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OBTAINING TESTIMONY OF A WITNESS IN CONDITIONS THAT ENSURE HIS SAFETY IN CRIMINAL PROCEEDINGS

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Annotation. The scientific article is devoted to the study of procedural, organizational-tactical and psychological features of obtaining witness statements in conditions that ensure his safety in criminal proceedings. It was concluded that the tactics of obtaining statements during the interrogation of a witness at the stage of pre-trial investigation are formed depending on the typical interrogation program of a person who is in the status of a witness (eyewitness, witness, expert, whistleblower, confidant, etc.), his age, and depends on the investigator situations in specific criminal proceedings, from real and potential threats to such persons, their relatives and relatives. It is noted that in the case when there are sufficient grounds to believe that the life, housing, health, property of the witness, his family and relatives are in danger, his interrogation should be conducted in conditions that ensure the confidentiality of personal information. It is emphasized that when deciding on the question of conducting an interrogation of a witness, it is worth giving priority to the safety of the witness, his family and friends, without risking the loss of potential evidence. Arguments are given that, for tactical reasons, it is expedient to question a witness in a court session by an investigating judge during a pre-trial investigation, or in the mode of a video conference using technical means from another room, in particular outside the court premises, to ensure the confidentiality of personal information. It was emphasized that obtaining objective information from minors and ensuring their safety at the same time depends on the skillful organization by the investigators of the procedure of questioning such a witness with the participation of a legal representative and a psychologist, as well as taking measures to ensure the confidentiality of information about the minor. In cases where a witness declares illegal influence after testifying, in order to keep information about his identity confidential, it is advisable to conduct the interrogation again with the assignment of the pseudonym of the participant in the investigative (search) action to the witness. In order to expand the procedural capabilities of the witness and his representative, in particular with regard to ensuring the safety of the

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witness due to the existence of a danger to life and health, the position is advocated for granting the right to the witness and his legal representative to apply to the investigating judge with a request to interrogate such a person in a court session in order Art. 225 of the Criminal Procedure Code of Ukraine, in particular the simultaneous interrogation of two or more already interrogated persons.

Key words: testimony, interrogation, witness, minor, criminal proceedings, pretrial investigation, security.

Formulation of the problem. During the pre-trial investigation in criminal proceedings, the rights and freedoms of its participants, in particular the witness, are exercised through authorized persons - the investigator, inquirer, detective, prosecutor and investigating judge.

According to the content of the current procedural legislation, investigative (search) actions during which security measures are applied to a witness should include the following: questioning of a witness and simultaneous questioning of two or more already questioned persons in a court session by an investigating judge during a pre-trial investigation, in particular remotely; identification without visual and audio observation of the person presented for identification; interrogation/identification by video conference during the pre-trial investigation.

Hypothetically, a witness may be involved in all of the listed investigative (search) actions, and during some of them, he may be in danger, there may be a risk of its occurrence. And this is not surprising, because among all participants in criminal proceedings, the figure of a witness is the most vulnerable. In most cases, this subject of legal relations has reliable and extremely important information for criminal proceedings, which can become a key moment in solving the tasks of criminal proceedings.

The most common investigative (research) action, during which a decision is made to keep the identity of a witness confidential, is an interrogation. This is dictated by the need to ensure his safety and protection against threats, blackmail, attempts at physical influence, destruction of property, etc.

The state of development of this problem. The problems of obtaining and verifying testimony of participants in criminal proceedings during the pre-trial investigation have long been the subject of scientific research. Certain aspects of the interrogation of witnesses taken under protection were studied by such scientists as: Yu. Andreyko, H. Denisenko, S. Karpushyn, Yu. Lozynska, O. Solyonova, S. Tomin, and others. The scientific achievements of these and other scientists in criminal procedural law and criminology are the basis for researching the peculiarities of obtaining witness statements in conditions that ensure his safety.

The purpose of the article. The wide use of witness statements in criminal proceedings and, in some cases, the insufficiency of scientific development to ensure their reliability in the conditions of such an external factor as a threat to the security and vital interests of their bearer, actualize the research of organizational tactical, procedural and psychological features.

Presenting main material. The most common investigative (research) action, during which a decision is made to keep the identity of a witness confidential, is an interrogation. Interrogation of a witness belongs to verbal investigative (detective) actions, that is, actions during which verbal information is obtained [1, p. 108; 2, p. 66], which is called such a source of evidence as the testimony of a witness. The widespread use of witness testimony in criminal proceedings and, in some cases, the insufficiency of the scientific development of ensuring their reliability in the conditions of such an external factor as a threat to the safety of the vital interests of their bearer, actualize the study of organizational tactical, procedural and psychological features of the interrogation of a witness with the simultaneous adoption of measures to ensure his safety.

