

ENSURING THE SECURITY OF A SUSPECT, ACCUSED, WHO HAS CONCLUDED A PRE-TRIAL COOPERATION AGREEMENT: RUSSIAN LAW ENFORCEMENT EXPERIENCE

^aOLEG ALEKSANDROVICH ZAITSEV, ^bALEXANDER YUREVICH EPIHIN, ^cNATALYA VLADIMIROVNA ILYYUTCHENKO, ^dIGOR OLEGOVICH ANTONOV, ^eANDREY VIKTOROVICH MISHIN

"The Institute of Legislation and Comparative Law under the Government of the Russian Federation, Professor, Doctor of Law, Chief Researcher, Department of Criminal, Criminal Procedure Legislation; Judicial System ISP, Vice-President of the Union of Criminologists and Criminologists, Russia"

^bKazan Federal University, Epihin Alexander Yurevich, Professor, Doctor of Law, Professor, Department of Criminal Procedure and Forensics, Kremlyovskaya St, 18, Kazan, Republic of Tatarstan, 420008, Russia

^cAntonov Igor Olegovich Candidate of Law, The Head of the Department of Criminal Process and Criminalistics, the Faculty of Law, Kazan Federal University, Kremlyovskaya St, 18, Kazan, Republic of Tatarstan, 420008, Russia

^dMishin Andrey Viktorovich, Associate Professor, Candidate of Law, Professor, Department of Criminal Procedure and Forensic Science, Department of Criminal Procedure and Forensic Science, Kremlyovskaya St, 18, Kazan, Republic of Tatarstan, 420008, Russia

*^eFaculty of Law of Moscow State University named after M.V. Lomonosov, Ph.D. in Law, Associate Professor of Criminal Procedure, Justice and Prosecutorial Supervision. Coordinator of international projects, Leninskie Gory, Moscow, Russia
E-mail: ^aoleg010663@mail.ru, ^bdoc@epihin.ru,
^cigolant@yandex.ru, ^dav-mishel@mail.ru,
^estopkina_natal@mail.ru*

Abstract: The authors carried out a comprehensive study of the institution of a transaction in criminal proceedings from the standpoint of ensuring the safety of participants in criminal proceedings. The multifaceted problematic issues of the process of the safe participation of subjects in Russian criminal proceedings require further improvement. This is especially true for the elimination of intersectoral (interdisciplinary) contradictions in the legal regulation of individual measures of state protection of participants in criminal justice. One of the solutions to such problems is to increase the effectiveness of the criminalistic support of procedural security measures for citizens as subjects of criminal procedural activities and especially the suspect, the accused, who has entered into a PCA.

Keywords: Cooperation; Criminal Process; Security Measures; A Deal With Justice; Tactical And Forensic Bases.

1 Introduction

The growth of organized crime causes numerous social and other conflicts in modern society, not only in Russia, but also in foreign countries. The adoption of the Convention against Corruption confirms this fact (Convention adopted based on Article K.3 (2) "c" of the Treaty on the European Union on the fight against corruption involving employees of the European Communities or employees of the Member States of the European Union"). One of the mechanisms for counteracting crimes is the conclusion of a deal with criminal justice, as mentioned in the foreign press (Hipple et al., 2019; Bekou, 2019; Leslie et al., 2017).

The literature notes that the contractual means of the state and the individual are manifested in Russia in the form of conciliation procedures: "a) the possibility of resolving a criminal dispute between the parties using the institution of terminating the case on the grounds provided for in Articles 25, 28, 281, 427 of the Criminal Procedure Code of the Russian Federation; b) implementation of an incentive criminal sanction during the proceedings in the case (chapters 40-40¹ of the Criminal Procedure Code of the Russian Federation)" (Zaitsev, 2019).

The applicability of a special order of trial due to the concluded PCA makes it possible to most effectively prosecute a person who is a member of a criminal group. "In 2014-2016, investigators concluded 79 pre-trial agreements on cooperation in criminal cases. This allowed solving 264 crimes; identify 116 accomplices, including 39 organizers of crimes; and establish the location of the stolen property in 11 cases" (Guseva, 2018).

