

SOME PROBLEMS OF APPOINTMENT OF EXPERTISE BY THE DEFENSE IN CRIMINAL JUSTICE OF UKRAINE

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Annotation. *The aim of the work is, based on the analysis of current criminal procedural legislation, special literature, investigative and judicial practice, to identify criminal procedural and organizational problems in the appointment of forensic experts by the defense in criminal proceedings and to formulate proposals for their elimination.*

The methodological basis of the study is based on dialectical method of scientific cognition. Formal-logical, formal-legal, comparative and modeling methods helped the author to identify and try to solve problems of appointment of expertise by the defense in the criminal justice of Ukraine.

Results. It is noted that according to the current Criminal Procedure Code of Ukraine, parties to criminal proceedings have equal rights to collect and submit to the court things, documents, other evidence, motions, complaints, as well as to exercise other procedural rights provided for by this Code. However, as a study of the investigative and judicial practice shows, the defense party does not always have the opportunity to exercise the right to appoint expert examinations at its own discretion by engaging an expert on contractual terms. It was established that most often the defense side is deprived of the opportunity to obtain the originals of the objects necessary for referral to the disposal of the expert, and, accordingly, it becomes difficult for the defense side to exercise the right to conduct an examination. Therefore, in reality, in practice, the defense side can only apply to the investigator, the prosecutor in accordance with Article 220 of the Criminal Procedure Code of Ukraine with a request to appoint a specific examination. Most often, the defense side is deprived of the opportunity to obtain the originals of the objects necessary for referral to the disposal of the expert, and, accordingly, it becomes difficult for the defense side to exercise the right to conduct an examination. Author thinks that the content of the request of the defense to the investigator, the prosecutor for the involvement of an expert, as well as the procedure for its consideration should be additionally regulated in the Code of Criminal Procedure of Ukraine.

Conclusions. The author concludes that the procedural rights of the defense party to appoint an expertise declared in the CPC of Ukraine do not fully correspond to the general principles of adversariality of the parties and freedom in providing their evidence to the court and proving their persuasiveness before the court. Therefore, this issue requires further study, generalization, refinement and legal improvement, which must be provided by clearly formed norms that determine the set of rights of the prosecution and the defense in relation to the involvement of an expert to conduct an examination.

Keywords: *criminal proceedings, forensic examination, the prosecution, the defense, equality of the parties, competition, collection of evidence.*

1. Introduction.

Article 22 of the current Criminal Procedure Code of Ukraine stipulates that criminal proceedings in Ukraine are conducted on the general principles of adversariality. This involves the independent defense of one's legal positions, rights, freedoms and legitimate interests by the means provided for by this Code by the prosecution and the defense. Parties to criminal proceedings have equal rights to collect and submit to the court things, documents, other evidence, petitions, complaints, as well as to exercise other procedural rights provided for by this Code.

In accordance with Part 2 of Art. 84 of the CPC of Ukraine, one of the procedural sources of evidence is the conclusions of experts. In accordance with Part 2 of Art. 243 of the CPC of Ukraine, the defense party has the right to independently engage experts on contractual terms to conduct an expertise, in particular a mandatory one. In addition, the expert may be involved by the investigating judge at the request of the defense party in the cases and procedure provided for in Article 244 of CPC of Ukraine (part 2 of Article 243), namely, in the case of the refusal of the investigator or the prosecutor to grant the defense party's request for the involvement of an expert.

However, as a study of the investigative and judicial practice developed under the current Code of Criminal Procedure of Ukraine shows, the defense party does not always have the opportunity to exercise the right to appoint expert examinations at its own discretion by engaging an expert on contractual terms.

2. Analysis of scientific publications.

Theoretical and practical aspects of appointing and conducting forensic examinations in criminal proceedings were studied by G.K. Avdeeva, V.G. Goncharenko, V.A. Zhuravel, A.V. Ishchenko, N.I. Klymenko, V.K. Lysychenko, I.V. Pyrig, M.Ya. Segai, E.B. Simakova-Efremyan, R.P. Chicha, V.Yu. Shepitko, M.G. Shcherbakovsky and other scientists.

