

Evidential Significance of the Results of Operational Search Activities at the Stage of Criminal Case Initiation According to Russian Criminal Procedure Legislation

Y P Ryapolova¹

¹Department of Criminal Procedure and Criminalistics, Southwest State University, Kursk, 50 let Oktyabrya str 94 305040, Russian Federation

E-mail: yaroslava@mail.ru

Abstract The article deals with studying the problematic issues related to the assessment of the evidential significance of the results of operational search activities obtained prior to the criminal case initiation and the admissibility of their use in criminal procedure evidence at the subsequent stages of the criminal proceedings. The exceptional evidentiary value of the operational search information is substantiated for those cases when it is obtained during the preparation or at the time of committing a crime, and cannot be obtained or replaced by a procedural means as part of the preliminary crime investigation. The author comes to the conclusion that in order to establish sufficient evidence of a crime (the ground for criminal case initiation under Article 141 of the Russian Federation Code of Criminal Procedure), the results of operational search activities can be used directly (i.e. without necessary transformations and giving the information received the status of evidence through duplicate investigative and procedural actions) by a legal person endowed with the right to initiate a criminal case. At the same time, in order to legally use the information obtained in the criminal procedural evidence at the subsequent stages of the criminal proceedings, they must be enshrined in the procedure. Based on the analysis of judicial practices of the Russian courts, the position of the Constitutional Court of the Russian Federation as well as the practices of the European Court of Human Rights on the problem of the scientific research, the causes and consequences of violations committed by law-enforcement officers carrying out operational search activities when checking reports of crimes are analyzed. The author argues that a problem of a possible 'police entrapment' remains unsolved and substantiates the fact that there is no comprehensive legislative approach to the criminal procedure regulation, form and conditions for using the results of operational search information at the pre-trial stage and, as a result, the lack of coordinated application of the norms of the Federal Law On Operational Search activities and the Code of Criminal Procedure of the Russian Federation.

1. Introduction

In accordance with Russian legislation, operational search activities (OSAs) are carried out outside the framework of the criminal proceedings. However, it is aimed at efficient obtaining information used in making key criminal procedural decisions. As evidenced in practice, for certain categories of crimes (bribery or illicit drug trafficking), the reason and sufficient grounds for criminal case initiation are most often the results of the relevant operational search measures (up to 97% of cases) [1].

At present, in the science of criminal procedure and theory of OSAs, theoretical approaches to determining the relation between criminal procedural activities and operational search ones, the conditions and grounds for operational search measures and further legalization of their results in criminal proceedings have been developed. At the same time, the issues related to the admissibility of using operational search information when making decision concerning criminal case initiation are still considered to be poorly studied. The problem should be focused on a number of theoretical and applied issues mainly associated with the need to enforce the rights and legitimate interests of the persons involved into criminal procedural relations at the very early stage of the investigation. The practices of the European Court of Human Rights help reveal the imperfection of the procedural aspects of exercising some operational search powers at the stage of verifying a crime report as an automatic possibility of violating the order of their measures and operational officers' abuse [2].

Thus, the issues of determining the evidentiary value of the results of OSAs obtained prior to criminal case initiation, and the admissibility of their use in the criminal procedure at the subsequent stages of the criminal proceedings are of a certain scientific and practical interest and urgent.

2. Results and discussion

Art. 11 of the Operational Search Activities [3] indicates the admissibility of using operational search information at the stage of criminal case initiation as a reason and grounds for criminal case initiation as well as a means of establishing the grounds for refusing to initiate a criminal case; in criminal procedural evidence as well as orienting and supporting information when preparing and organizing investigative and other procedural actions.

The Code of Criminal Procedure of the Russian Federation (RF CCP) directly permits to carry out operational search measures as independent verification actions prior to criminal case initiation on the written request of the investigator (Part 4, Art. 21; Para. 4, Part 2, Art. 38, Part 1, Art. 144 of RF CCP). In the Resolution dated November 6, 2014 No 27-P, the Constitutional Court of the Russian Federation also indicates that the results of the OSAs are a supplementary means for establishing legally relevant facts and circumstances that are important for making a procedural decision provided for in Article 145 of RF CCP based on the results of the consideration of the report of a crime [4]. The theory of OSAs has developed the idea that the results of OSAs are a kind of recorded information and can be a ground for the formation of all types of evidence regardless of the fact whether they were carried out prior or after a criminal case initiation [5, 6].

At the same time, it is necessary to take into account the specificity of the legal structure of operational investigative information at the stage of criminal case initiation: at these stages, the criminal procedure allows operating data, which are a relatively free in form and characterized by probabilistic content, without their formalizing or content transformation. The paradox also lies in the fact that the materials obtained in the process of checking reports of a crime are ambivalent in character. To refuse to initiate a criminal case it is sufficient to have verification materials obtained through operational search measures and presented in an inappropriate procedural form, or even wrongfully obtained. If a criminal case is initiated, then the issue of giving the materials verified by means of OSAs the status of procedural evidence is inevitable, since, as the Constitutional Court of the Russian Federation indicated, the results of operational search measures are not evidences but only information concerning the sources of those facts, which, being obtained in compliance with the requirements of the Federal Law on the OSAs, can become evidences after being enshrined applying the appropriate procedural method [7]. There would be no such a problem if the criminal procedure legislation directly allowed using OSA materials as sources of evidence as the lawmakers of some neighbouring countries did. In accordance with Part 2 of Art. 88 of the Code of Criminal Procedure of the Republic of Belarus, procès-verbaux are the sources of evidence; in Art. 246 of the Code of Criminal Procedure of Ukraine, there is a definition of covert investigative (search) activities the results of which are used in proving in criminal proceedings along with evidence obtained by open means. There are similar regulations in the criminal procedure legislation of Georgia, Kazakhstan, and Latvia [8]. There are also proponents of this approach in the scientific community [9].

