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PARTICULARITIES OF ESTABLISHING THE FACT OF A PERSON'S CONCEALMENT FROM INVESTIGATION AS A BASIS FOR PUTTING ON THE WANTED LIST

Abstract. Purpose. The purpose of the article is to formulate new and improve the existing legal and organisational measures regarding the activities of authorized bodies in case of evasion of a suspect or an accused person from participation in criminal proceedings. **Results.** The article underlines an imbalance between the provisions governing the same procedure, in particular, with regard to determining the type of search for persons (on the territory of Ukraine and international search) due to different grounds for their notification, and, accordingly, the use of the fact of being put on the wanted list as a ground for applying criminal proceedings in absentia. Putting a suspect on the wanted list does not automatically mean that he or she is evading the investigation (this is also confirmed by the concept of "search" and its tasks), it is necessary to establish the existence and intentional nature of these actions, as well as that the person has committed certain actions to conceal his or her whereabouts from the investigation or court, and that measures are being taken to establish his or her whereabouts. The latter is particularly relevant, since in each case of consideration of a motion for a special pre-trial investigation, the court pays attention to such circumstances. This is due to the existence of a number of problems related to the search, which are caused by various reasons. **Conclusions.** The author concludes that a person's concealment from the investigation should be understood as any intentional actions committed by a person with the aim of evading criminal liability for a crime, which forces law enforcement bodies to take measures to find and apprehend the offender (failure to appear without good reason when summoned to an investigator or court, non-compliance with the conditions of a measure of restraint, change of identity documents, change of appearance, transition to an illegal position, imitation of death, etc.) The indication that the prosecution shall prove that the search is ongoing will allow, in the case of a domestic search, to determine the scope, nature and effectiveness of the prosecution's actions to establish the location of the suspect, accused and the probable cause of his or her absence, and in cases of international search, in addition to the above-mentioned, to obtain confirmation that this search is ongoing.

Key words: criminal proceedings in absentia, special pre-trial investigation, grounds, a person's concealment from the investigation, putting on the wanted list.

1. Introduction

Following the institution of criminal proceedings in absentia into the pre-trial investigation system, its application and regulatory framework are being improved comprehensively. Due to the large number of scientific and other works, and, consequently, the diversity of their methods, there is already a certain scientific body of work that is of significant theoretical and practical importance. However, this diversity not only enriches, expands, and supplements scientific knowledge quantitatively and qualitatively, but also increases ter-

minological inconsistency, enabling numerous contradictions in scientific approaches to exist simultaneously, which complicates the work of law application and to some extent affects the chaotic nature of legislative initiatives. For example, one of the problematic issues in the practical implementation of the mechanism of special pre-trial investigation in terms of determining the grounds for conducting criminal proceedings in absentia is the establishment of the fact of evasion from the investigation. One of the conditions for a special pre-trial investigation is to put a person on

the "international wanted list" (Article 297-4 of the CPC of Ukraine), but according to the CPC, Article 281, Part 1, the investigator or prosecutor announces a person "wanted". In other words, there is a certain imbalance even between the perception of terminology in the provisions governing the same procedure (for example, an international wanted list is issued after a wanted list is issued on the territory of Ukraine and a number of doubts arise that it can be established for certain that the person is in the occupied territory and not abroad, which significantly changes the grounds for the wanted list and its type). Moreover, a ground for announcing a wanted list during the pre-trial investigation such as "the suspect's whereabouts are unknown" may occur both if the suspect evades the investigation and if his or her whereabouts are not established for other reasons, but the meaning of the concepts of "evasion of investigation or trial" and "evasion of criminal liability" is subjectively determined by the investigator or prosecutor in each case, which is a matter of dispute and the basis for various types of appeals against the actions of the prosecution. Therefore, the mechanism of criminal proceedings in absentia should include not only a system of knowledge and scientific positions, but also an objective assessment of the legal, social and political situation and the potentials of legal means to ensure the fulfilment of the tasks of criminal proceedings in case of evasion of the suspect or accused from participation in the proceedings, as well as identification of directions and ways to improve legislation and law application.

A number of scholars have considered the issue of compliance with the content of the terms, their use in certain situations, when a person is announced wanted. O.O. Dudorov and Ye.O. Pysmenskyi study the content of the concept of "evasion from pre-trial investigation" in the context of exemption from criminal liability due to the expiration of the statute of limitations (Dudorov and Pysmenskyi, pp. 87-99); V.V. Zuiev defines a clear mechanism for putting a person on the international wanted list as criminal procedural guarantees of a person's rights in international cooperation in criminal proceedings (Zuiev, 2017, pp. 112-114); I. Hloviuk considers the fact of absence of a suspect or accused as a ground for commencing a pre-trial investigation in absentia in the criminal proceedings of Ukraine (Hloviuk, 2015, pp. 16-25). That is, various scholars have expressed the opinion that the term evasion of a person from the investigation (as a ground for putting him/her on the wanted list) is used, but have not considered its content in the context of criminal proceedings in absentia.