Examining the procedural aspect of the testimony of a witness, it should be noted that the use as evidence of information provided by witnesses to whom security measures were applied at the pre-trial investigation stage is generally consistent with the provisions of the European Convention on Human Rights. At the same time, the European Court of Human Rights emphasizes the impossibility of passing a verdict solely on the basis of the testimony of such witnesses, which must be confirmed by other evidence [3].

On the one hand, keeping secret the personal data of witnesses who are interrogated in conditions that exclude their visual observation, limits the accused's right to defense, since he cannot fully assess the credibility of such testimony. Cases are known to judicial practice when anonymous witnesses are involved not for the purpose of ensuring their safety, but for the purpose of providing false testimony and avoiding criminal liability. Thus, pre-trial investigation bodies can involve such persons in order to realize the procedural interests of the accused party, thus abusing the right.

Therefore, the provisions regulating the procedural procedure for questioning witnesses, to which security measures are applied, require further improvement in terms of ensuring more effective protection of the rights of participants in criminal proceedings.

It should be emphasized that the practical absence of methodical recommendations regarding the organization of the interrogation of a witness taken under protection may lead to certain limitations in the application of tactical methods of obtaining such testimony, which may have negative consequences both for the interrogated person and for the entire criminal proceedings. The above confirms the importance of developing a typical program of actions of an authorized person who conducts an interrogation in conditions of real or probable threat to the life, health, housing and property of the witness, his relatives and relatives.

It is axiomatic that the tactics of questioning witnesses who are not interested in solving the case should be reduced to a detailed reproduction of the circumstances important for the investigation using tactical techniques aimed, in particular, at restoring forgotten facts in their memory. At the same time, when interrogating a witness taken under protection, the investigator must choose options for tactical decisions depending on the investigative situation that has developed in the criminal proceedings. So, if the person is unknown to

the suspect and his close circle, the questioning of such a witness, taken under protection, should be conducted without specifying the real data about his identity (surname, first name, patronymic, etc.) and assign him the pseudonym of the participant of the investigation (investigative) actions. If the suspect knows the witness, then it is necessary to change the information about the person being interrogated and draw up two protocols of the interrogation of the said witness: one - with real information about the person being interrogated, which may contain true, but meaningless statements; the other - with fictitious questionnaire data (pseudonym), but with reliable information about the circumstances of the criminal offense. The simultaneous drawing up of two protocols of the interrogation of a witness to whom security measures have been applied will allow to divert suspicion from him on the part of the suspect.

In order to ensure the confidentiality of information about the person for whom security measures have been taken, the investigator must carefully think through the sequence and wording of questions during the interrogation. The protocol of the witness's interrogation contains the text of his testimony along with his questionnaire data. The analysis of the features of the text makes it possible to establish the identity of the interrogated by the style of the presentation, the content of the information provided, its source, etc. In this regard, it is expedient for the investigator to record the testimony, keeping only the content of evidentiary information in the text of the protocol, omitting some non-essential details. At the same time, it is advisable to use words and sentences that do not contain stylistic and syntactic features of the interrogated language.

In cases where a witness declares to the investigator about illegal influence on him after he has already been interrogated in criminal proceedings, in order to keep the data about his identity secret, it is advisable to conduct the interrogation again with assigning the pseudonym of the participant of the investigative (search) action to the witness. At the same time, it is advisable to place the protocol of the initial interrogation of the witness in an envelope together with the decree on changing the personal data.

Minors and underage witnesses can have a negative impact during investigative (search) actions. In this connection, there is a problem of obtaining objective information from such a specific category of participants in criminal proceedings while simultaneously ensuring their safety. This is due to the fact that the behavior of minors is influenced by the perception of social space. Juvenile witnesses are children under the age of 14, at the same time, we do not consider the possibility of questioning a child under the age of 6, because his consciousness is not sufficiently formed to understand the information received, and its static reproduction can lead to an incorrect assessment of the event that took place. Criminal proceedings in which minors and minors participate must be carried out with the application of special rules that equally ensure an increased level of protection of the rights and interests of all minors, regardless of their procedural status.

According to Art. 226 of the Criminal Procedure Code of Ukraine, the interrogation of a minor or a minor is conducted in the presence of a legal

representative, a teacher or a psychologist, and if necessary, a doctor. At the same time, in Art. 491 of the Criminal Procedure Code stipulates that the presence of a doctor is necessary only if the minor has not reached the age of sixteen or if the minor is recognized as mentally retarded [4].

