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Evidentiary problems in the investigation of corruption crimes in Ukraine

Проблемы доказывания при расследовании коррупционных преступлений в Украине

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Written by:
Shcherbakovskyi Mikhailo[40]
https://orcid.org/0000-0002-8413-9311
Stepaniuk Ruslan[41]
https://orcid.org/0000-0002-8201-4013
Kikinchuk Vasyl[42]
https://orcid.org/0000-0003-2241-6384
Oderiy Oleksiy[43]
https://orcid.org/0000-0002-6999-4387
Svyrydova Liudmyla[44]
https://orcid.org/0000-0001-6667-2852

Abstract

The fight against corruption in Ukraine is one of the main tasks of law enforcement agencies. However, the process of proving corruption crimes in criminal cases is accompanied by problems that negatively affect the quality of the pre-trial investigation. The purpose of the article is to identify and study typical investigative errors and develop recommendations on the proper use of means and methods of proof in criminal cases of corruption crimes, taking into account the norms of national legislation and international criteria for ensuring human rights in criminal proceedings. To achieve this goal, a comparative and systemic structural analysis of international and domestic regulatory legal acts and court decisions, a selective study of materials from criminal cases on corruption crimes were made. It has been established that the process of proving in cases of corruption crimes in Ukraine will fully comply with international standards for ensuring human rights, provided that operational officers, investigators, and prosecutors comply with the admissibility criterion of evidence, especially when using secret measures. Investigative errors

Аннотация

Борьба с коррупцией в Украине является одной из главных задач правоохранительных органов. Однако процесс доказывания по уголовным делам о коррупционных преступлениях сопровождается проблемами, которые негативно влияют на качество досудебного расследования. Целью статьи является выявление и изучение типичных следственных ошибок и разработка рекомендаций по надлежащему применению средств и способов доказывания по уголовным делам о коррупционных преступлениях с учетом норм национального законодательства и международных критериев обеспечения прав человека в уголовном процессе. Для достижения данной цели были произведены сравнительный и системно-структурный анализ международных и отечественных нормативно-правовых актов и решений судов, выборочное изучение материалов уголовных дел о коррупционных преступлениях. Установлено, что процесс доказывания по делам о коррупционных

[40] Doctor of Law, Professor, Manager of the Department of Criminalistics and Forensic Science, Faculty № 6, Kharkiv National University of Internal Affairs; Ukraine.
[41] Doctor of Law, Professor, Professor of the Department of Criminalistics and Forensic Science, Faculty № 1, Kharkiv National University of Internal Affairs; Ukraine.
[42] Candidate of Law, Manager of the Department of Criminalistics and Forensic Science, Faculty № 1, Kharkiv National University of Internal Affairs; Ukraine.
[43] Doctor of Law, Associate Professor, Professor of the Department of Criminal Law Subjects and Forensic Examinations, Faculty № 1, Donetsk Law Institute of Ministry of Internal Affairs; Ukraine.
[44] Candidate of Law, Manager of the Laboratory of Handwriting analysis, Linguistic, Psychological and Art Critic Researches, Hon. Prof. M. S. Bokarius Kharkiv Research Institute of Forensic Examinations; Ukraine.

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that take place at the stage of pre-trial investigation in this category of criminal cases lead to the restriction of human rights and freedoms and consist in significant violations of the criminal procedural law when collecting, checking, and evaluating evidence, as well as when opening the collected materials to the defense. Preventing such violations requires strict adherence to the general requirements for conducting undercover activities, formulated in the decisions of the European Court of Human Rights and domestic courts. The proof must take into account the "fruit of the poisonous tree" doctrine of the inadmissibility of evidence derived from materials collected in violation of the law. The defense side should be provided with timely access to the materials of covert events, including the documents that served as the basis for their implementation. It is important not to allow actions that are regarded as a provocation (incitement) of the suspect to commit a corruption offense.

Key words: evidence in criminal cases of corruption, admissibility of the evidence, corruption investigation methods, corruption investigation errors, countering corruption.