In this regard, the law No.141-FZ of June 29, 2009 was adopted in a timely manner, establishing the conclusion of a procedural transaction with a suspect accused of committing a group crime (Federal Law of June 29, 2009 No. 141-FZ, Federal Law of June 29, 2009 No. 141-FZ). As the statistics show, in 2011-2019, a special procedure for court proceedings with the concluded PCA was applied in accordance with the procedures of Chapter 40.1 of the Criminal Procedure Code of the Russian Federation (see Table 1).

*Table 1: Application of a special procedure for judicial proceedings with the concluded PCA over time (according to the number of convicts) Ch. 40.1 of the Criminal Procedure Code of the Russian Federation**

2011	2012	2013	2014	2015	2016	2017	2018	2019
2672 (0.34%)	2640 (0.36%)	3647 (0.5%)	4123 (0.57%)	4260 (0.58%)	4190 (0.57%)	4157 (0.6%)	3614 (0.53%)	3009 (0.49%)
(all convicts under all compositions of the Criminal Code of the RF)								
2011	2012	2013	2014	2015	2016	2017	2018	2019
782,279	739,278	735,590	719,305	733,609	741,329	697,054	681,933	620,054

* URL: <http://www.cdep.ru/index.php?id=79&item=4476> (accessed date: 10.07.2020).

2 Methods

To write the article, the authors applied dialectical, comparative, formally logical, legal modeling, inductive and deductive methods.

3 Results and Discussion

As a deal with criminal justice is a relatively new institution for Russian law, let us look at the complexity of the legal impact of the fact that the institution of a pre-trial cooperation agreement has been introduced into the RF Criminal Procedure Code. The novels made changes to the Criminal (Criminal Code of the Russian Federation) and Criminal Procedure (Criminal Procedure Code of the Russian Federation) codes.

The Criminal Code of the Russian Federation has changed the content of one of the mitigating circumstances (c. "i" Article 61): now not only voluntary confession, active assistance in solving the crime, but also its investigation and criminal prosecution is recognized as mitigating. The more active role of the justice promoter is emphasized. The term and amount of punishment in this mitigating circumstance may not exceed more than 1/2 of the maximum term and amount of punishment provided for by the sanction of the relevant article of the Criminal Code. The law establishes strictly defined conditions: there is an opinion of the PCA on the case; there are no aggravating circumstances; the sanction of the article does not contain such types of punishment as the death penalty or life imprisonment (otherwise, the punishment is determined in the usual manner, that is, within the limits of the sanction of the article).

The text of the Criminal Code of the Russian Federation has been supplemented with a new article (Article 63.1), establishing the abolition of this procedure if a person provided false information or concealed from the investigation or the prosecutor any significant circumstances of the crime.

Thus, Russian criminal law norms are aimed at increasing the evidentiary activity of a criminal who promotes justice. The Criminal Procedure Code of Russia regulates in detail the procedure for concluding a PCA, the method for concluding, its conditions, etc. In addition to the additions to individual articles, a new Chapter 40-1 "A special procedure for making a court decision when concluding a pre-trial agreement on cooperation" (Articles 317.1-317.9) has been introduced, the conditions for the application of special security measures in relation to such a participant in the criminal case have been established.

We shall note that at present, Russian legislation has sufficient conditions for the use of international legal experience in ensuring the safety of participants in criminal proceedings (Zaitsev et al., 2018). Foreign experts also focus on the problem of personal security (Pechthong, 2019; Mujuzi, 2016; Klip, 2018).

Evidently, the conclusion of a PCA puts a person in a state that is dangerous to his life or health due to a possible threat from accomplices or members of a criminal group. For this reason, the legislator has established security guarantees for such a person as an independent participant in criminal proceedings (Verin et al., 2016; Makeeva et al., 2016; Zaytsev et al., 2016). Thus, he/she is subject to the security measures listed in part 3 of Article 11 of the Criminal Procedure Code of the Russian Federation (interrogation under a pseudonym, withdrawal of authentic data from a criminal case, control and recording of telephone and other conversations, etc.), as well as those established by law No. 119-FZ (resettlement to a new place of residence, work or study; change of documents; moving to another place of stay, etc.) (Federal Law of 20.08.2004 No.119-FZ).

