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Problematic aspects of the conduct of covert investigative (search) actions by the authorized criminal police officers within the framework of criminal investigation

Проблемні аспекти проведення негласних слідчих (розшукових) дій уповноваженими працівниками кримінальної поліції в межах оперативно-розшукового забезпечення кримінального провадження

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Abstract

The purpose of the article is to identify and analyze the problematic aspects of conducting covert investigative (search) actions by authorized criminal police officers within the framework of criminal investigation. Research methodology includes the use of general scientific and special methods of scientific knowledge, including general and specific ones: historical and legal, system and structural, formal and logical, analysis, content analysis, logical. Results of the research. The essence of the concept of "operational and investigative support" was defined. The content of tacit activities related to interference in private communication and other undercover actions was characterized. Practical meaning. Problematic aspects of performing of covert investigative (search) actions by criminal police officers during operational and investigative support for criminal proceedings were

Анотація

Метою статті є визначення та аналіз проблемних аспектів проведення негласних слідчих (розшукових) дій уповноваженими працівниками кримінальної поліції в межах оперативно-розшукового забезпечення кримінального провадження. Методологія дослідження включає в себе використання загальнонаукових та спеціальних методів наукового пізнання, серед яких історико-правовий, системно-структурний, формально-логічний, аналіз, змістовий аналіз, логічний. Результати дослідження. Визначено сутність поняття «оперативно-розшукове забезпечення». Охарактеризовано зміст негласних слідчих (розшукових) дій, пов'язаних із втручанням у приватне спілкування та інших негласних слідчих (розшукових) дій. Практичне значення. Виокремлено проблемні аспекти проведення нс(р)д працівниками кримінальної поліції під

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highlighted. Value/originality. A conclusion was made on the need to improve Article 246 of the Criminal Procedure Code of Ukraine concerning the category of persons who can be involved in conducting tacit measures and identification of authorized operational units, which are entitled to perform such activities.

Keywords: covert investigative (search) actions; criminal investigation; operative and investigative measures; police officers; pre-trial investigation; support.

Introduction

The institution of covert investigative (search) actions is quite relevant from the point of view of both science and practice. The scientists devote their research to the its study, as there are many problematic issues regarding the procedure and grounds for conducting covert investigative (search) actions, obtaining the results of their conduct, and using the last to prove the guilt of the person.

Effective detection and investigation of criminal offenses is impossible without close cooperation of different divisions (bodies) of the National Police of Ukraine. It is understood as joint service activities provided for in the legislation in force, aimed at complete, comprehensive and prompt investigation of criminal offenses. Most often, such interaction occurs between the pretrial investigation body and criminal police officers (operational officers).

The goal of such interaction is a constant "contact" during pre-trial investigation of criminal offenses, which is reflected in the operational investigation of criminal proceedings. As in all activities, criminal police officers often face various problematic issues related to conducting covert investigative (search) actions during criminal proceedings. Thus, the question of whether operatives are authorized to perform such measures and what acute aspects arise during their implementation by the specified category of the National Police body is particularly relevant at the moment.

Consequently, the aim of the article is to identify and analyze pressing matters of conducting secret activities by empowered criminal police officers within the framework of criminal investigation.

час оперативно-розшукового забезпечення кримінального провадження. Цінність/оригінальність. Зроблено висновок про необхідність удосконалення ст.246 КПК України в частині категорії осіб, які можуть залучатися до проведення негласних слідчих (розшукових) дій та визначення оперативних підрозділів, уповноважених на їх проведення.

Ключові слова: негласні слідчі (розшукові) дії; кримінальне провадження; оперативно-розшукові заходи; поліцейські; досудове розслідування; забезпечення.

Literature Review

The issue under consideration was studied, inter alia, by Khaberyush in his scientific work "Operational-search support of combating to contraband in Ukraine" (2016). On the basis of theory, legal regulation, and practical activity, the author highlighted certain issues regarding the improvement of operational investigative activities by the employees of operational units, their interaction with other units, as well as the use of operational equipment.

It is also worth paying attention to the article by Mailunts "Operational units as subjects of criminal prosecution" (2018). The researcher noted that the participation of employees of operational units in criminal proceedings cannot be limited to the execution of the investigator's orders, and proposed that the terms of reference of operatives be expanded, taking into account the current legal rules.