Problems of the implementation of adversarial principles during the appointment of forensic examinations in criminal proceedings were studied by A.F. Volobuev, D.V. Kurylenko, I.V. Glowyyuk, L.M. Loboyko, E.D. Lukyanchikov, V.M. Tertyshnyk, L.D. Udalova, E.V. Chuyko, O. Torbas, V.P. Shibiko, O.H. Shilo, M.Ye. Shumylo, O.G. Yanovska and others. However, many aspects of the appointment of forensic expertise by the defense in criminal proceedings were studied fragmentarily in the special literature, which, in our opinion, requires additional, in-depth and comprehensive research. In particular, issues related to the possibility of the defense obtaining objects necessary for the examination require legal and organizational settlement.

3. The aim of the work.

The purpose of the article is, based on the analysis of current criminal procedural legislation, special literature, investigative and judicial practice, to identify criminal procedural and organizational problems in the appointment of forensic experts by the defense in criminal proceedings and to formulate proposals for their elimination.

4. Review and discussion.

Forensic examination is a study based on special knowledge in the field of science, technology, art, crafts, etc. of objects, phenomena and processes with the aim of providing a conclusion on issues that are or will be the subject of judicial proceedings [1]. Usually, the objects of forensic examinations are objects, documents, money signs, etc., temporarily seized in accordance with Art. 148, 167 of the CPC of Ukraine, ensuring the preservation of which (temporarily seized property) is entrusted exclusively to an authorized official (Article 168 of the CPC of Ukraine). It is clear that no investigator will hand over such objects to the defense even if he receives a corresponding request. In this way, the defense side is deprived of the opportunity to obtain the originals of the objects necessary for referral to the disposal of the expert, and, accordingly, it becomes more difficult for the defense side to exercise the right to conduct an examination. It is known, that in most cases it is impossible to carry out an expertise based on copies.

Therefore, in reality, in practice, the defense side can only apply to the investigator, the prosecutor in accordance with Article 220 of the Criminal Procedure Code of Ukraine with a request to appoint a specific examination. However, the investigator, the prosecutor may refuse to grant the request for many reasons, for example, due to the fact that, for tactical reasons, the appointment of this

examination at the moment is considered premature, because, in their opinion, it will harm the pre-trial investigation.

In addition, the CPC of Ukraine does not mention the content and procedure for consideration of such a petition. Therefore, we believe that the content of the defense party's request to the investigator, the prosecutor for the involvement of an expert, as well as the procedure for its consideration should be separately regulated in the Code of Criminal Procedure of Ukraine. In this aspect, we consider the proposal of O.V. Malakhova to be appropriate, which suggests that in cases where an expert is involved in conducting an examination by the prosecution at the request of the defense or the victim, to enshrine in Art. 243 of the Criminal Procedure Code of Ukraine the right of the defense party and the victim: to file a petition for the appointment of an expert from among the persons specified by him; to challenge the expert; ask the expert questions; give explanations to an expert; submit additional documents; submit a request for the appointment of a new or additional expert opinion, as well as provide for the duty of the prosecution to inform the defense or the victim, at the request of which the expert was involved, of the expert's opinion [1, p. 134].

Another problem is the lack of a direct indication in the current CPC of Ukraine on the obligation to acquaint the suspect (in our case, also the defense party) with the resolution on the appointment of an expert and the expert's opinion after it has been received by the prosecution, as stipulated by the Criminal Procedure Code of Ukraine of 1960. Only recently has the uncommon practice of the prosecution notifying the suspect of the appointment of an expert examination indicating the expert institution or the expert entrusted with conducting it in accordance with Art. 111 of the CPC of Ukraine. At the same time, the defense side remains uninformed about the questions raised before the expert, as well as about the content of the expert's opinion until the moment the materials of the criminal proceedings are opened to the other party (Article 290 of the CPC of Ukraine).

