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ОКРЕМІ ПРОБЛЕМИ, ПОВ'ЯЗАНІ З КОНЦЕПЦІЄЮ “РОЗУМНИЙ СУМНІВ” В КРИМІНАЛЬНОМУ ПРОЦЕСІ

Анотація

Стаття присвячена дослідженню стандарту доказування “поза розумним сумнівом”. На основі аналізу наукової літератури та законодавства Великобританії, США, а також рішень Європейського суду з прав людини було виявлено основні стандарти доказування, які використовуються судами при відправленні правосуддя. Було виділено окремі проблеми визначення стандарту доказування “поза розумним сумнівом”. Окреслено основні напрями застосування стандарту, як у досліджуваних випадках, так і у в кримінальному процесі України.

Ключові слова: доказування, тягар доказування, стандарти доказування, поза розумним сумнівом.

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ОТДЕЛЬНЫЕ ПРОБЛЕМЫ, КАСАЮЩИЕСЯ КОНЦЕПЦИИ “РАЗУМНОЕ СОМНЕНИЕ” В УГОЛОВНОМ ПРОЦЕССЕ

Аннотация

Статья посвящена исследованию стандарта доказывания “вне/за пределами разумных сомнений”. На основе анализа научной литературы и законодательства Великобритании, США, а также решений Европейского суда по правам человека было выявлено основные стандарты доказывания, которые используются судами при отправлении правосудия. Автором, также, были выделены отдельные проблемы определения стандарта доказывания “вне/за пределами разумных сомнений”. Очерчены основные направления применения стандарта, как в исследуемых случаях, так и в уголовном процессе Украины.

Ключевые слова: доказывание, бремя доказывания, стандарты доказывания, вне/за пределами разумных сомнений.

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ANALYSIS OF THE POWERS OF THE PROSECUTOR IN ARTICLE 291 OF THE CCP

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This article analyzes the powers of the prosecutor in the criminal production verification and confirmation of the indictment on the pre-trial investigation. Assessment about the importance of changing the name of the indictment was made. Comparison of similar articles of the CCP in 1960 and 2012 was conducted. Necessity of the extensive interpretation of the Article 291 of the CCP was established. Conclusion about key role of the prosecutor was made.

Keywords: prosecutor, investigator, indictment, materials of criminal proceedings, approval of indictment, closing criminal proceeding.

Formulation of the problem. Constitution of Ukraine proclaims that a human being, his life and health, honor and dignity, inviolability and security are recognized in Ukraine as the highest social value. For criminal procedural law this means that Ukrainian law must be focused on ensuring the procedural possibilities of participants in criminal proceedings. Consistent and strict compliance of all requirements of criminal procedure law is one of the important conditions of implementation of the right of citizens to judicial protection against unlawful infringement.

New Criminal Procedure Code of Ukraine made a lot of changes in the process of pre-trial investigation and the trial to create more opportunities for participants to protect their rights. At the same time some changes require detailed study and analysis to improve enforcement activities of authorities. One of this changes is about powers of the prosecutor in the final phase of pre-trial investigation.

Analysis of recent research and publications. A lot of scientists developed the problem of the powers of the prosecutor during pre-trial investi-

gation, including Alimamedova E.N., Grishina Y.O., Galagan A.I., Davidova M.P., Zelenetskii V.S., Katkova T.V., Konovalova V., Lybusa I., Mikhaylenko O.R., Suslo D.S., and other scientists and practitioners. However, there are not many articles about powers of the prosecutor according to the current CCP.

Unsolved problems. Current CCP does not fully describe powers of the prosecutor at the end of pre-trial investigation. It can cause many problems during criminal procedural activities.

The purpose of the article. The aim of this work is to analyze procedural possibilities of the prosecutor during receipt and review of the indictment, which was drawn up and sent by an investigator as a logical result of the conducted pre-trial investigation.

Presenting main material. After completing all necessary steps to familiarization participants with the materials of the criminal proceedings, the investigator can proceed to the final procedural document in criminal proceedings - indictment. During such activities an investigator must be sure in the commission of crime and the guilt of a suspect. Investigator must also be convinced that during the pre-trial investigation all necessary actions to verify circumstances of the crime were conducted. Evidences which were collected during the pre-trial investigation must be evaluated both individually and together with other evidence. "The decision to end the pre-trial investigation is taken when it is determined that it was conducted fully, fairly and comprehensively" [4, p. 21].

Indictment is the criminal procedure act, which reflects decision of the investigator, approved by the prosecutor, or the prosecutor about the end of the pre-trial investigation and submits of criminal proceedings to the court to decide guilt of the suspect. Legal, valid and reasonable indictment is the guarantee of protection of rights and legitimate interests of accused and other participants in the criminal process. It could be used as a legal fact which significantly develops legal proceedings. Indictment shows confidence of investigator and prosecutor of the guilt of a particular person in the end of pre-trial investigation. This means that the indictment establishes achievements of the objectives of criminal proceedings.

