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INVESTIGATION OF THE PRE-TRIAL REPORT DURING THE TRIAL IN CRIMINAL PROCEEDINGS OF UKRAINE

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Abstract. The article is devoted to the problems of functioning of the institution of probation in criminal proceedings of Ukraine. It is stated that the national criminal procedural legislation does not establish the procedure for investigation of the pre-trial report by the court during the trial with the participation of the parties. It is emphasized that such a legislative gap limits the competitiveness of the parties and creates obstacles on the way to achieving the truth in the case. The article draws attention to the fact that most researchers define a pre-trial report as a written document that characterizes the accused and contains a conclusion about the possibility of correction of the person without applying the punishment associated with isolation from the society, without disclosing its procedural nature. Pre-trial report's procedural nature, as the authors emphasize, determines whether the analyzed document will be the subject of investigation during the trial. Based on the conducted research, they conclude that the report of the probation authority is a document – evidence in criminal proceedings, which, for the purpose of investigating in the trial, must be included in the list and volume of evidence to be examined, in accordance with Article 349 of the CCP of Ukraine. At the same time, it is emphasized that the report of the probation service should be investigated last, at the final stage of clarifying the circumstances of the criminal offence, as part of the addition to the trial, since it concerns the issue of the sentencing. Pre-trial report as an evidence-document must be announced at the court hearing with the opportunity for the parties to express their position regarding report's content and preparation methodology. The authors note that during the investigation of the probation report, the parties may ask their own questions to the probation officer, which requires his inclusion in the list of participants in the court proceedings, to whom the parties and other participants in the court proceedings have the right to ask questions during the investigation of the documents (part 2 of Article 358 of the CCP of Ukraine).

Key words: pre-trial report, evidence, document, investigation of the documents, trial, the final stage of clarifying the circumstances of the criminal offence; addition to the trial.

Introduction. With the entry into force of the Law of Ukraine “On amendments to certain legislative acts of Ukraine regarding enforcement of criminal punishments and implementation of the rights of convicts” dated September 7, 2016, No. 1492, the internationally popular institution of probation was introduced into the criminal justice model of Ukraine, in particular its variant – pre-trial probation, the purpose of which is to more fully provide the court with information, systematized in the form of a pre-trial report, which characterizes the person of the accused in order for the court to make a decision on the type and extent of punishment (Pro vnesennia zmin do deiakykh zakonodavchykh aktiv Ukrainy shchodo zabezpechennia vykonannia kryminalnykh pokaran ta realizatsii prav zasudzhennykh, 2016).

Having established the provision, according to which the court, passing the sentence, considers the pre-trial report with information about the socio-psychological characteristics of the accused (para. 17 part 1 of Article 268 of the CCP of Ukraine) (Kryminalnyi protsesualnyi kodeks, 2012), the legislator, however, did not regulate the procedural form of the report's investigation at the stage of the trial of a criminal case. This state of legal regulation in the Ukrainian criminal procedure science rightly considered as a legislative gap, since the parties to a criminal legal dispute should have the right and opportunity to express their opinions regarding the content of the report prepared by the probation service, the methodology for assessing the personality of the accused, to question the provisions of such report. Whereas the making of the final decision is carried out by the court in the deliberation room, the commission of the said actions by the parties during the adoption of the verdict is impossible. This approach of the legislator can damage not only the adversarial nature of the criminal proceedings, but also make it impossible to achieve the truth in the case, because the subject of proof and investigation in court proceedings includes the circumstances that characterize the accused (para. 4 of part 1 of Article 91 CCP of Ukraine). Therefore, the shortcomings of the probation report can distort the court's vision of the accused's personality and lead to the imposition of a punishment that does not correspond to his personality.

Thus, there is a need to determine the procedural mechanism of the investigation of the pre-trial report's data during the trial with the participation of the parties, for which it is expedient to clarify the procedural nature of the report of probation authority itself and to determine the possible procedural form of its investigation, setting it in the criminal procedural law.

