

Criminal procedural aspects of personal search execution

V V Kozlov^{1*} and R R Valyulin¹

¹Barnaul Law Institute of the MIA of Russia, 49 Chkalova str., Barnaul 656038 Russia

E-mail: vyacheslav.v.kozlov@yandex.ru

Abstract. The article analyzes the criminal procedure legislation regulating the execution of a personal search (body search), carried out at the apprehension of a person on suspicion of committing a crime. The article also deals with possibilities and forms of using personal inspection results in criminal evidence. In fact, this personal inspection is used as a substitute for body search in cases where the need for its execution arises before the criminal case initiation. This research is especially relevant with respect to an increased criminal situation in the cross-border regions.

Key words: criminal procedure, pretrial procedure, search, personal search, personal inspection, body search, body search of the suspect

1. Introduction

The criminal procedural legislation of the Russian Federation provides such investigative action as a personal search (body search). The grounds and procedure for conducting a personal search are regulated by Art. 93, Art. 184, of the first and the third parts of article 182 of the Criminal Procedure Code of the Russian Federation. In our opinion, the problems of a personal search at the preliminary investigation stage, as well as the issue of carrying out such a search before a criminal case is initiated, are relevant and of practical interest.

In the legal literature, there are problems related to a personal search of a detainee on suspicion of committing a crime, since the question remains when to conduct a personal search of a suspect after the legal decision of the investigator to detain is taken, which corresponds to the meaning of Art. 93 of the Criminal Procedure Code of the Russian Federation, or immediately before the arrest, what is more logical and serves as the source of the appropriate grounds for such a detention? However, in the second version, this involves a personal search of a person who has not yet been given the procedural status of the suspect [10], [18], [26], [30], [31], [32], [37].

Another issue of the normative-legal regulation theory and personal search practice is the way to issue a decision on its execution. According to Part 2 of art. 182 of the Criminal Procedure Code in the aggregate with part 1 Article 164 of the Criminal Procedure Code, the search is conducted on the basis of a justified decision of the investigator. This norm is a uniformed requirement for the execution of proceedings that restrict the rights of citizens on the basis of a special state-power act. However, the contradiction of the legislator in the regulation of investigative actions is manifested in the fact that Part 2 of Art. 184 of the Criminal Procedure Code of the Russian Federation allows to execute a personal search when a person is detained on suspicion of having committed a crime without having a relevant order [19], [28]. In the present study, we will consider in more detail the possibility of carrying out a personal search before initiating a criminal case.

2. Key Insights

According to the above rules of the Criminal Procedure Code of the Russian Federation, a personal search is possible only in relation to a person who has the procedural status of a suspect or accused of committing a crime, except for the cases when a person may be subjected to a personal search in a room or other place where a search is conducted provided for by Art. 182 of the Criminal Procedure Code of the Russian Federation, if there are reasonable grounds to believe that this person hides with him objects or documents that may be relevant to the criminal case. The Constitutional Court of the Russian Federation repeatedly drew its attention to the fact that the provisions of the first part of Article 184 of the Criminal Procedure Code of the Russian Federation supposes the possibility of conducting a personal search only in relation to a person who has the procedural status of the suspect and accused, whose rights are guaranteed by the norms of criminal procedure legislation during the execution of this investigative action Russian Federation [24], [25]. Respectively, based on the analysis of the norms of the Criminal Procedure Code of the Russian Federation and judicial practice, the presence of a criminal case is a prerequisite for conducting a personal search.

At the same time, it is often necessary in practical activities of law enforcement agencies to force a person and his clothes to be searched, to look for and seize items and documents that are tools, equipment or a means of committing a crime, the subject of criminal assault. The execution of such a search is required in cases when a person is caught at the crime scene or is detected immediately after it has been committed, as well as in other cases when there is enough evidence that the person may have such items and documents. These situations, as a rule, are characterized by a lack of time, do not tolerate delay, require law enforcement officers to take timely and adequate measures to detect and seize relevant evidence from a person, not waiting for the decision of the competent authority to initiate criminal proceedings, and even vice versa, to ensure sufficiency of the grounds for initiating it in the future.

The question of what rules of criminal procedural law should law enforcement officers follow when actually conducting a personal search before initiating a criminal case, when the person being searched does not have the appropriate procedural status, while the results of such a search could later be used as evidence before the present tense remains open. This problem, together with the general problem of insufficiently precise regulation of the procedure for the seizure of objects and documents when verifying a crime report, has long been a subject of discussion among researchers and practitioners [11], [14], [15], [20], [34].

Let's consider the list of criminal procedural means of checking a crime report, determined by the legislator after the law came into force on March 4, 2013. No. 23-FZ [33], the production of which is permissible before a criminal case is initiated. According to part 1 of Art. 144 of the Code of Criminal Procedure, when checking a crime report, the person authorized to carry out such an inspection, namely an investigator, an inquiry body, a head of an investigative body, has the right to receive explanations, samples for comparative research, to request documents and objects, to withdraw them in the manner prescribed by the Criminal Procedure Code, to appoint a forensic examination, to take part in its execution and obtain expert opinion within the reasonable time limits, to inspect the scene of the incident, documents, objects, corpses, examination, to require to check the documents, auditing, studying the documents, objects, corpses, to involve specialists in these actions, to give the investigative body a written instruction, obligatory for the execution of operational investigative activities.