The exceptional evidentiary value of the operational investigative information is due to the fact that in many cases it cannot be obtained only by means of traditional methods, but it cannot also be replaced by anything. In contrast to investigative actions, as a rule, operational search measures are carried out during the preparation or commission of a crime, information about which at the time of their formation is immediately registered in the operational records. In addition, the information concerning a crime obtained as a result of operational search measures prior to the criminal case initiation is identical to the information concerning the crime obtained as a result of the investigative procedures.

Finally, in certain categories of crimes, the establishment of circumstances to be proved is possible only during operational search activities and using the results in criminal procedure proving already at the stage of criminal case initiation. For instance, it is possible to establish the intent to sell, as a constituent characteristic of the elements of certain crimes, only during an operational search measure such as sample purchase, when a guilty person sells at least part of his product. To prove the intent to sell at the stage of preliminary investigation activities by means of only investigative actions is a very difficult task. In fact, further investigative actions such as questioning of participants of the sample purchase and representatives of the public who were present, examination of the money used as a means of payment are aimed only at verifying the information obtained concerning the intention to sell and establishing the reliability of the operational search action.

The downside of the positive practices of operational support of pre-investigative checks lies in possible violations of the conditions, grounds and procedure for carrying out operational search measures prior to criminal case initiation. Revealed facts can cause invalidation of the evidence, unjustified restriction of the constitutional rights and freedoms of persons in respect of whom the report of a crime was being checked.

The reason for such violations lies in the imperfection of the legislative regulation of the procedure of giving written instructions to the inquiry body on the procedure of operational search measures with regard to Part 4, Art. 21, Para. 4; Part 2, Art. 38; Part 1, Art. 144 of the RF CCP. These regulations do not contain information on the grounds for the investigator to give instructions to the inquiry body, do not regulate the procedural order for their issuing and deadlines and do not establish the possible scope of the order to the inquiry body [10]. An investigator has no legislative possibility to receive all the obtained operational search information in full [11]. The law also does not contain a consistent mechanism for introducing the results of operational search activities into the criminal proceedings; at the sub-legislative level, only the Instruction on the procedure for presenting the results of operational search activities to the inquiry body, investigator or court is adopted [12].

In Russia, primarily concerning the cases connected with corruption crimes and drug trafficking, there is a challenge associated with using the data obtained as a result of sample purchases or operational experiments that have elements of entrapment (i.e. in cases of direct or indirect incitement, persecution, or inducement to commit any illegal actions) as the evidence of the guilt of the accused, which is prohibited by the provisions of Art. 6 of the European Convention on the Protection of Human Rights and Fundamental Freedoms [13]: entrapment by law enforcement agencies cannot justify the use of evidence obtained as a result of these actions. Despite the fact that in a number of key decisions on this issue [14-16] the European Court of Human Rights formulated clear criteria for entrapment, neither Russian legislation and the system-forming practices of the Supreme Court of the Russian Federation contain a clear definition of the term 'entrapment' nor do they define standards of evidence and other parameters of judicial review of complaints against it [17].

The admissibility of using materials obtained in a sample purchase or operational experiment when there is a 'trap' situation is interpreted ambiguously: law enforcement agencies do not check the available information on the participation of a particular person in criminal activities but intend to 'catch' any person who commits a crime in the simulated conditions [18].

The judicial response to such situations can also be different. This can be seen comparing the Generalization of the Court of the Yamal-Nenets Autonomous Okrug [19] and the Judgement of the Presidium of the Stavropol Regional Court in case No 44u-787/13 [20]. In a number of cases, there is

insufficient evidence to ensure that there is no pressure on the person to induce him to commit a crime; cases when the courts apply the elements of the ‘essentially passive manner’ standard such as the persistence and repeated requests of a police agent to commit a crime are mainly single ones [21]. At the same time, the practices of ‘duplicative sample purchases’ caused an urgent need for the courts to develop a provision on their inadmissibility [22-23].

3. Conclusion

1. There is an expediency and practicability of using the results of operational search activities not only to identify the facts having the elements of a crime and necessary to resolve the issue of criminal case initiation, but also to establish circumstances to be proved in criminal proceedings and to obtain full procedural evidence.

2. The urgent problem is that at the stage of checking reports of various incidents, simultaneous implementation of various types of law enforcement activities (administrative, operational search, criminal procedure) is allowed, while only the information obtained by the procedural method has the status of evidence; up to the present, there is no legislative mechanism for using the results of operational search activities in criminal procedural evidence.

3. Cases of police entrapment are considered an urgent problem for Russian practices, which indicates that higher judicial bodies of the Russian Federation have to develop a clarifying guidance on the criteria for distinguishing entrapment from lawful operational search activities within the framework of the provisions of the European Court of Human Rights formulated in its decisions on this issue.

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