преступлениях в Украине будет полностью соответствовать международным стандартам обеспечения прав человека при условии соблюдения оперативными сотрудниками, следователями и прокурорами критерия допустимости доказательств, особенно при использовании негласных мероприятий. Следственные ошибки, которые имеют место на стадии досудебного расследования по данной категории уголовных дел, приводят к ограничению прав и свобод человека и заключаются в существенных нарушениях уголовного процессуального закона при собирании, проверке и оценке доказательств, а также при открытии собранных материалов стороне защиты. Предотвращение таких нарушений требует строгого соблюдения общих требований к проведению негласных мероприятий, сформулированных в решениях Европейского суда по правам человека и отечественных судебных инстанций. При доказывании нужно учитывать доктрину «fruit of the poisonous tree» о недопустимости доказательств, производных от материалов, собранных с нарушениями закона. Следует своевременно обеспечивать стороне защиты доступ к материалам негласных мероприятий, в том числе документам, которые выступали основанием для их проведения. Важно не допускать действий, которые расцениваются как провокация (подстрекательство) подозреваемого к совершению коррупционного преступления.

Ключевые слова: доказывание по уголовным делам о коррупции, допустимость доказательств, методы расследования коррупции, ошибки расследования коррупции, противодействие коррупции.

Introduction

The fight against corruption is currently one of the most paramount tasks facing the law enforcement agencies of Ukraine. The future of the state largely depends on the success in this struggle. The analysis of judicial practice shows there are two reasons why proving corruption crimes in criminal cases is characterized by increased complexity. Firstly, persons involved in corruption deals often have a high social status, patrons from among officials of state authorities, use sophisticated methods of disguising their criminal activities, actively resist investigations if they are convicted of committing a crime. Secondly, the identification and investigation of criminal offenses related to corruption require high professionalism from operatives, investigators, and prosecutors to provide an appropriate evidence base necessary for a comprehensive and objective consideration of the case in court.

However, in recent years in Ukraine, in connection with the implementation of large-scale reforms in the field of criminal and criminal procedural legislation, the creation of new anti-corruption bodies, new employees have been selected from among those who do not have sufficient experience in this area to the investigative and operational-search units. Therefore, in the practice of proving in cases of

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corruption crimes, there are problems due to the insufficient level of knowledge of law enforcement officials in the methods of work to expose corrupt officials in strict compliance with the requirements of domestic legislation and international standards for ensuring human rights. Errors in the investigation often lead to the presentation of insufficiently substantiated charges, the excess of necessary measures to interfere with privacy to document the facts of corruption, the use of provocation of crime, and other violations in proving corruption.

The purpose of this research is to identify and study typical investigative errors and develop recommendations on the proper use of means and methods of proof in criminal cases of corruption crimes, taking into account the norms of national legislation and international criteria for ensuring human rights in criminal proceedings.

Theoretical framework

The research is based on the general provisions of the theory of proof, in particular, the requirement that the factual data collected in a criminal case can be accepted as evidence of the suspect's guilt only if they are admissible, relevant, reliable, and sufficient (Orlov, 2009). We take into account the general rules and recommendations for organizing covert investigative actions, which are the most important and difficult means of proving corruption crimes (Shymanskyi, 2013; Bahryi, Lutsyk, 2017). Scientific approaches to the systematization of investigative errors and the development of means of their prevention are analyzed (Nazarov, 2000; Baulyn, Dziurbel, Karpov, 2004; Hultai, 2008; Basysta, 2011; Mylevskyi, Vorvykhvost, 2016; Moyseenko, 2016), as well as scientific work to establish the causes of errors during covert investigative actions (Koval, 2018; Tsyliuryk, 2018). The criteria for assessing the admissibility of evidence for compliance with international standards for ensuring human rights in criminal proceedings developed in the practice of the European Court of Human Rights (Drozdov, 2016; Ponomarenko, Havryliuk, Anheleniuk, Drozd, 2020).