The goal of the study. The purpose of the study is to develop theoretical and practical recommendations regarding the stage and order of investigation of the pre-trial report of the probation authority in a court proceeding with the participation of the parties. For this, the following tasks should be performed. To clarify the procedural nature of the pre-trial report in the criminal proceedings of Ukraine, to determine the stage of investigation of the pre-trial report within the framework of the trial, outline the procedural form of the investigation of the probation report during the trial considering the identified features of the procedural nature of such report, to develop recommendations regarding legislative changes and additions in the part of the mechanism of investigation of the pre-trial report in court proceeding under the CCP of Ukraine.

Material and research methods. The basis of the research was doctrinal approaches and legislation relating to the concept of evidence in criminal proceedings, pre-trial report, features of the trial and investigation of evidence, in particular documents. During the study, a systemic-structural approach was used, with the help of which the stage of clarifying the circumstances of the criminal proceedings, during which the evidence-documents are investigated, was separated from the trial as a system of stages. The leading methods of this study were formal-logical – analysis, comparison and generalization, that allow to clarify the features of the pre-trial report, compare them with the features of the evidence in criminal proceedings, and to make conclusions during the research. Forecasting and modeling methods were also used, in terms of constructing possible legal situations that may arise during the investigation of the pre-trial report in the court proceeding.

Results and discussion. The legal definition of a pre-trial report describes it as written information for the court that characterizes the accused (para. 2 of part 1 of Article 2 of the Law of Ukraine “On Probation” (Pro probatsiiu, 2015). This definition, in our opinion, does not fully reflect the features of this legal phenomenon, since the pre-trial report not only contains information about the accused, but also a conclusion about the possibility of his/her correction without the application of punishment associated with isolation from society (para. 3 of Chapter III of the Procedure for preparing a pre-trial report) (Poriadok skladennia dosudovoi dopovidi, 2017). And what is the most important, it does not give the answer to the question about procedural nature of probation report which, in our point of view, is decisive in clarifying the features of the evaluation of the pre-trial report by the subjects of the criminal process.

It should be noted that the researchers of the institute of the pre-trial report, revealing its concept, mostly bypass the issues related to its procedural nature. The doctrinal approaches analyzed by us agree on the fact that the report of the probation service is a written document that is prepared at the stage of the trial and contains comprehensive information about the accused with a conclusion about the presence of risks of re-offending and the possibility of correction of the offender without the punishment in the form of deprivation of liberty, and also serves as an auxiliary tool for the court when making a decision on the type and extent of punishment (Maksymenko, 2020: 49; Olefir, 2015: 34; Tkach, 2014: 56; Chuhaievskaya, 2018: 706).

Clarifying the procedural nature of the pre-trial report is essential, since it depends on it whether the analyzed document is subject to investigation during the trial in the criminal proceedings. For example, if the pre-trial report is considered to be only a document – a constituent part of the criminal proceedings' materials (according to part 6 of Article 314-1 CCP of Ukraine, the pre-trial report is attached to the criminal proceedings materials), then such document is not necessarily investigated during the trial, by analogy with other documents in the case, that do not affect the content of the sentence (as, for example, petitions of participants in the trial, subpoenas for summoning participants to a court proceeding, decisions made by the court without going to the deliberation room, etc.). If the pre-trial report is considered evidence in criminal proceedings, then the court is obliged to investigate it, and the parties have the right to participate in its investigation.

The analysis of the legislative definition and doctrinal approaches to the concept of evidence and the analysis of the features of the pre-trial report provide grounds for concluding that the pre-trial report has the procedural nature of evidence in criminal proceedings.

According to the Ukrainian legislator, evidence in criminal proceedings is factual data obtained in the manner prescribed by the Code, based on which the investigator, the prosecutor, the investigating judge and the court establish the presence or absence of facts and circumstances that are important for criminal proceedings and subject to proof (para. 1 of Article 84 CCP of Ukraine).