However, the Criminal Procedure Code of the Russian Federation also establishes special (additional) criminal procedural security measures in relation to the person who is the party to PCA:

- 1) referring a criminal case against such a person to a separate proceeding based on clause 4, Part 1, Article 154 of the Criminal Procedure Code of the Russian Federation.
- 2) another security measure is established in Part 3, Article 317.4 of the Criminal Procedure Code of the Russian Federation: the investigating body, in the event of a threat to the safety of the suspect or the accused who has entered the PCA, as well as his/her close relatives, relatives and close persons, issues an order on storage in a sealed envelope of the following documents:
 1. applications for the conclusion of a PCA;
 2. the decision of the investigator to initiate a petition before the prosecutor for the conclusion of a PCA;
 3. the decision of the prosecutor on the satisfaction of the petition for the conclusion of a PCA;
 4. a pre-trial cooperation agreement.

Note that the mechanism for ensuring the safety of such persons should be implemented using both criminal procedural and forensic means, since it has an intersectoral nature (Epikhin & Mishin, 2018). Therefore, it seems relevant to develop tactical and forensic bases for the application and implementation of security measures for participants in criminal proceedings. In this direction, it is necessary to improve the tactics of conducting procedural actions associated with the use of security measures. At the same time, psychological support for the participation of such persons in a criminal case is of particular importance, that is, the use of the help of a specialist psychologist in conditions of constant contact with the protected person.

In terms of forensic science, it is important to predict the results of a tactical decision made by an investigator to conclude a PCA, considering the possible future threat to the safety of life, health and other benefits. Consequently, there is a tactical risk posed by the adoption of this decision, which in such a situation should be justified in order to obtain important evidence in a criminal case.

In judicial practice, the issue of the status of the person who has entered into a PCA during his/her interrogation in the court session, in which the main case was considered on charges of other accomplices of the crime, was resolved ambiguously. Sometimes he was warned about criminal liability for refusing to testify or for knowingly giving false testimony. In other cases, they were not warned about anything.

Of course, in such a situation, the person cannot be warned about criminal liability for refusing to testify (giving deliberately false testimony), since he/she informs the court about the crimes he/she has committed, including crimes. Refusal to testify against oneself is the right to defense of the accused. When considering the main case, this person has already been convicted, since the case against him was previously separated into a separate proceeding and has already been considered by another court.

Now this person is being interrogated on the basis of the new Article 56.1 of the Criminal Procedure Code of the Russian Federation and has received his/her independent procedural status (Federal Law of 30.10.2018 No.376-FZ). It warns about liability for violation of the cooperation agreement. In case of refusal to provide information to the court, the terms of the agreement are violated, and his sentence will be revised within the limits of the sanction of the article, that is, without restrictions "no more than 1/2 of the maximum term and amount of punishment established in the sanction of the article".

The problem of ensuring the safety of a person who has entered into a PCA can also be complicated by the formal refusal of the court to make a court decision in a special manner and to recognize the nullity of the concluded agreement, when the court establishes the failure to comply with the grounds and conditions of such an agreement (Part 3, Article 317.6 of the CCP RF). This is indicated in par. 15 of the Resolution of the Plenum of the Supreme Court of the Russian Federation No.16 of June 28, 2012 (Resolution of the Plenum of the Supreme Court of the Russian Federation of June 28, 2012 No.16). In our opinion, in such a situation, when a criminal case will be considered in a general manner, in relation to the accused, whom had earlier entered a PCA, recognized by the court as null and void, the security measures that have already been applied to him in pre-trial proceedings should be extended.

Practice has cases of the prosecutor's refusal to give consent to the application of a special procedure for judicial review. At the same time, sometimes there was a formal (unreasonable) adoption of such a decision to refuse. In such a situation (in the absence of grounds for refusing the consent of the prosecutor), the court could react to such a refusal by issuing a private ruling on the groundlessness of ensuring the accused's right to a possible and statutory special procedure for making a decision with a reduction in punishment (Part 4 of Article 29 of the CCP RF). In our opinion, there is a certain criminal procedural conflict between the prosecution and the court in terms of consent (disagreement) with the conditions and grounds for concluding a pre-trial cooperation agreement. It should be noted that the courts take the side of the defendant in the event of the unjustified refusal of the prosecutor to consider the case by the court in a special order.

