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THE SYSTEM OF PROOF AS THE MAIN ELEMENT OF A UNIFIED FORM OF ACTION IN PRE-TRIAL PROCEDURE REALIZATION

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Abstract:

Subject / topic. *The system of proof within the pre-trial proceedings in the matter of unified procedural form*

Objectives/goals. *Analysis of problematic issues that have relation to the system of proof in pre-trial proceedings under the criminal procedure code of the Russian Federation. The author states that the differentiation of the form of action in pre-trial procedure predetermines that each of them has the individual system of proof, including the subject of proof, sources (procedural means) of data collection under the recognition as proof, which, as the example of an inquiry in a short form, requires appropriate changes in legislation.*

Methodology. *Analysis, synthesis, comparison, abstraction, target setting, hypothesis formulation, concretization, monitoring.*

Conclusion. *On the basis of legal analysis and the author's approach to the content of the legal form of action as an institution, there is a conclusion that the system of proof within the matters when the inquiry occurs in the short form, such system requires the conretization and individualization within the content of special Chapter of the criminal procedure code which regulates the above-mentioned legal Institution.*

Keywords: *subject of proof, range of proof, process of proof, means of proof in cases where the inquiry is in a short form*

I. Introduction

The specialists who study the problems of pre-trial procedure and, in particular, the current situation and perspectives for improvment of its compact procedure, it is known that there was the addition of a fundamentally

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new Chapter 32.1 - "Inquiry in short form" (hereinafter unified inquiry), adopted on March 4, 2013, in the Criminal procedure code of the Russian Federation (hereinafter CPC) by Federal law No. 23-FL. Thus, the legislator has restored the possibility of unified pre-trial registration of materials in regard to crimes in a certain category of criminal cases, which has largely simplified character within the procedural form and has significantly higher speed of activities in the investigative bodies and, above all, the police, in relation to mass and simple categories of criminal cases by the construction difficulty.

There is no doubt that with the enactment of the Federal law, the legislator, in comparison with the pre-reform criminal procedure code of the RSFSR, made a significant improvement in differentiation of the procedural form of action in pre-trial procedure. Thus, a new procedural form of action in pre-trial procedure has appeared in the domestic criminal procedure legislation, which is fundamentally different from the dual form of pretrial procedure.

Actually, what were the significant differences between the preliminary investigation and the inquiry, regulated by article 120 of the criminal procedure code of the RSFSR, in the disposition of which there was a formulation that the subject of procedural activity " follow the rules established for the preliminary investigation, except as provided...". And those in turn reduced to three conditions: non-participation of the defender; non-familiarization with criminal case materials by the victim, civil plaintiff, civil defendant and their representatives, they got the notice about the termination of inquiry; the appeal instructions order of the Prosecutor. The inquiry had a shorter period of procedure. We note that all these differences are essentially quite formal and, as practice has shown, had no significant impact on the declared differentiation in regard to the procedural form of action.

In one of his publications, the researcher Yu. K. Yakimovich expressed his point of view in relation to this issue by assessment of the pre-trial procedure state as "extremely" solid and practically non-differentiated. He, in particular, did not find any significant differences in the procedures of inquiry and preliminary investigation, which, according to him, "existed at the beginning of the criminal procedure code of the Russian Federation". Within the determination process in regard to inquiry difference from the investigation in the field of investigators activity in the Ministry of Internal Affairs, he replied – "There are practically no differences"[1, p.203-208].

A similar opinion belonged to L. V. Golovko, who defined the level of differences between two seemingly independent forms of preliminary investigation, as no less than "an artificial conceptual distinction", in which the subjects of procedural activity "are most often the same police agencies and who have the similar goals and means of procedure" [2]. He also made a conclusion that "all attempts to theoretically justify such parallelism have failed."

We can quote such judgments even further, but one thing is clear – the link of the procedural forms of action to each other, in accordance with the idea of the previously quoted expert by "goals and means of procedure", by subjects, and by systems of proof leads to their mixture, the erase of fundamental differences within the basis of trial procedures by developers and legislators.

As a result, later, scientists and practitioners-registrars have to formulate appropriate, often quite vague commentaries that allow to clarify and bring to the attention of the law enforcement officer the legislator goals , which constitute the basis for the legal regulation of specific procedural forms of action.

We leave beyond the scope of this study the various problems that have developed within the issues of theoretical justification and practical use in the field of the advantages and disadvantages of specific procedural forms of action in pre-trial procedures, we will underline the system of proof regulated by the legislator for an inquiry

within the short form, the disadvantages of the mentioned legal structure and ways of adjustment in order to achieve the necessary adequacy.

We use the concept of proof in regard to the next definition "the process establishment of truth in legal procedure, its estimation, justification of ideas about its content" [3 c. 541], and under the concept of system we use – "a set of any elements, units, parts within the combination by a common feature, or purpose" [4 p.742]. In this case the term of proof becomes a common feature. In other words, everything related to proof and has a projection in regard to the trial inquiry procedure in a short form it is the subject of our study.