In the criminal process science, the concept of "evidence" is suggested to be understood as a set of such elements as: a) any factual data which is important for criminal proceedings (content of the evidence); b) the procedural form of their consolidation (the method of using evidence in the materials of criminal proceedings); c) carrier of information (external expression of evidence) (Blahuta, Hutsuliak, Defeniuk, 2018: 41).

Ukrainian scientist M. Shumylo, analyzing the legal definition of evidence in criminal proceedings, set in para. 1 of Article 84 CCP of Ukraine, concludes that there are three components in the legal construction of evidence: informational ("evidence in criminal proceedings is factual data"), regulatory ("obtained in the manner prescribed by the Code" and "establish the presence and absence of circumstances that are important for criminal proceedings and subject to proof") and logical ("based on which the investigator, prosecutor, investigating judge and court establish the presence or absence of facts and circumstances that are important for criminal proceedings and subject to proof") one (Shumylo, 2018: 65).

Another researcher – V. Hmyrko – suggests a similar structure of evidence to the one proposed by the named legal scientist. In his opinion, evidence is a result of the person's intellectual operations, which consists of cognitive, informational and normative segments. The researcher calls one of the structural elements of evidence the normative-procedural one, which establishes the requirements for the legal procedure for obtaining evidence: a) it is factual data; b) it must be obtained in accordance with the procedure prescribed by the CCP of Ukraine; c) factual data must have legal and cognitive significance for criminal proceedings; d) evidence must meet the requirement of the CCP regarding propriety and admissibility (Articles 85–88 CCP of Ukraine) (Hmyrko, 2014: 34).

If we take as a basis the given valid positions regarding the understanding of the structure of the evidence, then the pre-trial report, in fact, contains information about the facts (factual data),

namely those that primarily characterize the accused: the history of committing offence; attitude of the accused towards the incriminated offence; conditions of his/her life activity and development; personal characteristics and social environment, etc. (para. 3 Chapter III of the Procedure for preparing a pre-trial report).

The procedure for collecting information about the accused and preparing a pre-trial report is mainly regulated by the by-law act (the Procedure for preparing a pre-trial report). CCP of Ukraine contains only a blanket norm, which refers to the relevant provisions of the legislation (para. 3 of Article 314-1 CCP of Ukraine) and set the rights and obligations of participants in criminal proceedings during pre-trial report preparation (para. 7, 8 part 4, para. 4 part 7 of Article 42, Article 72-1 CCP of Ukraine). Thus, the information contained in the pre-trial report is obtained in the manner subscribed by the criminal procedural legislation.

The information received by the probation officer is related to the circumstances that must be proven in criminal proceedings and are part of the subject of proof (in accordance with the requirements of para. 4, 5 of part 1 of Article 91 CCP of Ukraine). For example, such fundamental substantive elements of the pre-trial report as the conditions of life and development of the accused (housing, education, work, financial situation) can become a strong argument for the commission of a criminal offence because of the coincidence of grave personal, family or other circumstances, which, according to para. 5 of part 1 of Article 66 of the Criminal Code of Ukraine, is a circumstance that mitigates the punishment and is subject to proof in criminal proceedings (para. 4 of part 1 of Article 91 CCP of Ukraine).

Therefore, the pre-trial report must be considered (is) evidence in the criminal proceeding of Ukraine, since: a) it contains data on the fact characterizing the accused; b) data of this document is obtained in the manner subscribed by criminal procedural legislation; c) pre-trial report relates to the circumstances included in the subject of proof. It should be noted that the pre-trial report corresponds to the characteristics of one of the procedural sources of evidence – a document (Article 99 CCP of Ukraine).

The procedural nature of the pre-trial report makes it possible to determine the stage of the trial in which it will be investigated.

A mandatory condition for the investigation of certain evidence is its inclusion (based on Article 349 CCP of Ukraine) in the volume (list) of evidence to be investigated and the order of their investigation. For this reason, the court, after receiving a pre-trial report from the probation office, must inform the participants of the trial of the fact that the report on the socio-psychological characteristics of the accused has been submitted to the court and offer the parties to decide on the need for its investigation, as well as the place in the sequence of investigation of evidence.