Linenko (2022), using the example of the analysis of theoretical and legal foundations for the search for a suspect, reveals the quality of criminal police organization through the prism of various legislative innovations, reforming the judicial system and related legal institutions, etc.

According to Pcholkin (2022), operational investigative support in the structure of the methodology of investigations of criminal offenses is an integral tool of the activities of pre-trial investigation bodies. Thus, among the elements of the forensic tool, he includes the peculiarities of the detection of criminal offenses, interaction of the investigator with the bodies performing operational and investigative measures and covert investigative (search) actions, the organization of overcoming counteraction to investigation and other elements, which traditionally relate to criminal

investigation in the theory of operational and investigative activity.

It is clear that the scope of operational research covers a significant number of scientific works by a number of scholars. However, as Tarasenko et al., (2021, p. 106) correctly point out, nowadays, scientists are only trying to balance the possibilities of investigation (search) measures with operational and search activities within a fundamentally new model of criminal justice. Because of the constant improvement of the legislation, controversial issues in practice, problematic aspects of conducting covert investigative (search) actions by authorized criminal police officers within operational and investigative support require comprehensive study in view of the rules of the current legislation, selected gaps in the law on operational authority and solving the tasks of criminal proceedings without violating the fundamental principle – the rule of law.

Methodology

Scientific methods are chosen in view of the set goal, taking into account the object and subject matter of the study. In particular, general scientific methods (observation, description, comparison, classification) were used to determine the legal categories, characterizing criminal proceedings and the performance of covert investigative (search) actions. Historical and legal approach helped to study the development of the institution of tacit measures.

System and structural measures made it possible to highlight two types of secret activities – related to interference in private communication and other types of covert investigative (search) actions not related to it.

Formal and logical, as well as dogmatic methods were applied in the study of the legislation, governing the institution under consideration, the practice of its application, the views of scientists on certain issues included in the subject matter of the research, and respect for the rights and legitimate interests of the persons on whom they are produced.

With the help of the analysis method the procedure for implementing, recording and applying undercover measures was considered.

Content analysis approach was used in the interpretation of the relevant legal instruments and views of scholars, who examined

problematic aspects of the conduct of covert investigative (search) actions by the police.

Logical method was applied in summing up the research results and the need to amend current legislation, in particular, Article 246 of the Criminal Procedure Code of Ukraine.

Results and Discussion

Operational and investigative support for pre-trial investigation of a criminal offense occupies a special place in the criminal justice system and is implemented in accordance with the rules of the current legislation, in particular the Code of Criminal Procedure of Ukraine and the Law "On operative investigative activity" and is a very relevant topic for study both from the perspective of science and practice.

The word "support" is interpreted as "the creation of reliable conditions for the implementation of something", in our case – establishment of credible conditions for conducting covert investigative (search) actions in criminal proceedings. That is, effective disclosure of criminal offenses occurs as a result of coordinated and consistent activity of investigative and operational units, which is expressed in the timely implementation of operational and investigative measures.

As Podobnyi (2021, p. 222) notes, "operational and investigative support for criminal proceedings is a system of measures, mostly of secret nature, carried out in a qualified manner by operative units under the leadership of the investigator and prosecutor at the stages of pre-trial investigation and trial with the aim of: 1) creating optimal conditions for comprehensive and objective investigation process; 2) termination or neutralization of the of the organized criminal group members' obstruction to the implementation of the law enforcement function of the State and justice; 3) ensuring safety of participants in criminal proceedings".

According to Pcholkin (2019, p. 259), operational and investigative measures can be considered as the system of such actions along with covert investigative (search) actions aimed at creating optimal conditions for detecting crimes and performing complete and objective evidence process; overcoming obstruction to investigation; performing function of protection (security) of participants in the criminal process; guaranteeing the principle of the inevitability of accountability.

We agree with the definitions provided by the specified scientists, and, in turn, are of the view that operational and investigative support for criminal proceedings is also expressed in: providing evidence obtained expeditiously to facilitate an objective assessment of the testimony of the participants in the criminal proceedings; establishing proper tactics for conducting procedural actions; identifying necessary operational combinations; conduct a rapid verification of existing evidence, as well as direct participation of criminal police officers (operational officers) in the preparation and performing covert investigative (search) actions, which is extremely important for the legality, admissibility, and sufficiency of evidence in criminal proceedings, in particular in relation to the investigation of serious and especially serious crimes.