Thereafter, in order to study the problem, it is necessary to focus on the state and adequacy of the legal regulatory actions in relation to the subject of proof, the limits and conditions of proof, the process of proof and the means of proof.

Thus, G. M. Minkovsky, V. A. Tanasevich and A. A. Eisman define the subject of proof as "a system of conditions that expresses the properties and connections of the event under study for the correct final result of the criminal case and the implementation of the legal procedure tasks in each particular case" [5 p. 139]. A. B. Solovyov writes that under the concept of the subject of proof we determine "a set of conditions to be proved within a criminal case" [6 p. 36]. The authors of the textbook under conceptualization of the subject of proof, express even more specific definition – "it is the minimum of conditions, the establishment of which is a obligatory for the criminal case settlement as the matter of fact, the set of the actual case conditions, the establishment of which is necessary for its correct settlement" [3 p.542].

The basic list of such conditions to be proved in any criminal case occurs within the article 73 of the criminal procedure code.

At the same time, I. B. Mikhailovskaya correctly notes that "there is legal formulation of the subject of proof in general terms, that is applicable to all types of crimes" [7 p. 150].

All the above-mentioned opinions of scientists have the direct relation to the topic of our research.

Within the formulation process of the subject of proof in cases where the inquiry is in a short form, the legislator quite reasonably did not act with it in the blanket form with reference to the basic form in regard to the preliminary investigation with established direction to the provisions of article 73 of the criminal procedure code.

The subject of proof for an inquiry in short form belongs to the Chapter of the criminal procedure code specifically dedicated to such topic, in part 1 of article 226.5 and includes: the event of the crime; the nature and extent of the harm caused by it; the guilt of the person in the offence perpetration.

Such approach of the legislator to the tasks of a unified inquiry in many respects reminds the similar directions that related to the police inquiry under the legislation of the Russian Empire.

Their formulation was as follows: "Under the obligation to detect crimes, the police officers after statements or information receiving about the crime, realize an inquiry to study the fact of the crime and, if there was confirmation of crime, then what, when, by whom and under what circumstances it happened" [12].

However, this list of information as the subject of investigation in each case will definitely not be complete if it does not consider the conditions that exclude the performance of inquiry in a short form, an exhaustive

list of which the legislator placed in part 1 of article 226.2 of the criminal procedure code. These conditions include the following cases:

- the suspect is a minor and it appears to be that the age of the person who committed the crime must be under investigation;

- discovery by the inquiry of information that allows us to make a conclusion that the suspect has a chronic mental or drug-related illness, which inevitably causes the involuntary treatment;

-the suspect has strictly defined privileges, which allows to include him to the number of participants within the trial procedure with a special status, a complete list of which contains the provisions of article 447 of the CPC, so , those that are subject to special order within criminal procedure;

-the informed person who is guilty of two or more crimes;

- the suspect requires the services of an interpreter;

-the position of the victim, expressed during the investigation, is to object to the performance of inquiry under the short form.

The information above with the necessary reliability must also correspond to the facts for each case before a decision making about the form of trial procedure. Is this enough? We believe that it is quite enough.

It is also important to note that the legislator acted reasonably by addition of the above-mentioned norms to the special Chapter that dedicates to the inquiry in a short form. The legislator reduced to it all the legal information that characterizes the analyzed procedural institution.

Within the description of the range of proof, we should note that there is no unified approach to determination of the range of proof within the inquiry.

In accordance with L. M. Karneeva's opinion, "If we consider the subject of proof as the investigation condition margins within the case in horizontal direction, then the ranges of proof, which determine the depth of their research, can be conditionally belong to the definition as the boundaries in the vertical direction" [8 p. 104].

According to A. R. Belkin, "the range of proof is a cumulative evidence necessary and sufficient for reliable investigation of the conditions within the subject of proof" [3 p.546], which is difficult to disagree with.

As with the other opinion expressed in the special literature that "the ability to determine the cumulative evidence in a criminal case necessary and sufficient for clarification of all the circumstances within the subject of proof, should be provided to the subject of proof" [9 p. 122], it means to the investigator.

This is how the legislator determined the scope and range of proof in the course of inquiry procedure in a short form. It obliged the inquirer to perform only those investigative and procedural actions, the non-production of which may cause the irreparable loss of traces of a crime or other evidences.

In addition, the legislator granted the investigator the right to determine whether the scope of investigative measures is sufficient.

The author's experience in investigative forces highlights that it is not uncommon for service prosecutors and heads of investigation forces to require subordinate investigators and interrogators to conduct criminal

cases in order to formally demonstrate the performance volume of investigative work, to conduct interrogations, investigative and procedural actions that do not influence the investigation prospects.

By the assignment to the investigator the independence to determine the scope of proof, the legislator gave him the right, under certain conditions, not to check the evidence, to interrogate the persons involved in the case, and not to conduct other investigative actions, not to appoint forensic inquiries, unless the investigation situation requires it. The inquirer is the person who has exactly the opportunity to determine the necessity to determine the findings relevant to the case.

