the criminal courts of Mercer county would have no jurisdiction, and therefore the place of service was material and should have been alleged. We are of opinion that this argument is not applicable to the present proceedings, for the statute which creates the crime for which the defendant is indicted is a willful refusal to appear in obedience to the summons at the place named therein, or to be sworn or affirmed.

"The crime does not rest upon the mental conclusion of the defendant that he will not obey, but upon the fact that he does not appear at the place designated or refuses to be sworn and is not complete until he fails to present himself as required in the summons that he may be sworn, and also his refusing to be sworn. His absence amounts to a refusal to be sworn, which is an element of the offense charged in this indictment. * * * "

In the present case the witness was duly summoned to appear in Macon County, Missouri. He was subpoenaed in Boone County, Missouri. He was summoned to appear as a witness at a certain time and place in Macon County and to testify as a witness before the Division of Workmen's Compensation. This, under the facts submitted, he failed to do. Under Section 287.570, supra, any person subpoenaed to appear at any hearing before the Division of Workmen's Compensation who fails to obey the subpoena without reasonable cause or who refuses

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to be sworn or examined or to produce books and papers is guilty of a misdemeanor. The offense is not complete until the witness failed to appear at the designated time and place which would be Macon County. The venue would be with the court having jurisdiction over misdemeanors in Macon County where the witness failed to appear.

CONCLUSION

It is the opinion of this department that the offense of refusing to appear and be sworn as a witness under Section 287.570, RSMo, is committed in the county where the witness was summoned to appear and the testimony was to be given and the court having jurisdiction over misdemeanors in that county would have venue for the offense.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Moody Mansur.

Yours very truly,


NORMAN H. ANDERSON
Attorney General