Methodology

The methodological basis of the research is a set of general and special methods of scientific knowledge of social and legal phenomena. In particular, using the comparative method, comparison and analysis of international and domestic regulations and decisions of the courts was carried out; the systemic-structural method was used to determine the typical shortcomings of covert investigative actions; the sample survey method was used to analyze judicial practice in 200 criminal cases of corruption offenses. Based on the synthesis, conclusions and proposals on the research topic are formulated. The above methods allowed us to investigate the problem in the unity of social content and legal form.

Results and discussion

In the process of investigating corruption crimes in Ukraine, the proof is carried out by collecting, evaluating, and checking the evidence. The most effective methods of gathering evidence are tactical operations, which include several public and private investigative actions and are carried out at the initial stage of the investigation to expose officials and their accomplices. At the same time, information that records the circumstances of corruption acts (negotiations between participants in the events, transfer of funds, the performance of actions in the interests of the recipient of an unlawful benefit, etc.) is particularly important evidence. In most cases, such information can only be collected by interfering with private communication, using confidential cooperation, and other covert investigative actions. At the same time, it is important to obtain precisely reliable information and evidence in strict accordance with the law to exclude the possibility of error, to prevent violations of the rights of suspects or other interested parties (ACTWG, 2015). Recording of the discovered data should be carried out only in the form provided for by the criminal procedural law, namely, in the protocol and on the information carrier on which the procedural actions are recorded with the help of technical means (Law No. 4651-VI, 2012).

The evidence obtained in the course of the investigative actions is subject to assessment for the relevance, admissibility, and reliability. The relevance of evidence means that the information received relates specifically to the crime being investigated. Admissibility provides for the receipt exclusively by legal means. Reliability means the correspondence of information to reality and is ensured by the absence of facts or circumstances (for example, the interest of witnesses, the incompetence or dishonesty of the investigator, etc.) that raise doubts about the truth of the data obtained. Relevant, admissible, and credible evidence constitutes a sufficient body of evidence for an indictment. Accordingly, each evidence must be objectively related to other evidence, since they are all a consequence of the commission of a criminal offense, and they reflect its various circumstances.

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Verification of evidence consists of determining their good quality to reliably establish the circumstances of the crime committed. Verification, in contrast to assessment, which is an exclusively mental activity, includes practical operations to carry out additional or new investigative or judicial actions (Orlov, 2009). The result of the check may be confirmation or refutation of already obtained evidence (Jianhong, 2018). So, for example, witnesses in their testimonies assert the innocence of the suspect in the commission of a corruption crime. However, the check established that they could not objectively observe the circumstances that they set out in their testimony since at that time they were in another place and this is confirmed by the printouts of telephone conversations, the testimony of other witnesses, the results of covert investigative actions (for example, when conducting audio, video monitoring the absence of unauthorized persons was recorded), etc. The results of checking such evidence allow them to reasonably reject them since they do not correspond to reality, that is, they are unreliable (Ho, 2015).

Based on the results of studying court decisions in criminal cases on corruption crimes in Ukraine, it can be argued that the prosecution (investigator, prosecutor) does not always comply with the rules of the above procedure for collecting, evaluating, and checking the evidence. Miscalculations made shall entail the recognition of evidence inadmissible and exclusion from the materials of the criminal case. The court's recognition of the evidence that was collected during the pre-trial investigation as inadmissible is, first of all, a consequence of the errors of the prosecution related to the human factor, and in some cases with gaps in the law (Ponomarenko, et al., 2020). Regarding the investigation of corruption crimes, the first thesis is fully manifested, since, in the materials of criminal cases studied by us, one can trace the same type of procedural violations, tactical and technical errors that are made by investigators and prosecutors.

Procedural violations are the most dangerous since they not only lead to a complete failure of the prosecution in court but are also accompanied by significant violations of human rights and freedoms in criminal proceedings. In turn, tactical and technical errors (for example, an inaccurate description of the subject of unlawful profit in the protocol or the use of low-quality equipment for recording the negotiations of the participants in a crime) do not make it possible to establish individual circumstances of the event under investigation. Often in criminal cases, both procedural and tactical errors are made at the same time. They are primarily associated with the organization and conduct of covert investigative actions. This is because the institution of covert investigative actions for the criminal process of Ukraine is an innovation introduced in 2012. Accordingly, law enforcement officials still lack experience in conducting them. There are also some gaps and conflicts in the legislation, which complicates the uniform interpretation of its norms in practice.