Since the probation service report primarily concerns the issue of sentencing, which the court will decide in the verdict after establishing the guilt of the accused (para. 3 of part 1 of Article 368 CCP of Ukraine), in our opinion, it is appropriate to investigate it last, including the stage of the addition to the trial and after completion of the clarifying of the circumstances of the criminal offence by verifying them with evidence (Article 363 CCP of Ukraine). At this stage, as O. Babayeva rightly observes, the court has already formed an independent internal conviction about the person's guilt, which cannot be influenced by the pre-trial report (Babayeva, 2018: 66). Also, this approach will provide an opportunity for the probation officer to prepare a report considering the circumstances of a specific criminal proceeding, which will meet European standards, that recommend updating the pre-trial report during the trial (Council of Europe Probation Rules, 2010).

As noted earlier, in our opinion, when determining the procedural form of the investigation of the pre-trial report during the trial, one should be proceeded from the nature of such report as evidence – document in criminal proceedings.

The procedural mechanism of the investigation of documents during the trial is regulated by the Article 358 CCP of Ukraine. In accordance with paragraph 1 of this Article, protocols of investigative

(search) actions and other documents attached to the materials of criminal proceedings, if they contain or certify information that is important for clarifying the facts and circumstances of the criminal proceedings, must be announced in a trial at the initiative of the court or at the request of the participants in the trial and presented to the participants in the trial, and if necessary, also to other participants in the criminal proceedings. Thus, the probation report must be announced during the trial with the opportunity for the parties and other participants in the trial to comment on report's content and the data presented in it that characterize the accused and affect the final procedural decision on the type and extent of punishment.

It is possible that the investigated pre-trial report may contain contradictory data or certain inaccuracies, that should be clarified during the trial. In addition, the participants in the trial may have questions about the methodology of preparing the pre-trial report, the reasons for the formation of its conclusions. For this purpose, court, as well as other participants in the trial, should be managed to obtain explanations from the subject of preparing the pre-trial report during its investigation at the court hearing. At the same time, the procedural form of document investigation does not provide such possibility, based on the provisions of paragraph 2 of Article 358 CCP of Ukraine, where there is no probation officer in the list of subjects to whom the participants in the court proceedings have the right to ask questions about documents. In this regard, it is necessary to supplement the specified norm with a provision regarding the right of the participants to ask questions to the probation officer on issues related to the pre-trial report.

Based on the results of the study, we consider it expedient and necessary to improve the procedural regulation mechanism with the following changes to CCP of Ukraine: 1) Article 363 shall be supplemented by part 4 with the following provision: *“In the case of receiving of a pre-trial report, the court shall ascertain from the participants in the trial their opinion regarding the need to investigate the pre-trial report in the court hearing. If the participants in the trial insist on the investigation of the pre-trial report in the court hearing, such investigation shall be carried out in accordance with the procedure subscribed by this Code for the investigation of documents.”*; 2) part 2 of Article 358 shall be amended as follows: *“2. Participants in the court proceedings have the right to ask questions about documents to witnesses, experts, specialists, probation officer (regarding the pre-trial report)”*.

Conclusions. The procedural nature of the pre-trial report as evidence in the criminal proceedings of Ukraine necessitates the establishment of a mechanism for its investigation by the court with the participation of the parties during the trial of a criminal case.

Like any evidence, probation service report must first be included in the order and volume of evidence to be investigated, in accordance with Article 349 CCP of Ukraine.

Since the pre-trial report mainly concerns the issue of sentencing, it is expedient to carry out its investigation as a last resort, at the end of the clarifying of the circumstances of criminal proceeding by verifying them with evidence, as well as within the scope of the addition to the trial. This approach will meet European standards.

It is advisable to study the pre-trial report in the manner determined by law for the investigation of documents, with the opportunity for the parties to comment on the report and ask questions to the probation officer. Because of fact that the procedural order of the investigation of documents does not give the participants of the court proceedings the right to ask questions to the probation officer, the provisions of paragraph 2 of Article 358 CCP of Ukraine should be supplemented with indication of the specified subject of criminal proceedings.