In our opinion, in the event that a minor or minor has information about the circumstances to be investigated in criminal proceedings, the question of his questioning as a witness should be resolved only after consultation with a psychologist and with the consent of his legal representative, since in such cases there is a threat to the child's safety that is more important than even obtaining probative information. If the legal representative objects to the questioning of a minor or a minor witness, conducting investigative (search) actions with him is inadmissible.

In the event of a decision to interrogate a minor or a minor as a witness, the investigator must take possible measures to ensure the child's safety. In this case, the information about the personal data of the interrogated person should be classified as much as possible. It should be taken into account that the participants in the criminal process who have an interest in it - the suspect, the accused, their defense attorneys - have access to the materials of the criminal proceedings and can obtain information about the data of a minor or minor witness. Under such circumstances, the investigator must ensure the confidentiality of the specified information in the event of a threat to personal safety.

The legal representative of a minor or minor witness must be explained the situation in connection with which the child is involved in participating in criminal proceedings as a witness, as well as the possible risks for him related to this. After that, he must express his decision on the possibility of the child's participation as a witness. Also, the obligation to report information on persons who express interest in the child witness in criminal proceedings should be explained to the legal representative. If such an interest was expressed before the minor or minor was invited as a witness, then the legal representative must inform about this fact. When receiving information about the legal representative committing actions directed against the child's interests, the information must be verified, and in case of confirmation, the issue of replacing the legal representative and bringing him to justice should be decided.

The participation of a psychologist is an unconditional guarantee of the protection of the rights of minors in the conduct of investigative (search) actions with their participation. In our opinion, the question of questioning a minor or minor should be decided by an authorized person after consultation with a psychologist specializing in child psychology. The intellectual features of a child, depending on his age, are determined by a child psychologist, who can give a conclusion about his mental state, the ability to perceive and reproduce the received information, intellectual features that affect the behavior and development of the child, the feasibility of involving him in participation in investigators (search) actions.

Thus, the tactics of witness interrogation are formed depending on the typical interrogation program of a person who is in the status of a witness

(eyewitness, witness, expert, whistleblower, confidant, etc.), his age, and depends on the investigative situation in a specific criminal proceeding, on real and potential threats to such persons, their relatives and friends.

In most cases, the interrogation is conducted at the place of the pre-trial investigation or in another place (residence, work, study, treatment, recreation, etc.). For example, questioning a witness at his place of residence is expedient if the investigator wants to hide the fact of being summoned for questioning for tactical reasons and in order to ensure his safety. At the same time, the Criminal Procedure Code of Ukraine defines the format of the interrogation, which provides additional guarantees to the witness to ensure his safety - the interrogation of a witness and the simultaneous interrogation of two or more already questioned persons in a court session by an investigating judge during a pre-trial investigation, including remotely (part 1, Article 225, Part 2, Article 232 of the Criminal Procedure Code of Ukraine) and interrogation by video conference during the pre-trial investigation (Article 232 of the Criminal Procedure Code of Ukraine).

The investigating judge in the video conference mode can only conduct interrogations during the pre-trial investigation in the court session (Article 225 of the Criminal Procedure Code of Ukraine). From the content of Clause 19, Part 1, Art. 3 of the Criminal Procedure Code of Ukraine, it is understood that anyone from the side of the criminal proceedings, both from the side of the prosecution and the side of the defense, as well as the representative of the legal entity in relation to which the proceedings are being conducted, have the right to apply during the pre-trial investigation to the investigating judge with a request to question a witness in a court session during a pre-trial investigation. In accordance with the procedure specified in Art. 225 of the Criminal Procedure Code of Ukraine may interrogate a person in respect of whom an authorized body has made a decision on exchange as a prisoner of war. Options are not excluded when such a person will be in the status of a witness in criminal proceedings [3]. The decision to conduct an interrogation in this mode can be taken by the investigating judge not only at the request of the listed persons, but also on his own initiative.

In our opinion, such a right, along with the parties to the criminal proceedings, should be granted to the witness and the lawyer, in relation to the witness to whom he provides legal assistance in accordance with the procedure specified in Clause 2, Part 1 of Article 66 of the Criminal Procedure Code of Ukraine.

Conducting an interrogation in the video conference mode requires the authorized person conducting the interrogation to know the psychological patterns of the formation of testimony, to be aware of the principles of establishing psychological contact between individuals and the organization of informational interaction with the interrogated. Interrogation in the mode of a video conference is a way to solve the tasks of proof, but only in case of impossibility of direct participation of persons in pre-trial proceedings [155, p. 273]. The key task in carrying out this investigative (search) action is to create a benevolent and frank attitude in the interrogated person, which is achieved by the courtesy and gentleness of the authorized person. Certain psychological

relationships are built with the interrogated person, aimed at obtaining reliable information, evidence without psychological pressure and fear of pressure from the suspect or other persons.