According to Udalova, Savytskyi, Rozhnova and Ilieva (2015, p. 15), covert investigative (search) actions are a type of investigative (search) actions, information on the facts and methods of conducting which cannot be disclosed, aimed at data collection, verification or research in specific criminal proceedings and which are carried out in cases of extreme necessity, when information on the crime or the perpetrator cannot be obtained in any other way.

Sergeeva (2016, p. 94) defines covert investigative (search) actions as measures consisting of a set of search and cognitive, investigative and evidentiary techniques, information on the facts and methods of conducting which cannot be disclosed, which are carried out by the entity authorized by the criminal procedural law for the purpose of identifying and securing factual data and information on their sources for obtaining evidence in criminal proceedings and their verification.

Ivanenko (2013) points out that such actions are a type of investigative (search) actions, the procedure for which is established by the procedural law, have cognitive orientation, significantly affect the rights and legitimate interests of persons, are ensured by State coercion where necessary and are hidden from persons not involved in the criminal proceedings.

The legislator divides covert investigative (search) actions into two types – related to interference in private communication and other types of covert investigative (search) actions not related to it. The first category (related to interference) includes: audio and video

monitoring of persons (Article 260 of the Criminal Code of Ukraine) (Law of Ukraine No. 2465-IX, 2012); arrest, inspection and seizure of correspondence (Articles 261 – 262); collecting information from transport telecommunication networks (Article 263); collecting information from electronic information systems (Article 264).

Other types of covert investigative (search) actions include: inspecting publicly inaccessible places, home or any other property of a person (Article 267 of the Criminal Procedure Code of Ukraine) (Law of Ukraine No. 2465-IX, 2012); establishing the location of a radio-electronic device (Article 268); surveillance of an individual, an object or a place (Article 269); monitoring of bank accounts (Article 269-1); audio and video monitoring of a place (Article 270); control of the commission of a crime (Article 271); covertly obtaining samples which are necessary for comparative analysis (Article 274), etc.

Among the features inherent in covert investigative (search) actions, we can highlight the following:

- the decision is taken by the investigator, the prosecutor, and in some cases, the investigating judge;
- are conducted exclusively in criminal proceedings regarding serious or especially serious crimes;
- there is a clear deadline;
- related to the restriction of human rights and freedoms;
- are not subject to disclosure;
- are carried out using operational and operational and technical means.

Besides, for covert investigative (search) actions, except for the above-mentioned particulars, determining factor is their lack of visibility (concealment) from persons not participating in them, including subjects in relation to whom they are conducted (Kudinov et al., 2013, p. 7).

Sherudylo (2018, p. 30), for example, distributes covert investigative (search) actions according to the following criteria:

- depending on the possibility of interference in private communication: interference is carried out/it is carried out without interference;
- depending on the severity of the crime – serious/especially serious;

- depending on the official who grants the sanction: investigating judge/prosecutor/prosecutor or investigator;
- depending on the type of information received – information of verbal origin/objects or documents;
- related to confidential cooperation;
- depending on the type of evidence – documents/material evidence.

In general, we support this position of the scientist, but believe that the criteria of «type of information» and «type of evidence» should be merged. In our opinion, these are identical concepts (in the specified context) uniting the same groups of requested information - evidence in criminal proceedings, which can be in the form of information (secured through a chosen tacit investigative (search) action), documents or physical evidence, received during or as a result of such actions.

Thus, the studied measures are a type of investigative (search) actions, information on the facts and methods of conducting which cannot be disclosed except in cases provided for by the Code of Criminal Procedure of Ukraine (Law of Ukraine No. 2465-IX, 2012). The legal grounds and procedure for conducting these actions are enshrined in Chapter 21 of this Code.

We support the opinion by Sherudylo (2018, pp. 28-29), who emphasizes that covert investigative (search) actions cannot be called operational and investigative activities, since these two concepts are of different legal nature. The procedure for conducting the first type of measures is established by the Criminal Procedure Code of Ukraine, not the Law "On operational and investigative activities".

We also agree with the view by Poltavskyi (2014, p. 108), who points out that operational and investigative activity was never a procedural activity, and accordingly, the information obtained with its help, for example, on the person involved in the crime, it was necessary to «legalize» in order, determined by the criminal procedural law in force at the time.