References:

1. Babayeva, O. (2018). Dosudova dopovid u pidhotovchomu kryminalnomu provadzhenni [Pre-trial report in the preliminary criminal proceedings]. *Yuryst Ukrainy*, 2(37), 61–67 [in Ukrainian].
2. Blahuta R., Hutsuliak Yu., Dufeniuk O. (2018). Dokazy ta dokazuvannia u kryminalnomu provadzhenni [Evidence and proof in the criminal proceedings]. Retrieved from: https://dspace.lvduvs.edu.ua/bitstream/1234567890/956/1/Докази%20та%20доказування_2018.pdf [in Ukrainian].
3. Chuhaievska, A. (2018). Sutnist ta znachennia dosudovoi dopovidi pry zvilnenni osoby vid vidbuvannia pokarannia [The essence and significance of the pre-trial report when releasing a person from serving a sentence]. *Pravo, ekonomika ta upravlinnia: henezys, suchasnyi stan ta perspektyvy rozvytku*, 704–709 [in Ukrainian].
4. Hmyrko, V. (2014). Kryminalno-sudovi dokazy: yurydychne poniattia chy definitsiia [Criminal-court evidence: legal concept or definition]. *Pravo Ukrainy*, 10, 32–41 [in Ukrainian].
5. Kryminalnyi protsesualnyi kodeks Ukrainy vid 13.04.2012 [Code of criminal proceedings of Ukraine]. Retrieved from: <https://zakon.rada.gov.ua/laws/show/4651-17#Text> [in Ukrainian].
6. Maksymenko, O. (2020). Dosudova dopovid yak skladova probatsii ta yii znachennia u kryminalnomu protsesi [Pre-trial report as a part of probation and its importance in the criminal proceedings]. *Treti ekonomiko-pravovi studii*, 49 [in Ukrainian].
7. Olefir, L. (2015). Dosudova dopovid yak skladovyi element sotsialno-pravovoho doslidzhennia pravoporushnyka [Pre-trial report as an element of socio-legal investigation of the offender]. *Naukovyi visnyk Khersonskoho derzhavnoho universytetu. Seriya: Yurydychni nauky*, 1, 34–36 [in Ukrainian].
8. Poriadok skladennia dosudovoi dopovidi vid 27.01.2017 [Procedure for preparing a pre-trial report]. Retrieved from: <https://zakon.rada.gov.ua/laws/show/z0121-17> [in Ukrainian].
9. Pro probatsiiu [On Probation]. Retrieved from: <https://zakon.rada.gov.ua/laws/show/160-19#Text> [in Ukrainian].
10. Pro vnesennia zmin do deiakykh zakonodavchykh aktiv Ukrainy shchodo zabezpechennia vykonannia kryminalnykh pokaran ta realizatsii prav zasudzhenykh [On amendments to certain legislative acts of Ukraine regarding enforcement of criminal punishments and implementation of the rights of convicts]. Retrieved from: <https://zakon.rada.gov.ua/laws/show/1492-19> [in Ukrainian].
11. Recommendation CM/Rec (2010)1 of the Committee of Ministers to member states on the Council of Europe Probation Rules (adopted by the Committee of Ministers on 20 January 2010 at the 1075th meeting of the Ministers` Deputies). Retrieved from: <https://www.cep-probation.org/wp-content/uploads/2018/10/CoE-probation-rules-recommendation.pdf>.
12. Shumylo, M. (2018). Yurydychna konstruktsiia dokaziv u kryminalnomu provadzhenni [Legal construction of evidence in criminal proceedings]. *Visnyk kryminalnoho sudochynstva*, 1, 59–67 [in Ukrainian].
13. Tkach, T. (2014). Dosudova dopovid sluzhby probatsii: poniattia, neobkhdnist, funktsii [Pre-trial report of the probation service: concept, necessity, functions]. *Naukovyi visnyk*, 1, 56–65 [in Ukrainian].