

Criminal and procedural guaranties of the defender as a subject of proof during investigating (detective) actions in pretrial investigation

Про кримінальні процесуальні гарантії захисника як суб'єкта доказування під час проведення слідчих (розшукових) дій у досудовому розслідуванні

Volodymyr Kushpit, Inna Tsyliyryk

Key words:

defender, investigating (detective) actions, pretrial investigation, procedural guaranties, subject of proof, proves.

Ключові слова:

захисник, слідчі (розшукові) дії, досудове розслідування, процесуальні гарантії, суб'єкт доказування, докази.

The acting Code of Ukraine in comparison to the one of 1960 as considerably enlarged the defender duties as for the proves gaining in the pretrial investigation, it has granted him the right to initiate to conduct the investigating (detective) actions as well as enlarged the criminal and procedural guaranties of the defender as a subject of proof in the pretrial investigation. But the results of the conducted research of the materials of criminal investigations, survey of the acting employees provide us with the conclusion that mechanism of criminal and procedural defender guaranties as of the subject of proof during the investigating (detective) actions, which is approved in the Code of Ukraine, is not ideal. Due to this there are numerous problems which are connected with the realization of the criminal and procedural guaranties for the defender as the subject of proof during the investigating (detective) actions.

Scientific and theoretical basis of the given research are the works of the native and foreign experts, namely: A. Aleksandrova, I. Basysta, R. Belkin, V. Galagan, N. Glynska, O. Kaplina, I. Kotiuk, M. Pogoretsky, V. Tertyshnyk, L. Udalova, S. Sheyfer, V. Shepitko and the other, whose researches touch upon the matters of the criminal and procedural proof, criminal and procedural guaranties and the functioning of the defender in the criminal investigation.

According to the Code of Ukraine the investigating (detective) actions can be implemented by the investigator (paragraph 2, part 1 of art. 40 of Code of Ukraine), by prosecutor (paragraph 4, part 2 of art. 36 of Code of Ukraine), by the head of pretrial investigation (paragraph 6, part 2 of art. 39 of Code of Ukraine) and by the employee of the operating unit who is entitled as investigator (part 1 of art. 41 of Code of Ukraine).

Having defined the role of the defender as a subject of proof during the investigating (detective) actions and his criminal and procedural guaranties in it, we have to mention that the defender has the right to get the proves or verify the received proves in the following ways: 1) with the help of participating in the investigating actions with the participation of the suspect (part 5 of art. 46 of the Code of Ukraine); 2) with the help of initiating of the investigation (part 3 of art. 93 of the Code of Ukraine).

In accordance to the part 3 of art. 93 of the Code of Ukraine the defender has the right to apply for the investigating actions in order to get the proves or to verify the gained ones. But after having analyzed the materials of the criminal investigation, we make a conclusion that in practice the defender is not equal conditions with the prosecutor, because the prosecutor before starting the investigating actions only has to apply to the investigating judge, who has to make a decision in the shortest term (from 6 hours to one working day) as for the application. The defender has no right to directly conduct the investigating actions, but according to the part 3 of art. 93 of the Code of Ukraine he has the right to initiate its conducting with the help of application to the prosecutor. In this case V. Rozhnova mentions that when legislation doesn't provide any particular reasons to deny the application, the review and satisfaction of the application depends only on the proper prosecutor's and court's understanding of the reasons to satisfy the application. The phrase "with appropriate grounds", which is used in part 1 of art. 220 of the Code of Ukraine, gives unlimited freedom to the subject of the application satisfaction, especially taking into consideration that in most of the cases the Code of Ukraine doesn't contain any particular

definition of the appropriate grounds to conduct any procedural actions¹. In this case it is better to agree with the position of O. Yanovska who acknowledges that direct dependence of the defender on the prosecution side decision whether to conduct any procedural actions and obvious inappropriate terms of reaction of the judicial authority to the application of the both sides in the solving of the identical matters during the pretrial investigation, prove the absence of the sides equal rights and not provided in the considerable way the basis of the competition in the criminal investigation².

In the scientific sources we can see that the defender can influence the proves' gatherings with the help of initiating the investigating actions and not official investigating actions. But we cannot completely agree with this idea because the initiation of the investigating actions by the defense implies only the proper application on the necessary actions, which can be approved or rejected. But the influence from the defense on the proves' gathering happens directly during appropriate investigation.

We think that the right of the defense to get the proves with the help of starting investigating actions is not of the common criminal investigation rules during the pre-trial investigation, and does not meet needs of the law practices due to the fact that the decision to conduct investigating actions is made by the prosecutor and by the investigator, who have controversial procedural interests in the criminal investigation.

Also we think that the following opinion of the scientists is controversial: they suggest in the matters of the competition as for the applications overseeing the duty of the investigator to apply to the prosecutor the materials of the criminal actions in case he/she rejects the application, and obligating the prosecutor to study the application by himself/herself and making the proper decision; or even to decline the statement on the application rejection. Such duty of the prosecutor will not provide the competition by any chance because the prosecutor as well as the investigator is the subjects of the accusation side which procedural interest does not coincide with the interest of the defense. In addition, the existence of such norm will create additional guaranties of the application examination to be prolonged and unreasonable rejections to the prosecutor.