Of course, according to clauses 14-15, part 3 of Art. 42 of the CPC in accordance with Art. 221 investigator, the prosecutor is obliged, at the request of the defense party, to provide them with the materials of the pre-trial investigation for review, with the exception of materials on the application of security measures to persons participating in criminal proceedings, as well as those materials, the disclosure of which at this stage of the criminal proceedings may harm the pre-trial investigation. However, the investigator can easily refuse to grant the defense's request to provide the expert's opinion for review, referring, again, for example, to the fact that for tactical reasons at this stage of the criminal proceedings, notifying the defense of the information contained in the expert's opinion will harm pre-trial investigation, etc.

In view of the above, the proposal of V.V. Bazhanyuk seems appropriate, regarding the obligation of the investigator, prosecutor (pre-trial investigation body) to familiarize the defense with the relevant resolution (order), clarify the right to submit proposals (petitions) regarding the objects of examination, formulation of questions to the expert, definition of the expert institution, etc. After receiving the expert's opinion, the pre-trial investigation body should also be obliged to acquaint the defense with it [3, p. 143]. We believe that this approach will ensure the accused's right to defense, compliance with the reasonableness of criminal proceedings terms, and will reduce the number of additional and repeated expertises.

An example from judicial practice is indicative in this aspect. The verdict of Khrystynivskyi District Court of Cherkasy Oblast dated October 25, 2021 in case No. 706/1113/20 made a decision regarding the recognition of the conclusion of the commission forensic medical examination (expertise based on case materials) No. 04-01/25 dated September 18, 2020 as inadmissible evidence. In justification of such a decision, the court noted that the norms of the Criminal Procedure Code of Ukraine stipulate that when an expert is appointed, the accused has the right: 1) to challenge the expert; 2) request the appointment of an expert from among the persons specified by him; 3) ask for additional questions to be asked before the examination; 4) give explanations to the expert; 5) submit additional documents; 6) get acquainted with the examination materials and the expert's conclusion after the examination; 7) submit a request for the appointment of a new or additional examination; 8) to be present with the permission of the investigator when the expert conducts individual studies and to give explanations. Not notifying the accused about the appointment of an expert in the case, depriving him of the opportunity to participate in the examination and

depriving him of the opportunity to fully exercise his other rights granted by law, violates the right to defense of the accused. Taking into account the above, the court considers that this evidence, namely the opinion of the expert (expertise based on the case materials) No. 04-01/25 dated 18.09.2020 is inadmissible evidence, since it was obtained in violation of the requirements of the Criminal Procedure Code of Ukraine, and therefore the request of the lawyer PERSON_7 for recognition its inadmissibility is subject to satisfaction [4].

Thus, the defense party has the opportunity to exercise its right to independently engage experts on contractual terms to conduct an examination only in cases where the objects of the future examination are at its disposal. However, such cases are the exception rather than the rule. After all, there is no proper legal mechanism that would allow the defense to properly collect evidence that could become objects of expert research and obtain samples for comparative expert research, which was repeatedly noted in the special literature [5, p. 313; 6, p. 111].

In order to engage an expert on contractual terms, the defense party must apply to the head of the expert institution, specifying: a brief statement of the circumstances of the criminal offense in connection with which the petition is submitted; legal qualification of the criminal offense with an indication of the relevant article (part of the article) (with a copy of the extract from the Unified Register of Pretrial Investigations); a concise statement of the circumstances that justify the arguments of the request for the involvement of an expert; an expert or an expert institution to whom the examination should be entrusted; the type of expert examination to be conducted and the list of questions to be asked to the expert. The following must be attached to the petition: copies of the materials used to substantiate the arguments of the petition; copies of documents that confirm the powers of the defense attorney (copy of the certificate of the right to practice law, a copy of the warrant, contract with the defense attorney or mandate of the body (institution) authorized by law to provide free legal aid); raw data for expert research (object of expertise or access to the object) [7, p. 35].