But before the analysis of the powers of the prosecutor during his approval of the indictment, some attention must be paid to the name of this procedural document. It must be noted that the CCP in 1960 called this document not an act, but a conclusion. Although this change of the name doesn't significantly alter the essence of the document, it should be said that the term "conclusion" describes the indictment better. As everyone knows, the conclusion - is a logical result which is made on the basis of certain facts. Accordingly, the term "conclusion" emphasizes the importance of this document and its final character. In the indictment investigator (or prosecutor) expounded his argument he based on the evidence collected, thereby finishing pre-trial investigation. From this position the term "act" diminishes the final value of the indictment in some way. T.V. Katkova has a similar position. She noted that the title of the final document - "conclusion" shows its purpose.

Conclusions of the investigator are preliminary and could be refuted at the trial (for example, by court's acquittal) [7, p. 31].

However, some scientists support opposite position. For example, M.S. Strogovich notes that the final document in the case "... by its very gist does not have any conclusion that - this is exactly the "act, decision of the authorities" [8, p. 150], which contains "... not only logical conclusion, but power and public order" [8, p. 150].

Interesting position is presented by I.D. Goncharov, who analyzed necessary articles of the CPC in 1960 and noted that after the approval of the accusatory conclusion by the prosecutor, it transforms into accusatory act and this moment will be the beginning of the trial [5, p. 32]. In any case, it should be told that the change in the title has more linguistic gist and has almost no affects on procedural gist of this procedural document.

CCP article 291of notes that almost always indictment will be drawn up by investigator. However, the fact of drawing up the indictment by investigator is not enough for sending these final procedural documents to the court. Any indictment must be approved by the prosecutor. And powers of the prosecutor at this stage of pre-trial investigation should be analyzed.

Current CCP has left aside some proceedings of the prosecutor during his approval of the indictment. For example, CPC in 1960 provided a list of circumstances which the prosecutor had verified after he received the indictment from the investigator (art. 228 CCP in 1961).

In particular, the prosecutor had to check whether there was the offense, whether there were formal components of the crime, whether all the relevant criminal procedure legislation on the rights of the suspect and the accused of defense were provided by the investigator, whether there were no grounds for closing criminal proceedings, whether all necessary persons were accused in crimes, whether there was correct classification of crime, whether investigator followed the requirements of the law in drawing up the indictment, whether preventive measures were applied according to the criminal procedure law, whether measures to ensure damage caused by the crime were taken and so on.

However, in the current CCP these circumstances are not specified. In Article 291 of the current CCP only general information that must be included in the indictment is given. At the same time it should be noted that during the approval of the indictment the prosecutor draws attention on these circumstances. During the approval of the indictment, the prosecutor primarily provides "supervising the compliance with law during pre-trial investigation in the form of providing procedural guidance in a pre-trial investigation". The indictment, as already mentioned, is the result of the investigation, a kind of "mirror" that reflects the work of the investigator. Therefore the prosecutor has to check the whole pre-trial investigation during his approval of the indictment. That prosecutor will support public prosecution in court, and it is interested in the fact that pre-trial investigation was conducted in compliance with all requirements of the procedural law. Thus, we can

conclude that today the prosecutor must verify the circumstances that were provided in the CCP in 1960. That's why this part on the current CCP must be changed.

Also the lack of guidance in the current CCP on the term for which the prosecutor is to make decision on the indictment is worth pointing. If the old CCP mentioned that the prosecutor was obliged to examine the criminal case within 5 days of its receipt, current CCP hasn't such mention. The period during which the prosecutor must approve the indictment is included in the total period of pre-trial investigation. Also, according to the current CCP investigator is required, within the shortest possible time, but not later than twenty-five days after the person concerned has been notified of being a suspect, to submit for approval of the public prosecutor one of the following procedural documents: 1) draft decision to close criminal proceedings; 2) draft motion to discharge the person concerned from criminal liability; 3) an indictment, motion to enforce compulsory medical or educational measures; 4) a request to extend time limit for pre-trial investigation on grounds specified by the CCP. So in the investigation of criminal misdemeanors we know how long the prosecutor must take one of the necessary actions, but in the case of investigating of crimes CCP doesn't mention any terms.

The analysis of indictment by the prosecutor consists of two parts: the study of the criminal proceedings and the study of the conclusions, which were made on the basis of available evidence. During this procedures prosecutor should ensure that all available evidence are competent, admissible and sufficient, and the conclusions that were made upon the evidence are reasonable.

Using Article 291 of the CCP, the prosecutor during the study of the indictment must pay attention to the clarity of the description of a crime, especially on the time and place of the offense, methods that were used during commit crime and other circumstances that are required by the law. Prosecutor must check the qualification of the crime.

J.N. Kalmykov offered to control correctness of the qualification by solving a number of issues: whether all suspected criminal acts were included in the indictment and whether to all actions of the suspect were given proper legal assessment in such indictment. [6, p. 226].