Therefore, the grounds and procedure for conducting investigative (search) actions (which include covert ones) are regulated by the criminal procedural rules, and operational and investigative measures are governed by the relevant Law of Ukraine No. 1882-IX (1992). It is not entirely correct to note that the latter have been enshrined in the Criminal Procedure Code of Ukraine, since covert investigative (search)

actions are a type of investigative activities as a means of evidence formation in criminal proceedings. By their legal nature, they are criminal procedural operations, the form of proceedings of which differs from the procedure for conducting operational and investigative measures.

Thus, the decision to conduct covert investigative (search) actions is taken by the investigator, the prosecutor, and in the cases provided by law – by the investigating judge at the request of the prosecutor or the investigator agreed with the prosecutor. The investigator is obliged to inform the prosecutor about the decision to perform certain tacit activities and the results obtained. The prosecutor has the right to prohibit the conduct or cease the further implementation of covert actions.

An investigator conducting pre-trial investigation of a criminal offense has the right to undertake covert investigative (search) measures, or on his behalf – authorized operational units of the National Police and other bodies. However, in practice, there are still problematic aspects related to the conduct of such activities by operatives, so we suggest considering them.

The first aspect we would like to draw attention to is the legislator's vague definition of persons involved in performing such measures. Thus, Article 246 of the Criminal Procedure Code of Ukraine (Law of Ukraine No. 2465-IX, 2012) defines authorized criminal intelligence units of the National Police, security agencies, the National Anti-Corruption Bureau of Ukraine, the State Bureau of Investigations, and authorities supervising compliance with tax and customs legislation, bodies, penitentiary institutions and pre-trial detention centres of the State Penitentiary Service of Ukraine, bodies of the State Border Guard Service of Ukraine as those that shall have the right to conduct covert investigative (search) actions, without specifying which ones – criminal police, special police, intelligence.

On the other hand, it is clearly stated in the Law of Ukraine No. 1882-IX (1992) that operational and investigative activities are carried out by special operational units of the National Police – units of the criminal and special police, in particular, units of other bodies are also specified.

We believe that covert investigative (search) actions and operational and investigative activities, clearly, are of common legal nature,

but distinguished by the subject composition, the moment of implementation, legal regulation. Therefore, we consider it necessary to clearly indicate the specific divisions of the National Police bodies that are entitled to conduct tacit actions, because this is one of the most important factors of an impartial and complete investigation of a criminal offence and just the specified Code regulates the procedure and legal grounds for conducting these activities.

Besides, the same article provides for including other persons in performing tacit actions by the decision of the investigator or prosecutor; which other persons the legislator means is incomprehensible. Clearly, in practice, there are cases of involvement of various categories of persons by the employees of operational units in individual covert investigative (search) actions, for example, control over the commission of crime, special task of detecting criminal activities of an organized group or criminal organization, etc., but there are no clear rules in this case.

For example, Sokolov (2022, p. 132) cites the following circle of actors, who can be involved in the performance of tacit activities, namely: employees of operational or operational and technical divisions of law enforcement agencies, specialists, translators, individual citizens, persons who cooperate with operational subdivisions on a confidential basis, etc. The author also supports the position regarding the involvement in individual cases of the applicant, victim, witness, etc., in covert investigative (search) actions.

In this context, interesting is the issue of attraction of a minor in tacit activities. Currently, juvenile delinquency is a fairly common phenomenon, for example, the creation of various criminal groups with their participation. The purpose of covert investigative (search) actions is to collect necessary evidence in criminal proceedings in a "hidden" way. In such cases, it will be more effective to involve the juvenile in performing tacit measures. This issue is not regulated by the current legislation, and therefore requires more detailed study.

The next problematic aspect of covert investigative (search) actions carried out by operatives is the use of the results of these activities as evidence. In the categories of criminal offences such as illicit traffic in narcotic drugs, corruption offenses, criminal offenses against national security, the direct source of evidence is precisely the results of tacit measures. But these data are not always

recognized by the court as admissible due to failure to comply with protocol procedures.