If the defense party failed to exercise its right to independently involve an expert on contractual terms for conducting an examination, the only thing that remains is to apply to the investigating judge for the involvement of an expert. However, there are some nuances here.

According to Part 6 of Article 244 of the Criminal Procedure Code of Ukraine, based on the results of the review of the petition, the investigating judge has the right to entrust the examination to an expert institution, expert or experts, if the person who submitted the petition proves that:

1) to solve issues that are of significant importance for the criminal proceedings, it is necessary to involve an expert, but the prosecution did not involve him, or the expert involved by the prosecution was posed with questions that do not allow a full and proper conclusion to be given on the issues to be clarified, or there are sufficient grounds to believe that the expert engaged by the prosecution will provide or has provided an incomplete or incorrect opinion due to his lack of necessary knowledge, bias or for other reasons (item 1 part 1 of Article 244). The possibility of finding out the grounds specified in the last paragraph by the defense party is doubtful, since the defense party is unlikely to be able to obtain reliable information about the lack of the necessary knowledge of the expert engaged by the prosecution party. In addition, the wording seems to be too vague and not specific: "there are sufficient grounds to believe that the expert engaged by the prosecution... will provide... an incomplete or incorrect conclusion";

2) the defense party cannot engage an expert independently due to lack of funds or for other objective reasons (item 2, part 1, article 244 of the CPC of Ukraine).

In accordance with Part 2 of Art. 244 of the Criminal Procedure Code of Ukraine, in a request to the investigating judge to appoint an expertise, the defense side must, among other things, indicate the expert that must be involved, or the expert institution that must be entrusted with conducting the examination; the type of expert research to be conducted and the list of questions to be asked to the expert. However, the investigating judge has the right not to include in the decision on the commission of the examination the questions posed by the person who made the corresponding request, if the answers to them do not relate to the criminal proceedings or are not important for the court proceedings, justifying such a decision in the decision (Part 7 Article 244 of the CPC of Ukraine).

At the same time, the following problematic questions may arise in practice. Can the defense party appeal the decision of the investigating judge not to include in the decision on the appointment of an expert opinion the issues formulated by it in the relevant petition? Will the request for the involvement of an expert be rejected if the type of examination is incorrectly defined in the request, or the expert institution in which this type of examination is conducted is indicated? Scientists say that the mechanism of appeal by the defense side of the investigating judge's decision not to include in the decision on the commission of expert examination the issues raised by the person who made the corresponding petition should find its own legislative regulation. Incorrectly defined type of examination in the request for examination, or specified expert institution, in which this type of examination is not conducted, should not be a reason for refusal to appoint an examination by the investigating judge. In such cases, the investigating judge must indicate in his decision about the deficiencies found in the petition [8, p. 102].

In accordance with Part 3 of Art. 244 of the CPC of Ukraine the request for expert examination is considered no later than five days from the date of its receipt by the court by the investigating judge of the local court, within the territorial jurisdiction of which the pre-trial investigation is carried out, and in criminal proceedings regarding criminal offenses referred to the jurisdiction of the Higher Anti-Corruption Court, by the investigating judge of the High Anti-Corruption Court. The person who submitted the petition is notified of the place and time of its consideration, but his or her non-appearance does not prevent consideration of the petition, except in cases where the participation of such a person is recognized as mandatory by the investigating judge. We consider it expedient to agree with O.V. Malakhova's proposal that this period should be reduced to three days to ensure the efficiency of obtaining samples for examination, if necessary, and to avoid the possibility of their destruction or damage [2, p. 134-135].

5. Conclusions.

Summarizing what has been said, we note that real procedural opportunities of the defense party to appoint an expertise declared in the Criminal Procedure Code of Ukraine do not fully correspond to the general principles of adversariality of the parties and their freedom in providing the court with their evidence and proving their persuasiveness before the court. Therefore, this issue requires further study, generalization, refinement and legal improvement, which must be provided by clearly formed norms that determine the set of rights of the prosecution and the defense in relation to the involvement of an expert to conduct an examination.

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