ENSURING THE IMPLEMENTATION OF THE PRINCIPLE OF LEGALITY BY THE PROSECUTOR DURING THE APPLICATION OF PREVENTIVE MEASURES

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Annotation. The purpose of the work is to study the problematic issues of ensuring the implementation of the principle of legality by the prosecutor during the application of preventive measures.

The methodological basis of the scientific research was the following general scientific and special methods: analysis, synthesis, generalization, analogy, structural-logical, systemic-structural, and comparative-legal methods.

The results. The article examines the problematic issues of ensuring the implementation of the principle of legality by the prosecutor during the selection of a preventive measure. It was established that the stage of choosing a preventive measure consists in the joint work of the investigator, the prosecutor and the investigating judge, however, the key role is played by the prosecutor, who, exercising his powers, must check the materials that substantiate the suspicion and are the basis of the petition, in order to prevent arbitrariness on the part of law enforcement agencies. The basis for the application of a preventive measure is the existence of a well-founded suspicion that a person has committed a criminal offense. Having analyzed the opinions of scientists regarding the concept of "reasonable suspicion" in the context of choosing precautionary measures, it was concluded that this term is a more meaningful standard than the sufficiency of evidence, and is different from a written notification of suspicion. That is why the request for the selection of a preventive measure should be based on more substantial evidence of the person's involvement in the commission of a criminal offense than that contained in the paper document "notification of suspicion". Attention is drawn to the fact that before sending the petition to the investigating judge, the prosecutor must check the evidence and facts indicated in it, and in case of discovery of illegal evidence, the prosecutor must provide an assessment of the entire body of evidence through the prism of the doctrine of "fruit of the poisoned tree" and the rule of "inevitable discovery", and "independent source" to form a conclusion about the legality or illegality of the suspicion as a whole.

Conclusions. In the event that the prosecutor establishes illegal evidence, he must provide an assessment of the entire body of evidence through the prism of the doctrine of "fruit of the poisonous tree" and the rules of "independent source", "inevitable discovery" in order to form a conclusion about the legality/illegality of the suspicion as a whole. If the prosecutor concludes that the suspicion is illegal, he does not have the right to initiate the question of applying a preventive measure before the court by drawing up or agreeing to the appropriate motion.

Key words: prosecutor, investigator, precautionary measures, legality, prosecutorial supervision, prosecutorial control, procedural management.

1. Introduction.

Choice of a preventive measure is one of the important procedural decisions, the content of which consists of a legal, but significant, restriction of the rights of a person suspected of committing a criminal offense. That is why the legislator provides for prosecutorial control, which consists in agreeing

with the request of the investigator to choose a preventive measure. When deciding whether to approve or reject a request for a preventive measure, the prosecutor must not only comprehensively, completely and impartially investigate the circumstances of the criminal proceedings, but also provide a proper legal assessment of the evidence that is the basis for the suspicion and on which the request for a preventive measure is based. Since, during the illegal selection of a preventive measure, the suspected person may actually be isolated from society or his rights may be violated in some other way, the issue of the prosecutor's compliance with the principle of legality when deciding on the application of preventive measures is extremely relevant.

2. Analysis of scientific publications.

The study of preventive measures was carried out by such scientists as V.V. Vapnyarchuk, O.V. Vynokurov, I.V. Glowyuk, M.E. Gromova, O.V. Kaplina, O.M. Korinyak, L.M. Loboyko, T.O. Loskutov, M.A. Pohoretskyi, A.R. Tumanyants, T.G. Fomina, I.S. Yakovets et al. However, there are currently debatable issues concerning how prosecutors implement the principle of legality when evaluating evidence for decision-making on applying preventive measures.

3. The aim of the work.

The aim of the article is to examine the issues related to the prosecutor's role in applying the principle of legality when implementing preventive measures. To achieve this goal, the article will analyze relevant scientific literature and evaluate the evidence presented in the investigator's request through the lens of contemporary doctrines.

4. Review and discussion.

Ensuring the legality of the application of preventive measures by the prosecutor is a complex activity that involves several stages. Depending on the process of their application, in the scientific legal literature, a distinction is made between "selection of a preventive measure", which is understood as the adoption of a decision on a preventive measure, and "application of a preventive measure", which is interpreted as a procedural action that is carried out from the moment of making a decision on the selection of a preventive measure until its cancellation or change [1, p. 107]. The stage of choosing a preventive measure consists in the joint work of the investigator, the prosecutor and the investigating judge. However, at the initial stage of deciding the issue of choosing a preventive measure, the key role is played by the prosecutor, who, exercising his powers, must check the materials that substantiate the suspicion and are the basis of the petition, in order to prevent arbitrariness on the part of law enforcement agencies.