The purpose of the article is to formulate new and improve the existing legal and organisational measures regarding the activities of authorized bodies in case of evasion of a suspect or an accused person from participation in criminal proceedings.

2. Particularities of establishing the fact of a person's concealment from the investigation

Putting a suspect on the wanted list does not automatically mean that he or she is evading the investigation (this is also confirmed by the concept of "search" and its tasks), it is necessary to establish the existence and intentional nature of these actions, as well as that the person has committed certain actions to conceal his or her whereabouts from the investigation or court, and that measures are being taken to establish his or her whereabouts. The latter is particularly relevant, since in each case of consideration of a motion for a special pre-trial investigation, the court pays attention to such circumstances. This is due to the existence of a number of problems related to the search, which are caused by various reasons. Annually the units of the National Police of Ukraine search for about 30 thousand people, and the number of wanted persons has increased significantly as a result of hostilities and the evacuation of citizens (their movement within the country and abroad). In most cases, the concealment of a suspect (accused) leads to the suspension of pre-trial investigation or court proceedings. Practice shows that the accumulation of such criminal proceedings in which the suspect (accused) is wanted leads to the fact that no one is actually searching for such persons. Investigators and operational units of law enforcement bodies formally take certain measures aimed at establishing the whereabouts of wanted persons, which do not lead to the desired result. An analysis of the materials of the activities of law enforcement bodies on the organisation of the search for persons and the establishment of their whereabouts shows the following main shortcomings: the formal issuance by the investigator of a resolution to put a suspect on the wanted list without proper organisation of the actual search; entrusting the search for a suspect to operational units without proper control by the investigator over the content and results of the search; formal implementation by operational units of measures to identify the wanted person in the absence of proper interaction with pre-trial investigation authorities and exchange of relevant information on the circumstances of the search; failure of investigators to take appropriate procedural measures in case of establishing the whereabouts of a person concealment from pre-trial investigation and court; unreasonable delay in opening

or unreasonable closure of an operational search case of the relevant category and deregistration of wanted persons without appropriate consent of the investigative units; choosing a measure of restraint not related to custody against a suspect or accused person whose whereabouts have been established etc. (Lysenko, 2017). In addition, these organisational problems are related to the existence of a number of problems in the regulatory framework for these processes.

3. Problematic issues of proving a suspect's intent to evade criminal liability

One of the unresolved issues has been identified the problem (Shumeiko, 2019, pp. 88-93) of proving the suspect's intent to evade criminal liability, because in any case, the person will try to avoid such a formulation and will insist that the reasons for his or her absence, inaccessibility to the investigation and court are different, for example, fear for his or her life, lack of faith in the justice system, receiving threats, etc. Therefore, it is only possible to make an assumption about the true purpose of such person's actions, which is almost impossible to find out for sure, moreover in cases where there is no suspect. From the content of the analysed and other examples of judicial practice, it is clear that the purpose of concealment, "evasion of criminal liability" is not separately investigated and established, the entire formula defined by the legislator is applied, that is, "concealment of a suspect with the aim of evading criminal liability". For example, the ruling of the investigating judge should contain a separate structural element of the document "On the fact of the suspect's concealment from the investigation and court" (Decision of the investigating judge of the High Anti-Corruption Court, 2020), but in practice there are no examples when it has been established that the suspect concealed from the investigation and court but not for the purpose of evading criminal liability (and therefore there are no grounds for a special pre-trial investigation).

O.V. Sachko is sceptical regarding the above legislative formula: it is logical to assume that "the statement of circumstances that the suspect conceals from the investigation and court authorities in order to evade criminal liability" has signs of legal fiction. First, it is possible to find out the purpose of the person in general, as well as the purpose of "evasion of criminal liability," only when interrogating such a person or obtaining other information from him/her (for example, by listening to his/her conversations), but at the same time knowing where such a person is. Second, if a person is in absconding, his or her whereabouts are unknown, and therefore it is virtually impossible to find out the purpose of his or her concealment (Sachko, 2019, p. 218).