In the Ukrainian scientific literature, devoted to the consideration of the problems of covert investigative actions, the typical mistakes of their implementation are highlighted, which include: violation of the right to protection of the person in respect of whom they were carried out; errors in drawing up protocols of covert investigative actions; failure to inform the person about the secret measures taken against him; the absence in the materials of criminal proceedings of the permission of the investigating judge to carry out such actions (Koval, 2018). The characteristic flaws in the preparation of procedural documents in connection with the conduct of covert investigative actions were noted (Tsyliuryk, 2018). It is important to note that the danger of errors by the investigator and the prosecutor in collecting evidence is obvious. They influence the adoption of final decisions in the case (Basysta, 2011) and not only lead to improper observance of human rights at the stage of the pre-trial investigation but can be transformed into judicial errors (Mylevskyi, Vorvykhvost, 2016). Investigative and judicial errors made at different stages of the proceedings mean that the goal of the criminal proceedings has not been achieved (Hultai, 2008).

An investigative error in criminalistics is not recognized as any omission in the work of an investigator, but only as a significant unintentional violation that led to a distortion of the result of activities in a criminal case (Baulyn, et al., 2004). Investigative errors are classified on various grounds (Nazarov, 2000, Moyseenko, 2010), among which the most significant in the context of our research are errors made in the process of proving. We emphasize that any violations of the law by an investigator or a prosecutor, which lead to the recognition of evidence as inadmissible, directly or indirectly always restrict human rights and freedoms. Based on this, we believe that errors in proving corruption crimes at the pre-trial stages of criminal proceedings can be divided into two groups: 1) significant violations of the norms of the criminal procedural law when collecting, checking, and evaluating evidence; 2) significant

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violations of the norms of the criminal procedural law when familiarizing the defense with the materials of criminal proceedings.

Let us consider the most typical violations that the prosecution commits when collecting, checking, and evaluating evidence of a corruption crime.

1. The pre-trial investigation body conducts covert investigative actions until the data on the criminal offense is entered into the Unified Register of Pre-trial Investigations.

According to the requirements of Part 3 of Art. 214 of the Criminal Procedure Code of Ukraine, it is not allowed to conduct a pre-trial investigation before entering information into the register or without such entry. It is possible to inspect the scene only in urgent cases, as an exception. When exposing corrupt officials at the initial stage of the investigation, it is important to covertly from the suspects to carry out a series of covert investigative actions aimed at fixing the circumstances of the preparation and commission of the crime. Only after that, the suspect is detained red-handed and the scene of the incident is examined. However, inexperienced investigators and prosecutors make mistakes when they try to first record the preparation for a crime by secret methods, detain suspects, inspect the place of detention, and only then enter the information into the Unified Register of Pre-trial Investigations.

2. The prosecution overestimates the severity of the identified criminal offense to obtain permission to carry out covert investigative actions.

Under Part 2 of Art. 246 of the Criminal Procedure Code of Ukraine, most covert investigative actions can only be carried out in cases of the grave or especially grave crimes. Their use in violation of legal restrictions on the severity of the crime, in the investigation of which such covert actions are allowed to be used, leads to the inadmissibility of the protocols of these actions. Recommendation No. Rec (2005) 10 of the Committee of Ministers of the Council of Europe to member states "On" special methods of investigation "of serious crimes, including terrorist acts" of 20 April 2005, states that special methods of investigation should be used only if there are grounds believe that a serious crime has been committed, prepared or in preparation (Council of Europe, 2005).

Obtaining an unlawful benefit without qualified signs refers to crimes of average gravity (Law No. 2341-III, 2001). It is serious only if there are aggravating circumstances. However, in investigative practice, there are often cases when to record events, law enforcement agencies unreasonably begin an investigation based on more serious crime and conduct covert investigative actions. Subsequently, in the final version of the charge, the person is charged with a crime of average gravity, but this charge is based on evidence obtained in violation of the law.