In Part 2 of Art. 177 of the Criminal Code of Ukraine states that the basis for the application of a preventive measure is the existence of a well-founded suspicion that a person has committed a criminal offense, as well as the existence of risks that give the investigating judge, the court sufficient grounds to believe that the suspect, accused, convicted person can carry out the actions provided for in the first part of this article. Investigators and prosecutors do not have the right to initiate the application of a preventive measure without the grounds provided for in this Code [2].

Since the Criminal Procedural Legislation of Ukraine does not provide a definition of the term "reasonable suspicion" in the context of choosing a preventive measure, it is currently a debatable issue among scientists.

So, M.E. Gromova notes that the term "reasonable suspicion" should not be identified and applied solely from the standpoint of the presence of a written notice of suspicion in the criminal proceedings. At the same time, she claims that within the meaning of Art. 177 of the Criminal Code of Ukraine, "reasonable suspicion" includes the presence of a procedural document - a notification of suspicion and the presence of sufficient evidence to resolve the issue of the application of a preventive measure [3, p. 41].

A. Palyukh claims that the evidentiary activity of the prosecutor regarding the presence (absence) of grounds for the application of preventive measures will consist in establishing two facts in the criminal proceedings - the existence of a well-founded suspicion (that is, the person was notified of the suspicion in the prescribed manner due to the sufficiency of the evidence indicating that that this person has committed a criminal offense), as well as the presence of risks in criminal proceedings that may complicate the investigation of a criminal offense [4, p. 504].

There is a point of view according to which the presence of reasonable suspicion is not a reason for applying precautionary measures. Proving his point of view, T. Fomina claims that, firstly, the very fact of informing a person of suspicion cannot justify the application of preventive measures, since the pre-trial investigation can be completed, and the trial can be carried out even without choosing preventive measures against the suspect, the accused. Secondly, the approach provided by the legislator to understanding the grounds for the application of preventive measures creates a danger that the very fact of the notification of suspicion may be considered by the investigator, the prosecutor as a sufficient reason for initiating the issue of applying preventive measures, and the investigating judge - for his election. Thirdly, the fact of committing an offense reflected in the notice of suspicion cannot justify the application of preventive measures, since their selection is conditioned by the need to ensure the proper implementation of the pre-trial investigation [5, p. 119-120]. That is, the paper document "notification of suspicion" and the information contained in it do not fall under the concept of "reasonable suspicion" as a basis for choosing a preventive measure.

Regarding the content of the concept of "reasonableness", in the opinion of I.S. Yakovets, it can only be defined as a decision on the application of a preventive measure, in the descriptive and motivating part of which the following are indicated: 1) factual data that testify to the validity of the suspicion or accusation of a certain person in the commission of a crime; 2) factual data testifying to the possible negative behavior of the suspect or the accused, aimed at opposing the solution of the tasks of justice; 3) circumstances that make it necessary to apply a specific preventive measure [6, p. 30].

Despite the importance of the criterion of reasonableness of suspicion, there is no definition of this term in the criminal procedural legislation [7], however, such an interpretation is given in the judgments of the ECtHR.

Thus, in paragraph 175 of the decision of the European Court of Human Rights in the decision "Nechyporuk, Yonkalo v. Ukraine", the Court reiterates that the term "reasonable suspicion" means that there are facts or information that can convince an objective observer that the person, in question, could have committed an offence. However, the requirement that the suspicion must be based on reasonable grounds is a significant part of the guarantee against arbitrary detention and detention. Moreover, in the absence of reasonable suspicion, a person may not under any circumstances be detained or taken into custody for the purpose of forcing him to confess to a crime, to testify against other persons, or to obtain from him facts or information that may serve as a basis for reasonable suspicion (see. the decision in the case "Cebotari v. Moldova", N 35615/06, item 48, dated November 13, 2007) [8].

When considering a petition for the application of a preventive measure, the court is obliged to establish whether the evidence provided by the parties to the criminal proceedings proves the fact that the suspicion of a criminal offense is justified. It is implied that the burden of proving the weight and sufficiency of the evidence of reasonable suspicion rests with the side of the criminal proceedings that submits it. The presence of evidence in the materials of criminal proceedings is not enough - the relevant circumstances must be substantiated in the petition for the application of a preventive measure and proven before the court [3, p. 42].