In accordance with Article 252 of the Criminal Procedure Code of Ukraine (Law of Ukraine No. 2465-IX, 2012), recording of the progress and findings of covert investigative (detective) actions shall comply with the general rules for recording criminal proceedings provided for by this Code. After the conduct of a covert investigative (detective) action, a record shall be drawn up, with attachments thereto, where necessary. Information about persons who conducted covert investigative (detective) actions, or were involved in the conduct thereof, where security measures are applied to them, may be indicated, provide that confidentiality of personal data relating to them is protected in accordance with the procedure established by law. The conduct of covert investigative (detective) actions may be recorded with special technical and other means.

The protocol on the course and results of covert investigative (search) action (or its stages) is drawn up by the investigator, if it is conducted with his (her) direct participation, in other cases – by the authorized employee of the operational unit, should comply with the general rules for recording criminal proceedings. Other cases are those in which surveillance materials were used as reasons and grounds for initiating pre-trial investigation; assignment to conduct an unspoken investigative (search) action, as a rule, shall be made available to the operational unit that detected the offence, but its authority is taken into account (Order No. 114/1042/516/1199/936/1687/5, 2012).

The decision of the investigating judge on permission to conduct covert investigative (search) action or the resolution of the investigator, prosecutor on the implementation of this operation is attached to the directive of the investigator, prosecutor. If several operative units are involved in the conduct of tacit activity, drawing up the protocol is entrusted to the unit defined by the head of the body as the main one.

Employees of operative units – performers of covert investigative (search) actions – should take necessary measures to ensure the preservation and integrity of the received materials (protection against unauthorized interference, deformation, demagnetization, discoloration, erasure, etc.) before handing them over to the prosecutor.

In case of implementing security measures against employees of operative units who conducted tacit activities or were involved in their exercise, the record of these persons shall be kept confidential in a manner determined by the legislation (Order No. 114/1042/516/1199/936/1687/5, 2012).

Having analyzed the above, we came to the following conclusions: 1) the protocol must be drawn up by an employee of the operational unit that conducted covert investigative (search) action and who was specifically charged with; 2) the order to conduct this activity should be in the criminal proceedings and provided to the parties when opening the materials of the criminal proceedings on the basis of Article 290 of the Criminal Procedure Code of Ukraine (Law of Ukraine No. 2465-IX, 2012), as it serves as documentary evidence of the authority to draw up the records of tacit measures by the operative unit employee; 3) appendices to the protocol on secret investigative (search) actions should be properly constructed, labelled and preserved (Mokhonko, 2020, p.218).

Failure to comply with these rules can lead to "destruction" of evidence, which is confirmed by relevant practice. Thus, the Kramatorsk City Court of the Donetsk region (Right No. 1-kp/234/102/19, 2019) noted the following: « the court comes to the conclusion that the protocols provided by the prosecution, obtained by the application of technical means are not protocols for recording the progress and results of covert investigative (search) actions, the registration of which is provided for by the requirements of Article 252 of the Criminal Procedure Code of Ukraine. They do not include any information about where, at what time, and what kind of tacit actions were conducted in criminal proceedings, who performed them and who participated in their performance; there is no descriptive part with information on the sequence of secret measures, on the data obtained as a result of their conduct, including discovered and/or provided items and documents; there is no final piece with information on carriers produced during covert investigative (search) actions and the method of their identification, technical means used and information for their identification, reports on familiarization of participants with the contents of the protocols.

Therefore, properly formalized investigator's instructions to conduct covert investigative (search) actions to the operative unit remains a problematic issue. We believe that it is necessary

to conduct clarifications or training with investigators and explain the correct procedure for submitting and internally filling out orders to operational units for conducting undercover investigative (search) actions.

Conclusions

Analyzed the above, we came to the conclusion that the rules of the criminal procedural legislation, which provide for the grounds and procedure for conducting covert investigative (search) actions, require additional regulation. This concerns the improvement, change or amending current articles, in particular, supplement to Part 6, Article 246 of the Code of Criminal Procedure with regard to authorized operational units with the identification of criminal and special police units in accordance with judicial practice.

We also consider it necessary to define in paragraph 6 the list of persons belonging to the category of other persons, who may be involved in conduct of covert investigative (search) actions. This is important to bring certain norms into compliance with the requirements for the proper conduct tacit measures within the scope of operative and investigative support for criminal proceedings. Compliance with the rules of the current legislation, human rights, which are violated during the implementation of the relevant activities, will ensure the prevention of problematic aspects by the authorized employees of the criminal police during operational and investigative support for criminal proceedings.

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