3. Violation of the requirements of procedural legislation and organizational errors made by the prosecution during control over the commission of a crime, audio and video monitoring of a person or place (Law No. 4651-VI, 2012). These covert investigative actions are the most important for proving corruption. Among the reasons for the failure of the prosecution in criminal cases, there are examples of carrying out these actions without legal grounds (without the consent of the investigator with the prosecutor or the permission of the investigating judge), the facts of the absence of protocols or gross procedural errors in their preparation. A typical systemic mistake of law enforcement agencies is that the protocols do not describe the entire procedure of investigative action, but only the results obtained are reflected.

In most cases, the above procedural violations are caused by an erroneous interpretation by investigators and prosecutors of new norms for the criminal procedural legislation of Ukraine regarding the use of covert methods in the investigation. In the scientific literature, it is emphasized that to avoid errors in the application of novelties of the law, it is necessary to take into account the practice of the European Court of Human Rights and the practice of the highest courts of Ukraine. (Shymanskyi, 2013). Therefore, practitioners need to know that, following this practice, such errors do not simply lead to invalidation of the factual data collected directly during the investigative action, but entail the rejection of all evidence derived from it by the court. According to Art. 87 of the Criminal Procedure Code of Ukraine, evidence obtained as a result of a significant violation of human rights and freedoms is inadmissible. Besides, in the Ukrainian jurisprudence, the international doctrine "fruit of the poisonous tree" is actively used when assessing evidence obtained with violations. The legal position of the Grand Chamber of the Supreme Court of Ukraine regarding this doctrine is based on the decisions of the European Court of Human Rights and

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looks like this: “if the source of evidence is inadmissible, all other data obtained with its help will be the same ... The criterion for classifying evidence as "the fruit of a poisoned tree" is the existence of sufficient grounds to believe that the relevant information would not have been obtained in the absence of information obtained illegally " (Right No. 1-07 / 07, 2019)

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The second group of errors of proof in cases of corruption crimes in Ukraine is the failure of the prosecution to comply with the procedure for opening pre-trial investigation materials to the defense. According to the requirements of the law, after the completion of the pre-trial investigation, the prosecutor or the investigator, on his behalf, are obliged to provide the defense party with access to all the materials they have, including any evidence (Law No. 4651-VI, 2012). However, at present, the courts of Ukraine have passed many sentences, where the materials of covert investigative actions have been recognized as inadmissible evidence due to the refusal of investigators and prosecutors to provide access to them to the defense before the criminal case is sent to court. The refusal of the prosecution to declassify not only the protocols of covert investigative actions directly but also the documents that served as the basis for their conduct is interpreted by the courts as a significant violation of the suspect's rights to defense and a fair trial.

The decisions of domestic courts are based on the practice of the European Court of Human Rights, which determined that under the requirement of fairness in the context of Art. 6 of the "Convention for the Protection of Human Rights and Fundamental Freedoms" the prosecutor's office must familiarize the defense with all the evidence both in favor and against the accused (Judgment of the European Court of Human Rights, 2004). It was also established that the prosecution does not have the right to hide or not provide the accused with materials that can help him release from responsibility or receive a less severe sentence (Judgment of the European Court of Human Rights, 2000). The Resolution of the Grand Chamber of the Supreme Court of Ukraine noted: "To prove the admissibility of the results of covert investigative actions, not only the results of these actions but also the documents that served as the legal basis for their conduct, must be disclosed since the content of these documents can verify the compliance with the requirements of the criminal procedural law regarding covert investigative (search) actions." (Right No. 751/7557/15-k, 2019). In the long-term practice of operational-search activity that existed earlier in Ukraine, it was not customary to acquaint the accused with classified materials about the secret measures carried out against them. That is why, as well as due to the ignorance of the international standards for ensuring adversarial proceedings by investigators and prosecutors, there are still refusals to declassify all materials and provide access to them to the defense.