However, A. Palyukh claims that allowing the possibility to do without evidentiary information at all when making procedural decisions means knowingly allowing the possibility of arbitrariness towards a person. Therefore, decisions on the application of preventive measures, despite their preventive nature, must be based on evidence [4, p. 504].

However, in his research M.A. Pohoretskyi and O.A. Mitskan claims that the standard of proof "reasonable suspicion" is the lowest standard of proof in a criminal trial and does not require the presence of reliable knowledge about the commission of a criminal offense by a person [9, p. 43-44].

At the same time, they note that in cases where the applicants contested the application of a preventive measure in the form of detention, the ECtHR repeatedly pointed to the dynamic nature of the standard of proof "reasonable suspicion" [9, c. 43-44].

Justifying their opinion, scientists refer to Part 3 of Art. 5 of the Convention, which states that the existence of "reasonable suspicion" that the detained person has committed a criminal offense is a necessary condition (conditio sine qua non) of detention, but over time it becomes insufficient. In such a case, the Court must establish whether the national courts have established the presence of other "relevant" and "sufficient" circumstances justifying the continued detention of the person in custody, as well as whether the national authorities have shown "special diligence" in conducting criminal proceedings (Case of Idalov v. Russia (Application № 5826/03): Judgement of the European Court of Human Rights 22.05.2012) [9, p. 43-44]. Indeed, when choosing a preventive measure as a priority, the investigator and the prosecutor must prove the existence of reasonable suspicion, which will be the basis of a request for a preventive measure. In the case of further extension of the already chosen preventive measure, the prosecutor must establish other circumstances that are more substantial and substantial at the time of the extension, in order to establish the existence of reasonable suspicion.

Therefore, after analyzing the points of view of scientists, we can conclude that the term "reasonable suspicion" in the context of choosing a preventive measure is a more meaningful standard than the sufficiency of evidence, and is different from a written notification of suspicion.

We believe that such a rule exists because a paper document "notification of suspicion" must be served in every criminal proceeding where there is a person who is actually suspected of committing a criminal offense, as opposed to a preventive measure, which is chosen in exceptional cases. That is why the evidence referred to by the investigator in his petition for the selection of a preventive measure must be checked in detail by the prosecutor for the legality of their receipt, since the unjustified application of such a measure to a person can significantly violate his rights.

In order to become grounds for the application of preventive measures, the evidence must contain information that necessitates their application. Therefore, when deciding on the application of one or another preventive measure at a pre-trial investigation, the prosecutor, as a procedural person who will prove the risks before the investigating judge, having received a request from the investigator or making this request independently, must first establish from the materials of the criminal proceedings the presence grounds for applying preventive measures in criminal proceedings [4, p. 504]. It is worth noting that the study of such materials should not be formal, but more meaningful.

Determining the peculiarities of the legal institution of preventive measures, N. Marchuk drew attention to the importance of the participation of the prosecutor in the application of preventive measures, which is aimed at ensuring the effectiveness of criminal proceedings, in particular, through the supervision of the observance of the rights, freedoms and legitimate interests of a person when applying preventive measures [10, p. 58].

O. M. Korinyak also agrees with the preliminary opinion, who notes that despite the fact that the final decision rests with the investigating judge, the prosecutor, preliminarily solving this issue during the investigation, carries out a pre-trial check of the legality and reasonableness of the application of the measure of ensuring criminal proceedings of the type under investigation and at the same time acts as a guarantor of the protection of human rights and freedoms against unlawful restriction of personal freedom [11, p. 157].

We agree that the verification of the legality and reasonableness of the adopted procedural decision, including the request for the application of a preventive measure, acts as an additional guarantee of the protection of the rights, freedoms and legitimate interests of a person in criminal proceedings [12, p. 102]. Therefore, in order to comply with the law when deciding the issue of choosing a preventive measure, the prosecutor must carry out a review of the totality of evidence to establish reasonable suspicion when deciding the issue during the approval of the request for choosing a preventive measure, that is, study the materials of the criminal proceedings and evaluate each piece of evidence in order to establish the legality of the evidence received.