The psychology of communicating with a witness when applying security measures and questioning in conditions that exclude visual observation has important procedural and psychological significance. Along with the interviewee's personality traits, the perception process is influenced by his attitude to the relevant event, emotions and feelings. The completeness and accuracy of perception are affected by the characteristics of memory, the experience of the witness, the characteristics of his activity and emotional state.

Important in terms of obtaining high-quality testimony of a witness is the creation of not only organizational tactical, but also appropriate technical conditions. Technical means that transmit video information in real time must ensure proper sound and image quality, simultaneous and complete perception of information by all participants of the investigative (search) action, as well as information security. A high-quality image makes it possible to identify the identity of the witness by his appearance and record it by technical means, with the further possibility of identifying such a subject by the image. Adequate sound quality makes it possible to clearly and intelligibly distinguish the testimony of a person by his voice by all participants of the investigative (search) action and to record such testimony by technical means with the further possibility of their identification by this feature.

In view of the significant number of technical points that accompany the process of communication of the participants of the interrogation in the mode of video conference, in order to carry out this investigative (search) action, the investigator, prosecutor or investigating judge must involve a specialist who must ensure the serviceability of the technical means, establish other technical conditions for conducting the video conference.

In our opinion, a decrease in the level of communicative contact during the conduct of investigative (search) actions in the mode of audio video conference should not be considered as a significant obstacle to the use of video conference in criminal proceedings. It should be considered as a "technical intermediary" between the investigator, the prosecutor, the investigating judge and the interrogated person, which involves a minimum of influence on the direct impression of the interrogated person, does not create an insurmountable barrier for effective communication between the participants of the investigative (search) action.

Conclusions. When deciding on the advisability of questioning a witness, including simultaneous questioning, the authorized person should in no case put the witness, his family and friends at risk, risk evidence, the presence of which largely depends on the sense of personal security of the person who testifies that expose the suspect of committing a criminal offense. The investigative situation in a specific criminal proceeding, the presence of real and potential threats to witnesses, their relatives and relatives, determine the choice by the authorized person of the type, format and tactics of witness interrogation depending on

the typical interrogation program of a person in this status (eyewitness, witness, expert, whistleblower, confidant, etc.), her age.

For tactical reasons, it is expedient to question a witness in a court session by an investigating judge during a pre-trial investigation, or in a video conference mode using technical means from another premises, including outside the premises of the court, in order to ensure the confidentiality of information about a person, which imposes an obligation on the authorized person ensuring not only organizational tactical, but also appropriate technical conditions.

In order to expand the procedural capabilities of the witness and his representative, in particular, with regard to ensuring the safety of the witness due to the existence of danger to life and health, it is appropriate to grant the witness and his legal representative the right to apply to the investigating judge with a request to interrogate such a person in a court session during a pre-trial hearing investigation in accordance with Art. 225 of the Criminal Procedure Code of Ukraine, in particular the simultaneous interrogation of two or more already interrogated persons.

In the event that there are sufficient grounds to believe that the life, health, housing and property of the witness, his relatives and friends are in danger, his interrogation should be conducted in conditions that ensure the confidentiality of personal information. In cases where the witness declares to the investigator about illegal influence on him after his interrogation, in order to keep the identity of the witness secret, it is advisable to conduct the interrogation again with assigning to him the pseudonym of the participant of the investigative (search) action.

References:

1. Plieva K.V. (2008) Verbalni slidchi dii ta yikh kharakterystyka. *Naukovyi visnyk Kyivskoho natsionalnoho universytetu vnutrishnikh sprav.* № 4. S. 108–112. [in Ukrainian]
2. Kachmar B.M. (2017) Mekhanizm zabezpechennia bezpeky osib, yaki berut uchast u kryminalnomu sudochynstvi (kryminalnyi protsesualnyi aspekt): dys. ... kand. yuryd. nauk: 12.00.09. Kharkiv. 198 s. [in Ukrainian]
3. Van Mekhelen, Doorson ta inshi proty Niderlandiv (Case of Van Mechelen and Others V. the Netherlands): rishennia vid 23 kvit. 1997 r. *Ukrainskyi portal praktyky Yevropeiskoho sudu z prav liudyny:* [sait]. URL : <http://www.eurocourt.in.ua/Article.asp?Aldx=384>.
4. *Kryminalnyi protsesualnyi kodeks Ukrainy:* vid 13 kvit. 2012 r. № 4651-VI. *Ofitsiinyi visnyk Ukrainy.* 2012. № 37. St. 1370. Red. vid 25.08.2022. URL: <https://zakon.rada.gov.ua/laws/show/4651-17#Text>.