The investigative errors described above are illegal or unreasonable actions that do not contain signs of a criminal offense (Nazarov, 2000). It is necessary to distinguish from investigative errors the abuses of operational officers, investigators, and prosecutors that take place during the investigation of corruption crimes, which are deliberate offenses. These actions are manifested in obtaining evidence of undue benefit through incitement from law enforcement officials and/or their undercover agents. Such actions are provocation (Ashworth, 1976). They entail criminal liability by Art. 370 of the Criminal Code of Ukraine.

In the special literature, it is recommended to avoid provocation when using covert investigation methods, since in this case, the evidence of the person's criminal behavior will become inadmissible, they cannot be used in proving (Bahryi, Lutsyk, 2017). Based on the practice of the European Court of Human Rights, to recognize admissible evidence obtained as a result of covert investigative actions, law enforcement agencies need to confine themselves to a “passive” investigation of the suspect's illegal activities, not to influence him or to incite him to commit a crime, which, without such actions, cannot be committed (Judgment of the European Court of Human Rights, 1998). Therefore, law enforcement officials need to know the criteria for distinguishing provocation from acceptable interference in the process of a planned corruption crime. It should be noted that the European Court of Human Rights recognizes the possibility of using the help of secret agents, informants, and covert working methods, especially in the fight against organized crime and corruption (Judgment of the European Court of Human Rights, 2008), but at the same time such activities should be regulated and protected from abuse. Establishing the fact of the presence or absence of incitement to obtain an unlawful benefit in the assessment of evidence is carried out by analyzing the behavior of law enforcement officials and their undercover agents during a tactical operation. The personality of the suspect and his tendency to commit a criminal offense are also taken into account (Judgment of the European Court of Human Rights, 2014), the presence of possible ulterior motives of

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informants or secret agents to accuse a person is assessed (Judgment of the European Court of Human Rights, 2008), facts pressure on the applicant by law enforcement officials (Judgment of the European Court of Human Rights, 2014). In addition to material signs of incitement to commit a crime, the European Court of Human Rights also takes into account the procedural aspect, namely, assesses whether the authorized state bodies have duly checked the statement of a person that he was persuaded to commit a crime to solve the latter (Drozdov, 2016). This is because provocative evidence must be excluded (Judgment of the European Court of Human Rights, 2006).

Thus, when planning and conducting a tactical operation to expose corrupt officials, it is necessary to find out if the person who agreed to confidential cooperation has a motive to stipulate the suspect, and also to obtain information about the identity of the alleged corrupt official. The applicant should not be pressured to persuade him to take part in the giving of an undue benefit. Concerning the process of criminal activity, it is necessary to act passively, to prevent incitement from agents and employees of the law enforcement agency to commit corruption. If the suspect, after being arrested, declares that he was persuaded to commit an offense, all measures provided by law must be taken to verify this statement. Only if these recommendations are followed will the evidence collected at this stage be benign.

Conclusions

The process of proving in cases of corruption crimes in Ukraine will fully comply with domestic and international standards for ensuring human rights, subject to strict compliance by operational officers, investigators, and prosecutors with the admissibility criterion of evidence, especially during covert investigative actions during the investigation.

Errors and violations that take place at the stage of pre-trial investigation in this category of criminal cases lead to the restriction of human rights and freedoms. In most cases, they consist of significant violations of the criminal procedural law when collecting, checking, and evaluating evidence, as well as when opening the collected materials to the defense. Preventing such violations requires strict adherence to the general requirements for the conduct of undercover measures, formulated in the decisions of the European Court of Human Rights and domestic higher courts. It is necessary to take into account the doctrine of "fruit of the poisonous tree" on the inadmissibility of evidence derived from materials collected in violation of the law. The defense should be provided with access to all materials of covert events, including the documents that served as the basis for their conduct. It is important to prevent actions on the part of operational officers, investigators, prosecutors, and undercover agents, which are regarded as a provocation (incitement) of a suspect to commit a corruption crime.

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