O.V. Heselev says that the prosecutor is authorized to agree or refuse to agree to the requests of the investigator to the investigating judge to conduct investigative (search) actions, secret investigative (search) actions, other procedural actions in cases provided for by the Criminal Procedure Code of Ukraine, or to independently submit such requests to the investigating judge. This authority is related to the need to conduct investigative and procedural actions during the pre-trial investigation, which to a certain extent limit or interfere with the constitutional rights and freedoms of the participants in criminal proceedings or are related to the application to them of coercive measures defined by the new Code of Criminal Procedure. In particular, this applies to conducting searches, inspecting a person's home or other possessions, interfering with private communication, etc. Similar petitions are made in the case of the need to apply measures to ensure criminal proceedings, such as removal from office, seizure of property, temporary access to things and documents, other types of these measures, as well as the application of preventive measures and detention by the decision of the investigating judge (Article 131 of the Criminal Procedure Code of 2012). The prosecutor, either independently drafting the motion, or deciding the issue of approval or refusal to approve the motion of the investigator, must find out the existence of a well-founded suspicion of committing a criminal offense by the person against whom the specified measures are applied, the presence of sufficient grounds for conducting relevant investigative (search) actions, secret investigative (search) actions, the need to carry out exactly such actions to fulfill the tasks of criminal proceedings, etc. During the consideration of the petition by the investigating judge, the prosecutor in an adversarial process with the defense gives arguments to justify his legal position [13, p. 84].

Justly notes V.A. Zavtur said that the institution of approval is a kind of procedural "filter", which aims to prevent those petitions from being considered by the investigating judge that do not have a judicial perspective, that is, they will be returned to eliminate shortcomings or left without satisfaction [14, p. 143]. That is why, before sending the petition to the investigating judge, the prosecutor must check the evidence and facts mentioned in it. If the prosecutor discovers illegal evidence, he must provide an assessment of the entire body of evidence through the prism of the doctrine of "fruit of the poisonous tree" and the rules of "inevitable discovery", "independent source" in order to form a conclusion about the legality or illegality of the suspicion as a whole.

The "fruit of the poisonous tree" doctrine was established in Silverthorne Lumber Co. V. United States (Silverthorne Lumber Co. V United State). The authors of this concept advocated the unconditional recognition as inadmissible evidence of those obtained in violation of the procedural law, regardless of the nature and degree of these violations. And this assumes that a consistent chain of evidence forms the use of only those items whose procedural status has been established in accordance with the law. Evidence obtained on the basis of illegally obtained evidence is derived from it and therefore inadmissible [15, p. 298].

In the criminal procedural legislation of Ukraine, this doctrine is reflected in Art. 87 of the Criminal Code of Ukraine "Inadmissibility of evidence obtained as a result of a significant violation of human rights and freedoms", therefore it is important to observe the " reasonableness of suspicion ".

The criterion for assigning evidence to the "fruit of the poisoned tree" is the presence of sufficient grounds to believe that the relevant evidence would not have been obtained in the absence of primary information obtained illegally [16, p. 516].

This doctrine boils down to the fact that if the "tree" of evidence is poisonous, so is its "fruit." That is, if the source of evidence is inadmissible, all other data obtained with its help will be the same. The specified doctrine provides for the assessment not only of each means of proof independently, but also of the entire chain of directly connected evidence, some of which follow from others and are derived from them [17].

In particular, we will give such an example as conducting a search without the participation of witnesses and continuous video recording, or conducting it without a decision of the investigating judge. According to the results of such a search, it is most likely that certain objects or substances, which have been removed from illegal circulation on the territory of Ukraine, could be identified and seized. In the future, the findings are sent to research, according to which an expert's opinion will be obtained, which is one of the procedural sources of evidence. Based on the results of such a search,

statements will be obtained from the suspect and witnesses who were present as eyewitnesses. In this case, each of the received procedural sources of evidence will be poisonous, since the derivative source, that is, physical evidence discovered and seized during the search, was obtained in violation of the requirements established by the Criminal Procedure Law. According to the above, when choosing a preventive measure, the prosecutor cannot refer to such evidence.

In the case of establishing evidence obtained from the "fruits of a poisonous tree", the prosecutor is obliged to give the investigator a written instruction to obtain evidence from another source or to find other legal evidence that will substantiate or refute the suspicion. If the evidence can justify the suspicion, then it must convince an objective observer, i.e. the investigating judge, that this particular person has committed a criminal offense and there are reasons to apply a preventive measure against him. That is why the prosecutor must evaluate the entire set of evidence indicated by the investigator in the request for a preventive measure, through the prism of doctrines.

The concept of "fruit of the poisonous tree" is not absolute and has certain exceptions: the "independent source" rule, the "unavoidable discovery" rule, the "cleansing" rule, the "harmless mistake" rule, and the "good faith exclusion" rule. Their analysis through the prism of the decisions of the Supreme Court (Ukraine), the ECtHR and the Supreme Court of the United States allows us to conclude that their application requires a careful study taking into account the circumstances of a specific case, since their unjustified application can lead to a violation of the rights and freedoms of a person in the process of criminal proceedings and to an unfair trial in general. At the same time, the analysis of judicial practice and scientific sources gives grounds for asserting that, unlike the very concept of "fruits of the poisoned tree", exceptions to it are not characterized by unity in perception and application at both the applied and doctrinal levels [18, p. 380-381].