It is also worth mentioning that one of the criminal and procedural guaranties of the defense as a subject of prove during the investigating actions in the pre-trial investigation is the right to apply the complaint in the term of 10 days on the rejection of the application on the conducting investigating actions (part 1 of art. 304 of the Code of Ukraine). Such complaint should be studied within 72 hours from the moment of its application by the investigating magistrate (part 1, 2 of art. 306 of the Code of Ukraine). As the practice proves in most of the cases the investigating magistrate decline the investigators' and prosecutors' statements on the rejection of the investigating actions application under the existence of the reasonable grounds; correspondent procedural actions take place; but we think that such mechanism of the criminal and procedural guaranties for defense (as a subject of proving) realization in the pre-trial investigation leads to prolongation of the criminal investigation and does not provide accurate and time-boxed proves obtaining by the defense in the pre-trial investigation; in some cases it even can lead to their loss. This has been pointed out by V. Gryniuk, namely he states that such procedure is the consequence of the prolonged investigating actions and unofficial investigating actions, which makes the defense chanceless to get the proves that can be used to disprove the suspicion³.

We think that to be able to provide proper mechanisms of the criminal and procedural guaranties of the defense realization as of the subject of prove during the investigating actions in the pre-trial investigation the decision to conduct investigating actions on the defense initiation, including the other subjects of the defense, victim or the juridical person's representative who is under the investigation, should be made not by the investigator or prosecutor, but by the investigating magistrate. It is also worth to mention that the same opinion is shared by the other local scientists – supporters of the procedural approach⁴.

¹ Rozhnova V. Does the unacceptability of the proves provided by the defense exist? / V. Rozhnova // Actual problems of the proves in the criminal investigation: materials of the Ukrainian scientific and practical internet conference (Odessa, November, 27, 2013), editing I. Gloviuk and others; Odessa Law academy. – Odessa, law literature, 2013. – Pp. 63–64.

² Yanovska O. Equality of the parties in the proving process: the problems of the law implications / O. Yanovska // actual problems of the proving in the criminal investigation: materials of the Ukrainian scientific and practical internet conference (Odessa, November, 27 2013), editing I. Gloviuk and others; Odessa Law academy. – Odessa, law literature, 2013. – Pp. 174–175.

³ Gryniuk O. Disproof by the defense of the suspicion (preliminary conviction) during the pre-trial investigation / O. Gryniuk // Criminal Law Journal. – 2015. – № 3. – Pp. 16–18.

⁴ Udalova L. Some problems of the proves gathering according to the new Code of Ukraine / L. Udalova // Proves and proving according to the new Code of Ukraine: materials of the International scientific and practical conference (Kyiv, December, 6–7, 2012). – Publisher D. Stokov, 2013. – P. 33.

The defense participation in the investigating actions is of high importance because, on one hand, it gives the legal help to the defendant during such actions, and on the other hand – it provides the fulfillment of the standards of the Code of Ukraine as for the order of the correspondent investigating actions conduction, also it increases the effectiveness of the appropriate evidence gaining; its activity, qualifications and experience can influence the behavior of the investigator who conducts the investigating actions; and the appropriate remarks, objections, applications and suggestions can influence the methodology and tactics of the investigating actions conduction, and the result as well⁵.

We think that there are the following goals of the defense as of the subject of prove during the conduction of the investigating actions: 1) to get proves that eliminate the following: the real circumstances that imply the existence of the suspicion, the fact of the criminal violation, the suspect's guiltiness in the crime, the motives and goal of committing the crime, existence of the damage due to the crime, existence of the circumstances that imply punishment; 2) to get proves that state the following: circumstances that decrease the damage's scope in the result of the crime, circumstances that eliminate the criminal liability, circumstances that are the reason to eliminate the criminal liability or punishment; 3) examination of the gained proves; 4) control over the possibility, appropriation and accuracy of the proves gaining by the investigator or prosecutor; 5) providing of the legal rights and legal interests defense of the defendant. During the investigating actions the defender as the subject of the prove uses his rights described in the Code of Ukraine and in the article 20 of the Law of Ukraine on "Advocacy and advocate activity", as well as the suspect's rights (part 3 of art 42, part 4 of art. 46 of the Code of Ukraine). In particular, the defender has the right to put the questions and express his/her suggestions, comments and objections as for the order of the correspondent investigating actions conduction, which is documented in the protocol (paragraph 2 part 6 of art. 223 of the Code of Ukraine); also he can use the technical means (item 11 part 3 of art. 42, part 4 of art. 46 of the Code of Ukraine). At the same time the provided set of rights does not always give the opportunity to the defense to provide effective proving in the pre-trial investigation during the conduction of the investigating actions.