Another criminal procedural problem of making a court decision in a special order (Part 5, Article 316 of the Code of Criminal Procedure of the Russian Federation) is the legal restriction of the grounds for appealing such a decision in an appeal or cassation (supervisory) procedure (Article 317 of the Code of Criminal Procedure): it cannot be appealed under the reason for the discrepancy between "the conclusions of the court set out in

the verdict, the factual circumstances of the criminal case, established by the court of first instance" (paragraph 1 of part 1 of article 389.15 of the Code of Criminal Procedure). This rule is quite understandable: if the court neither examines the evidence during the proceeding, nor sets out them in the verdict, therefore, such a verdict cannot be justified or unjustified.

Adoption of a court decision in a special order, that is, without examining evidence in a criminal case on the basis of Part 5 of Article 316 of the Criminal Procedure Code of the Russian Federation, determines the problem of establishing objective (material) truth, which is traditional for Russian, Russian criminal proceedings. Indeed, without examining the evidence, without calling and questioning witnesses in a criminal case, the truth cannot be established. This rejection of objective truth and the establishment of formal (procedural) truth is characteristic of the Anglo-Saxon legal system.

The next problem is seen in amending Article 90 of the Code of Criminal Procedure of the Russian Federation: "Prejudice" (Federal Law of 29.06.2015 No.191-FZ). This decision was made on the basis of the facts in practice that the content of the verdict passed in respect of the selected case on the charge of the person who has entered the PCA did not comply with the provisions of the verdict issued in the main case. We believe that the limitation of prejudice with respect to sentences passed in a special order does not correspond to the prejudicial status of any sentence. In such a situation, the legislator should refrain from changing Article 90 of the Criminal Procedure Code of the Russian Federation, since in the event of inconsistency of one sentence with another, the existence of a miscarriage of justice can be eliminated in the appeal (Chapter 45.1 of the Criminal Procedure Code), the cassation procedure (Chapter 47.1 of the Criminal Procedure Code), or when the criminal proceedings are resumed due to new or newly revealed circumstances (Chapter 49 of the Criminal Procedure Code of the Russian Federation).

4 Summary

- 1) The institution of a pre-trial cooperation agreement allows for effective criminal prosecution in complex and resonant criminal cases. The preliminary investigation bodies and the court receive information, important for proving, about the commission of group crimes. The person who has entered into such an agreement, for this reason, takes the side of the prosecution. Consequently, the person finds him/herself in a state of personal threat (of relatives, close persons) to life or health and he needs state protection.
- 2) Security measures can be applied on the basis of criminal procedural norms: assignment of a pseudonym; identification outside visual control, etc. (Part 3, Article 11 of the Criminal Procedure Code of the Russian Federation). In addition to these security measures, non-procedural measures can be applied against a person who has entered into a PCA, replacement of documents; private security; relocation to a new place of residence, work or study; change in appearance, etc.
- 3) Considering a criminal case in a special order in relation to a person who has entered into a PCA, the evidence is not examined by the court. The truth in such a criminal case is established on the basis of the fulfillment of formal procedures (Part 5, Article 316 of the Criminal Procedure Code of the Russian Federation).
- 4) The implementation of the decision to ensure the safety of the suspect, the accused, who has entered into a PCA, cannot be effective without the use of appropriate forensic recommendations.

5 Conclusion

The institution of a pre-trial agreement on cooperation between a suspect accused in Russian criminal proceedings, as shown by law enforcement practice, has a significant impact on the effectiveness of proving the most complex crimes committed by organized groups. Persons who have entered into a PCA must ensure the safety of assistance in a criminal case. The existing

complex of criminal procedural and other security measures for participants in criminal proceedings makes it possible to achieve an optimal balance between the interests of the state in the fight against crime and the legitimate interests of citizens who help in criminal prosecution.

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