We determine extremely important that the investigator also has the right not to perform investigative and procedural actions, when such information contains in the massage audit reports in regard to the crime and they coincide with the requirements of the law, immanent evidences.

Thus, the legislator actually correlated the materials evidential significance of the the crime statement verification and any information (factual data) under recognition of the CPC as proof. This is extremely important in discussion about the problem of formulation in regard to system of proof, within the framework of the unified inquiry procedural form.

Some examples. Thus, the legislator within the CPC regulates the norm, where he suggests "not to interrogate persons from whom during the massage examination there was explanations receiving ". Ipso facto, the information about the crime within the interrogation Protocol and, from here, under unambiguous evidence recognition during the preliminary investigation, has the identification with the information of explanation document, and posses the evidentiary value during the investigation in a short form.

In addition, the legislator fixed the norm, in which he has practically identified the expert's conclusions within the crime report verification in the course of inquiry in a short form, and the conclusion of the forensic analysis during the preliminary investigation.

Concurrently , the criminal procedure code defines a legal procedure that does not allow for other investigative and procedural actions to get information of the case, if such there was a receipt of such information earlier, during the message examination, and contains the inherent "qualification of evidence".

From the all the above it follows the question and in the same time the conclusion – and what data (information) can actually meet the qualification requirements of the CPC in regard to proof? We suppose that - only the proof itself.

The above-mentioned arguments lead to the next element characteristic for the system of proof - to the sources of proof, means of proof within the trial procedure of inquiry in a short form.

Probably it would be wrong, that, from our point of view, the legislator also determines within the assessment procedure of the sources characteristic in regard to "any information" that has permission to participate in the investigation in a a short form, to use legal remedy of the preliminary investigation. Otherwise, there will inevitably be a mixture of elements with one another, and the result of all this will be confusion and accusations in relation to artificiality in differentiation of the procedural forms of actions in pre-trial procedures.

What is the idea in this case?

In accordance with the criminal procedure code, within the crime report check, the subject of investigation has a right to obtain any information by the following procedural means: explanations of participants; samples for comparative research; documents and objects; conclusions of forensic examinations and specialists; inspection records: locus of the accident , documents, objects, corpses; protocols and examination certificates, documentary verification, audits, studies of documents, corpses; data of the agencies of inquiry in regard to the results of the execution of commission in relation to law enforcement intelligence-gathering activities.

Note that such an approach of the legislator to the so-called pre-investigation examination was unthinkable even some time ago, within the regulation context of dual form for preliminary investigation under the criminal procedure code of the RSFSR. And this, from our point of view, is undoubtedly a step in the correct direction. Since the differentiation of the procedural form of action should not reduce to formal differences.

The procedural form of action is subject to specific tasks and must correspond to them. The unified form of pre-trial procedure is to ensure optimal, in compliance with the requirements of procedural economy, registration of cases within a certain category and, in particular, in regard to obvious and not very dangerous crimes with a simple structure structure, when the guilty person admits his guilt, which demonstrates remorse for criminal behaviour.

Undoubtedly, the mentioned procedural means allow us fully identify and record evidentiary information by the category of criminal cases where the investigation performs in a short form. The utility problem for such sources of proof information within the framework of a unified inquiry deserves independent scientific research, which the author plans in the near future.

The listed sources analysis of information gathering within the scope of the CPC during the crime report examination allows us to make a conclusion that most of them are sources of proof and belong to the number of "other documents".

Such classification,from our point of view, is quite appropriate when it comes to preliminary investigations, where, of course, we use other means of procedure more often: statements of participants, conclusions of forensic examinations, crime investigation procedure records.

At the same time, within the specifics of the procedural form of action itself, most of the unified inquiry uses the legal means for the crime report examination. They are exactly the main ones.

We suppose that it would be correct to determine these means of procedure as independent sources of "any information" within the framework of an inquiry in a short form and to give them the force of immanent evidence for this procedural form of action in regard to the system of proof.

The proposed decision making, from our point of view, will further individualize the procedural form of action for a unified inquiry and ensure a real differentiation of the procedural form of action within the criminal pre-trial procedure.

In accordance with our approach, which we defined at the beginning of the article, the system of proof also includes such element as the procuring evidence.

The conventional thinking in regard to the definition of "procuring evidence" belongs to the authors of the Course of criminal procedure. They determine that it refers to" the collection, examination and assessment of proof in accordance with the law in order to reliably establish the conditions of a criminal case " [3 p.560].

In addition, monographic studies of A. B. Solovyov [10], Yakimovich Yu.K. and pan T. D. [11] relate to this problem.

The procuring evidence in cases where an inquiry performs in a short form, undoubtedly, has its own peculiarities, however, we believe that their study within this publication for the limitation reasons is not appropriate, since they are also a subject for independent research.

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