Having analyzed all parts of the indictment and comparing the evidence with the conclusions made by the investigator in the indictment, the prosecutor has to adopt one of the decisions which are contained in the Article 291 of the CCP. It must be noted that this Article obliges the prosecutor after reviewing of the indictment approve this document and send it to the court or drawn up new indictment. It's easy to understand that this provision Article requires extensive interpretation. The prosecutor has wide powers during pre-trial investigation, which he can use whenever he needs to. Pre-trial investigation begins with the entry of the information on criminal offense to the Integrated Register of Pre-Trial Investigations and ends with the submitting of the indictment to the court. Pre-trial investigation stage is indivisible,

and it's wrong to limit powers of the prosecutor during his activities. That's why prosecutor has more powers that are mentioned in the Article 291 of the current CCP. So, prosecutor can also return the indictment to the investigator with some instructions to conduct certain investigative actions or close the criminal proceedings by himself.

It must be mentioned that submitting the indictment to the court is the logical conclusion of the pre-trial investigation, in which investigator has found all suspects and gathered enough evidence to prove their guilt. The criterion for such decision should be the belief in the reliability of the results of the pre-trial investigation by the prosecutor. Affirming the indictment prosecutor agrees with the conclusions which were made by the investigator. It is made by placing written approval on the indictment in its beginning.

Article 291 CPC allows the prosecutor to draw up a new indictment and send it to the court. The prosecutor uses his right to make a new indictment when he is convinced in the completeness and comprehensiveness of the investigation, the adequacy of existing evidences which can prove the guilt of a person in court, but at the same time he disagrees with the formulation of the conclusions of the investigator or on other details in this procedural document. Prosecutor will support public prosecution in court and therefore he must be sure of the clarity and credibility of the indictment, which will be determined by the scope of the trial. Prosecutor also can draw up a new indictment when he just wants to change the style of this document. Such indictment does not require the approval of the prosecutor.

When the prosecutor during the study of the material of pre-trial investigation and the indictment, come to the conclusion that the available evidence insufficient cannot prove the guilt of a person in the court, he can return all materials to the investigator for additional investigation. In this case prosecutor sends a clear written instruction with the indictment that contain information on what exactly has to be done by the investigating. After conducting all necessary actions investigator re-opens materials of the criminal proceedings to the other party as it should be done according to the Article 290 of the CCP, adding to them the information that had been received in the result of additional investigative actions. After that investigator draws up a new indictment and sends it to the prosecutor according to the requirements of the CCP.

The prosecutor closes criminal proceedings in the manner prescribed by Article 284 of the CCP. As it was already mentioned prosecutor can close the proceedings during the whole pre-trial investigation. This stage is not divisible by any substages and therefore the prosecutor can use his powers under the Article 284 of the CCP whenever he needs to, even when the investigator has already sent him an indictment. It is possible that investigator did not notice grounds for the closing of criminal proceeding, continued pre-trial investigation, drew up an indictment and sent it to trial prosecutor. However, the prosecutor has to carry out procedural guidance during any pre-trial investigation and can fully use his powers. Prosecu-

tor isn't interested in submitting an illegal indictment to the court.

Conclusion. The current CCP gave to the investigator wide powers to ensure that pre-trial investigation will be carried on fully. However, the existence of procedural autonomy of investigation does not preclude control by the prosecutor. And during his supervising the compliance with law during pre-trial investigation in the form of providing

procedural guidance in a pre-trial investigation prosecutor checks whether investigator committed all necessary actions and whether enough number of evidences were collected to prove the guilt of the person during the trial. This "fresh" look at the pre-trial investigation can significantly affect on its completeness. Therefore, the prosecutor should meticulous check the indictment and use all his powers to increase its quality.

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АНАЛІЗ ПОВНОВАЖЕНЬ ПРОКУРОРА ЗГІДНО ЗІ СТАТТЕЮ 291 КПК

Анотація

Стаття присвячена аналізу повноважень прокурора при перевірці матеріалів кримінального провадження та затвердженні обвинувального акта на стадії досудового розслідування. Була оцінена необхідність зміни назви обвинувального акта. Було проведено порівняння відповідних положень КПК 1960 та 2012 рр. Встановлена необхідність розширювального тлумачення ст. 291 КПК. Зроблено висновок щодо ключової ролі прокурора при затвердженні обвинувального акта.

Ключові слова: прокурор, слідчий, обвинувальний] акт, матеріали кримінального провадження, затвердження обвинувального акта, закриття кримінального провадження.

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АНАЛИЗ ПОЛНОМОЧИЙ ПРОКУРОРА СОГЛАСНО СТАТЬЕ 291 УПК

Аннотация

Статья посвящена анализу полномочий прокурора при проверке материалов уголовного производства и утверждении обвинительного акта на стадии досудебного расследования. Была оценена необходимость изменения названия обвинительного акта. Было проведено сравнение соответствующих положений УПК 1960 и 2012 г. Установлена необходимость расширительного толкования ст. 291 УПК. Сделано вывод о ключевой роли прокурора при утверждении обвинительного акта.

Ключевые слова: прокурор, следователь, обвинительный акт, материалы уголовного производства, утверждение обвинительного акта, закрытие уголовного производства.