Some complications of the realization of the procedural guaranties of the defense as of the subject of prove during the investigating actions in the pre-trial investigation appear due to the imperfection of the statements of the Code of Ukraine, which define the elements of the protocol that the investigator applies and the prosecutor in the result of the investigating actions. It should be mentioned that in the practice the investigators and the prosecutors do the protocols on the investigating actions in a rather formal way, they do not realize that they can be used as proves in the criminal investigation. At this very moment the proving actions of the defense are of high importance because if the defense does not see the violation done by the investigator or the prosecutor during the investigating actions when signing the protocol, then they will not be able to state the unacceptable proves, gained when conducting the investigating actions, during the criminal trial.

In this way we can conclude that there are the following criminal and procedural guaranties of the defense as of the subject of prove when conducting investigating action in the pre-trial investigation: the right to the defense to address the investigation magistrate to conduct the investigational actions; the right of the defense to provide short consulting when conducting the investigational actions on the own initiative or on the suspect's demand; the participation of the defense in the searching of the room provided by the investigator or by the prosecutor; normative definition of the duty to mention in the investigational protocols; the date, time of the beginning and the end of the investigational action, points of the necessity of the rights and duties clarification to the participants of the investigational action; information on the presence or absence of the protocol annexes; making the proves unacceptable in case they are gained at the result of the investigational actions with violations of its conducting.

Summary

In accordance with the second paragraph of art. 59 of Constitution of Ukraine there is state advocacy act to guarantee the right of protection from prosecution. The realization of this constitutional provision is of the high priority for criminal proceedings, especially during pretrial investigation; one of the major tasks of the last one is to protect rights, freedoms and legal interests of the suspect, which applies also to the defender to provide.

⁵ Lan O. Defender as a subject of the prove in the pre-trial investigation of the criminal actions as for the juvenile: dissertation of the candidate of law science : spec. 12.00.09 / O. Lan ; Kyiv National University of Taras Shevchenko. – K., 2016. – 104 p.

Effective execution of the duties of the defender in the pretrial investigation is possible only due to the presence of the correspondent criminal and procedural guaranties for the defender – the subject of proof and acting mechanisms of its realization in the pretrial investigation. The approved Code of Ukraine in the comparison to the one of 1960, has considerably enlarged the criminal and procedural guaranties of the defender as a subject of proof in the pretrial investigation being based on the principles of competition, equality and discretionary and having granted him the authority to provide proves.

Анотація

Відповідно до ч. 2 ст. 59 Конституції України з метою забезпечення права на захист від обвинувачення в державі діє адвокатура. Реалізація цього конституційного положення має пріоритетне значення для кримінального провадження, особливо у досудовому розслідуванні, одним із завдань якого є захист прав, свобод і законних інтересів підозрюваного, забезпечення чого покладається, зокрема, і на захисника. Ефективне здійснення захисником своїх повноважень у досудовому розслідуванні можливе лише за умов наявності належних кримінальних процесуальних гарантій захисника як суб'єкта доказування та дієвих механізмів їх реалізації у досудовому розслідуванні. Прийнятий КПК України, порівняно з КПК України 1960 р., ґрунтуючись на засадах змагальності, рівності та диспозитивності, значно розширив кримінальні процесуальні гарантії захисника як суб'єкта доказування у досудовому розслідуванні, надавши йому повноваження щодо здійснення доказування.

Literature:

1. Rozhnova V. Does the unacceptability of the proves provided by the defense exist? / V. Rozhnova // Actual problems of the proves in the criminal investigation: materials of the Ukrainian scientific and practical internet conference (Odessa, November, 27, 2013), editing I. Gloviuk and others; Odessa Law academy. – Odessa, law literature, 2013. – P. 112.
2. Yanovska O. Equality of the parties in the proving process: the problems of the law implications / O. Yanovska // Actual problems of the proving in te criminal investigation: materials of the Ukrainian scientific and practical internet conference (Odessa, November, 27 2013), editing I. Gloviuk and others; Odessa Law academy. – Odessa, law literature, 2013. – P. 177.
3. Gryniuk O. Disproof by the defense of the suspicion (preliminary conviction) during the pre-trial investigation / O. Gryniuk // Criminal Law Journal. – 2015. – № 3. – P. 38.
4. Udalova L. Some problems of the proves gathering according to the new Code of Ukraine / L. Udalova // Proves and proving according to the new Code of Ukraine: materials of the International scientific and practical conference (Kyiv, December, 6–7, 2012). – Publisher D. Stokov, 2013. – 33 p.
5. Lan O. Defender as a subject of the prove in the pre-trial investigation of the criminal actions as for the juvenile: dissertation of the candidate of law science : spec. 12.00.09 / O. Lan ; Kyiv National University of Taras Shevchenko. – K., 2016. – 104 p.

Volodymyr Kushpit,

*Associate Professor, Candidate of Law, Associate Professor of the Department of Criminal Law and Process
Educational-Scientific Institute of Law and Psychology
National University "Lviv Polytechnic"*

Inna Tsyliiryk,

*Assistant of The Department of Criminal Law and Process
Educational-Scientific Institute of Law and Psychology
National University "Lviv Polytechnic"*