The independent source doctrine consists in the possibility of using evidence from a so-called independent source, which leads to conclusions about the need to exclude evidence obtained in violation of the applicants' conventional rights, but with reference in court decisions to other evidence of the commission of a criminal offense [17]. Independent and independent sources of evidence include testimony of witnesses, an investigative experiment with a witness, and expert opinions. In our opinion, such evidence will contribute to the well-founded suspicion, which is relied on by the prosecutor as the basis of the petition for the selection of a preventive measure and will be able to convince an objective observer that this particular person has committed a criminal offense.

The essence of the rule of "inevitable discovery" (inevitable discovery) in the criminal process is that it allows the recognition of evidence that was obtained in an illegal way, if it was "inevitably" obtained regardless of these illegal actions. This is one of several exceptions to the exclusionary rule, or the related fruit-of-the-poisonous-tree doctrine, that prevent access to evidence gathered in violation of a defendant's constitutional rights. Incidentally, we note that this issue was the subject of a study by the European Court of Human Rights in the case of Svetin V. Slovenia [19, p. 5].

It is worth agreeing that the application of both the doctrine of the "fruit of the poisonous tree" and the doctrines and concepts that are an exception to it add flexibility to the criminal process in the matter of recognizing evidence as admissible, which ensures the fairness of the trial process for both parties and a certain balance between public the interests of society and the person who is brought to criminal responsibility, his rights and freedoms [16, p. 517-518]. Such flexibility of the criminal process, at the stage of deciding the issue of choosing a preventive measure, gives the prosecutor the opportunity to objectively examine all the evidence provided to the investigators and establish the involvement or non-involvement of the person in the criminal offense in which he is suspected.

Investigating the evidence specified in the petition for the selection of preventive measures, the prosecutor is obliged to check each of them, which the investigator indicates in this document, for the purpose of its legal receipt. We are convinced that the use of the doctrines mentioned by us will help the prosecutor to resolve the issue of the legality of the presented motion for preventive measure, regardless of whether the law enforcement officers made any mistakes during the collection of evidence.

M. Tishin proposes his algorithm of actions of the prosecutor-procedural manager in case of evaluation of evidence obtained in violation of the Code of Criminal Procedure of Ukraine. According to his algorithm, the procedure is as follows:

a) in the case of violations defined in Art. Art. 87, 88, 88-1 of the Criminal Procedure Code of Ukraine, the prosecutor recognizes them as inadmissible and does not use them in further making and justifying procedural decisions in criminal proceedings;

b) in the case of other violations of the Code of Civil Procedure of Ukraine, the prosecutor must determine: their significance; whether they call into question the reliability of factual data; how rights have been affected by convention and constitutional human rights. Depending on the results, the prosecutor must decide whether to recognize the evidence as inadmissible, and if not, what arguments will he use to prove their admissibility in court [20, p. 162]. It is considered a valid proposal to evaluate the evidence taking into account the degree of violation of the suspect's personal and procedural rights, as this is an additional guarantee of the protection of his rights during the criminal process, including in the case of deciding on the choice of one of the precautionary measures.

Supplementing the specified algorithm, we propose to impose on the prosecutor the obligation to provide written instructions to the investigator on obtaining evidence from another independent source or to conduct other investigative (search) actions in order to identify other evidence, which in their totality will constitute a well-founded suspicion or refute it for further resolution of the issue regarding the choice of preventive measure. In the case of impossibility of obtaining a set of evidence that will constitute reasonable suspicion in the context of Art. 177 of the Criminal Procedure Code of Ukraine, the prosecutor must refuse to agree to a request for a preventive measure or to choose a preventive measure altogether.

5. Conclusions.

When making a decision to submit a petition for the application of a preventive measure or a decision to approve such a petition of the investigator, the prosecutor must assess the legality of the evidence on which the suspicion is based, within the framework of checking the existence of "reasonableness of suspicion". In the event that the prosecutor establishes illegal evidence, he must provide an assessment of the entire body of evidence through the prism of the doctrine of "fruit of the poisonous tree" and the rules of "independent source", "inevitable discovery" in order to form a conclusion about the legality/illegality of the suspicion as a whole. If the prosecutor concludes that the suspicion is illegal, he does not have the right to initiate the question of applying a preventive measure before the court by drawing up or agreeing to the appropriate motion.

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