So what exactly is the significance of proving the purpose of the absconding suspect – evasion of criminal liability, as provided for in the CPC of Ukraine, Article 297-2, part 2? What other purpose of concealment can there be and what is its significance for making a decision to conduct a special pre-trial investigation? How can such purpose be established with certainty since it is subjective and there is no direct communication with the suspect? If it is a matter of a person's fear for his or her safety or life, the law provides for mechanisms to ensure security for such persons. "Disbelief in justice", "political reprisals" and other subjective motives cannot be considered in the absence of relevant evidence (Shumeiko, 2019, pp. 88-93).

This subjective assessment is not removed from the text of the CPC of Ukraine, Article 297-2, part 2, but at present, the ground is also defined as the presence of information that the suspect has left and/or is in the temporarily occupied territory of Ukraine, in the territory of the state recognised by the Verkhovna Rada as the aggressor state with the aim of evading criminal liability and/or information about being put on the international wanted list, that is, this ground can already be confirmed by establishing objective facts, unlike the ground of "the purpose – evasion of criminal liability". It should be noted that the purpose of "evasion of criminal liability" is specified by the legislator only for cases of special pre-trial investigation and apprehension by an authorised official (Article 208 of the CPC of Ukraine). According to the CPC of Ukraine, Article 208, part 1, clause 3, an authorised official has the right to apprehend a person suspected of committing a crime punishable by imprisonment without a ruling of the investigating judge or court only if there are reasonable grounds to believe that a person suspected of committing a grave or especially grave corruption crime (but only those that are within the jurisdiction of the NABU) may abscond with the intent to evade criminal liability. This also raises the question: what other purpose, other than evasion of criminal liability, may such a person intend to abscond for and whether this purpose is relevant for the decision to apprehend him/her in accordance with Article 208 of the CPC of Ukraine? The purpose of the application of measure of restraint (Drozd, Ponomarenko, Vakulenko, 2017, pp. 34-35) is to prevent attempts to conceal from pre-trial investigation and/or court (CPC of Ukraine, Article 177, part 1, para.1) without indicating evasion of criminal liability, and according to the CPC of Ukraine, Article 186, part 2, paragraphs 2, 3, a measure of restraint in the form of detention may be applied only if (except for the grounds provided

for in Article 177 of the CPC of Ukraine) it is proved that, while at large, the person concealed from the pre-trial investigation body or court (Criminal Procedure Code of Ukraine, 2012). According to the CPC of Ukraine, Article 189, Part 4, the investigating judge or court shall refuse to grant permission to apprehend a suspect or accused person for the purpose of compelled appearance unless the prosecutor proves that the circumstances specified in the motion for a measure of restraint indicate that there are grounds for keeping the suspect or accused in custody, and there are sufficient grounds to believe that the suspect or accused abscond from the pre-trial investigation or court. Other cases that require the establishment of the fact of a person's concealment also do not provide for the purpose of such actions (CPC of Ukraine, Article 249, part 4). The wording "with the purpose of evading criminal liability" is also not used. We assume that the wording "abscond for the purpose of evading criminal liability" was reproduced in the CPC of Ukraine, Article 297-1, part 4 in accordance with the purpose of the law that amended the CPC of Ukraine, but without harmonisation with other provisions of the CPC of Ukraine and without assessing possible problems of law application.

A person who evades investigation or trial is a person known to these authorities (as evidenced by the materials of a criminal case) as having committed a certain crime and taken actions to conceal his or her whereabouts from the investigation or trial. The statute of limitations is personalised, and therefore, a person's evasion from the investigation can only be said to have occurred when the investigation is conducted in relation to a specific person. Therefore, evasion can be said to have occurred in relation to a person who is aware that an investigation is being conducted against him or her, i.e. the perpetrator has been identified and measures are being taken to establish his or her whereabouts (Resolution of the Supreme Court, 2019), including a search for him or her.

One of the conditions for a special pre-trial investigation is to put a person on the wanted list, but Article 297-4 of the CPC of Ukraine stipulates that the investigating judge shall dismiss the motion for a special pre-trial investigation unless the prosecutor or investigator proves that the suspect is ... on the international wanted list, however, according to the CPC, Article 281, part 1, if during the pre-trial investigation the suspect's whereabouts are unknown or the person is in the temporarily occupied territory of Ukraine or outside Ukraine and does not appear without good reason at the summons of the investigator or prosecutor, provided

that he or she has been duly notified of such a summons, the investigator or prosecutor shall announce him or her wanted. Since the international wanted list is announced after the wanted list is announced on the territory of Ukraine, this significantly changes the grounds for the wanted list and its type.

Therefore, in order to harmonise the legal provisions relating to the institution of special pre-trial investigation and prevent unequal understanding of the law, it seems appropriate to amend a number of provisions of the CPC to be read as follows:

- Article 297-2, part 4: Information on putting a person on *the wanted list, measures and actions taken for the purpose of search*;

- Article 297-4, part 1: The investigating judge shall dismiss the motion for a special pre-trial investigation unless the prosecutor or investigator proves that the suspect *evades appearing at the summons of the investigator, prosecutor or court summons of the investigating judge or court (failure to appear without a valid reason more than twice)*, is put on *the wanted list and actions are being taken to search for him/her*;

- Article 297-4, part 3, para. 3: Repeated application for a special pre-trial investigation to the investigating judge in the same criminal proceedings is not allowed, unless there are new circumstances confirming that the suspect *evades appearing at the summons of the investigator, prosecutor or court summons of the investigating judge, court (failure to appear without a valid reason more than twice)* and is put on *the wanted list and actions are being taken to implement it*;

- Article 323, Part 3: a trial in criminal proceedings concerning the offences referred to in this Code, Article 297-1, part 2, may be conducted in the absence of the accused, except for a minor who *evades the summons of an investigator, prosecutor or court summons of an investigating judge, court (failure to appear without a valid reason more than twice)* (special court proceedings) and is put on *the wanted list and actions are being taken to implement it*;

- Article 193, part 6: The investigating judge or court may consider a motion for a measure of restraint in the form of detention and impose such a measure in the absence of the suspect or accused only if the prosecutor, in addition to the grounds provided for in Article 177 of this Code, proves that the suspect or accused is put on *the wanted list and actions are being taken to implement it*.

4. Conclusions

A person's concealment from the investigation should be understood as any intentional actions committed by a person with the aim of evading criminal liability for a crime, which

forces law enforcement bodies to take measures to find and apprehend the offender (failure to appear without good reason when summoned to an investigator or court, non-compliance with the conditions of a measure of restraint, change of identity documents, change of appearance, transition to an illegal position, imitation of death, etc.) The indication that the prosecution

shall prove that the search is ongoing will allow, in the case of a domestic search, to determine the scope, nature and effectiveness of the prosecution's actions to establish the location of the suspect, accused and the probable cause of his or her absence, and in cases of international search, in addition to the above-mentioned, to obtain confirmation that this search is ongoing.

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ОСОБЛИВОСТІ ВСТАНОВЛЕННЯ ФАКТУ ПЕРЕХОВУВАННЯ ОСОБИ ВІД СЛІДСТВА ЯК ПІДСТАВИ ОГолоШЕННЯ В РОЗШУК

Анотація. Мета. Метою статті є формулювання нових і вдосконалення наявних правових та організаційних заходів щодо діяльності уповноважених органів у випадку ухилення підозрюваного, обвинуваченого від участі в кримінальному провадженні. **Результати.** У статті зазначено, що спостерігається дисбаланс між нормами, які регламентують одну й ту саму процедуру, зокрема щодо визначення виду розшуку осіб (на території України та міжнародного розшуку), у зв'язку з різними підставами їх оголошення та, відповідно, використання факту оголошення в розшук

як підстав для застосування заочного кримінального провадження. Оголошення підозрюваного в розшук автоматично не означає його ухилення від слідства (ця позиція також підтверджується поняттям «розшук» і його завданнями), потрібно встановити наявність та умисний характер цих дій, а також те, що особа вчинила певні дії з метою приховування місця свого перебування від слідства або суду, що здійснюються заходи, спрямовані на встановлення її місцезнаходження. Останнє особливо актуально, адже в кожному випадку розгляду клопотання про здійснення спеціального досудового розслідування суд звертає увагу на такі обставини. Це пояснюється наявністю низки проблем, пов'язаних із розшуком, що зумовлені різними причинами. **Висновки.** Зроблено висновок, що під переховуванням особи від слідства варто розуміти будь-які умисні дії, вчинені певною особою з метою уникнути кримінальної відповідальності за вчинений злочин, що змушує правоохоронні органи вживати заходів, спрямованих на розшук і затримання правопорушника. Це, зокрема, нез'явлення без поважних причин за викликом до слідчого або суду, недотримання умов запобіжного заходу, зміна документів, які посвідчують особу, зміна зовнішності, перехід на нелегальне становище, імітація своєї смерті тощо. Вказівка на обов'язковість доведення стороною обвинувачення того, що розшук здійснюється, дасть змогу в разі внутрішньодержавного розшуку з'ясувати обсяг, характер і результативність дій сторони обвинувачення щодо встановлення місця знаходження підозрюваного, обвинуваченого та вірогідну причину його відсутності, а в разі міжнародного розшуку, окрім зазначеного, – отримати підтвердження, що такий розшук здійснюється.

Ключові слова: заочне кримінальне провадження, спеціальне досудове розслідування, підстави, переховування особи від слідства, оголошення в розшук.

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