It is obvious that the legislator did not include in this list any personal search or any other criminal procedure action similar to it in its goals and objectives. This can be explained by the fact that according to the sectoral interpretation of the norms of the Criminal Procedure Code of the Russian Federation and from the point of view of constitutional and legal positions, any investigative (and other criminal procedure) actions involving the use of measures of procedural coercion are not allowed in cases of lack of sufficient evidence of a crime [12].

However, the need for such actions to find and seize items, documents and values before initiating a criminal case leads to the fact that law enforcement officers produce activities that do not have a strictly established legal regime that contradict a number of provisions of the Criminal Procedure Code of the Russian Federation, which turn to be the "surrogates" of the personal search [28].

The study of some criminal cases content and court decisions in the course of this research showed that in most cases compulsory examination of a person and his clothes in order to find and seize objects, documents and valuables, carried out before the initiation of a criminal case, is documented in a personal inspection report (act). However, in the present system of legal regulation, a personal inspection is an administrative-legal measure, provided by clause 16 Part 1 of Art. 13 of the Law on Police in system unity with Art. 27.7 of the Administrative Code. Despite this, the results of such inspections are later used in proving criminal cases under certain conditions. Thus, the appeal decision of the Supreme Court of the Russian Federation of 10/11/2016 No. 32-APU16-12 recognized to be legal the seizure by a police officer during a personal inspection of two mobile phones from V. Beloglazov, their subsequent seizure and examination by an investigator in accordance with the provisions of Art. 182 - 184 of the Criminal Procedure Code [3].

The existing practice of execution by the investigator (interrogating officer) within the framework of the criminal case investigation the seizure of items (documents, valuables) from a law enforcement officer, who, in his turn, previously confiscated these items (documents, valuables) during a personal inspection, along with the confiscation of the inspection protocol (act) itself, with the aim of their further inclusion in the criminal case materials as physical evidence, seems to be absurd a bit, but at the moment it seems to be the only way to give the procedural form to this action.

At the same time, there is the practice of introducing the essentially non-procedural results of a personal inspection into criminal proceedings directly as other documents, as the type of evidence provided in part 2 of art. 74 of the Criminal Procedure Code while this approach is also supported by the judges. Thus, the Judicial Collegium for Criminal Cases of the Supreme Court of the Russian Federation considered to be justified the decision of the Novosibirsk Regional Court to recognize as the evidence and as other document (clause 6, part 2, article 74 of the Criminal Procedure Code of the Russian Federation), the personal inspection report of Khapugin, S. I., when a cell phone was confiscated from the inside pocket of his jacket [23]. A number of scientists also consider this approach as a way out of the existing problem [29], [36]; however, it is necessary to agree with the authors, who believe that in the context of criminal procedural knowledge, "other" documents express information provided by third parties [27], while the subjects of a personal inspection are the officers of the inquiry bodies that have a potential relation to the prosecution, in this case, as a result of their actions, which are usually compulsory, items, documents and values are confiscated from the suspected persons that are directly the instruments, equipment or means of committing a crime or the subject of criminal assault.

In addition, it is impossible not to draw attention to the fact that there is the Supreme Court's point of view, that in most cases fundamentally calls into questions the legality of the personal inspections execution and the use of its results as evidence in the future. The nature of this position is as follows: the right to conduct personal inspection of individuals is provided by law only if there is sufficient evidence that they carry weapons, ammunition and other prohibited items. In cases where there are reasonable grounds to suspect a person of committing a crime, law enforcement officers are only entitled to check identity documents [22].

Another method encountered in practice for producing an activity that actually replaces a personal search at the stage of initiating a criminal case is the examination of a person and his clothes as part of the crime scene search. In legal literature, the issues of replacing one investigative action with another are given sufficient attention [4]. At the same time, we consider this practice unacceptable and agree with the authors claiming that a search and a personal search differ significantly from the investigative examination [13] in terms of their tasks, nature, conditions and procedure, and therefore the evidentiary value the results of this investigative action is subjected to great doubt. Thus, the Supreme Court hasn't justified the crime scene search, during which a personal search was actually conducted on Afonin, V. S., when a package with narcotic substance was found and confiscated, justifying its decision by the fact that Art. 176, 177 of the Criminal Procedure Code of the Russian Federation, regulating the grounds and procedure for the search, presupposes only the crime scene, the area, housing, other premises, objects, and documents as objects of inspection [21].

Thus, in resolving issues relating to the grounds and procedure for the executing and documenting of a compulsory examination of a person, and in fact conducting a personal search before initiating a criminal case, and further using its results in the proof, neither the theorists nor the law enforcers have a common approach.

One of the solutions of the problem considered, which would allow to resolve all the difficulties and gaps in the legislation governing the initial stage of criminal proceedings, is to abolish the stage of the criminal case initiation. This position is actively supported by several process scientists [2], [7], [9], [15], [16]. In this case, the issues of using in proving the results of pseudo-procedural actions that substitute a personal search, would become irrelevant. As an example, the new Criminal Procedure Code of the Republic of Kazakhstan can serve as an example, according to which the start of a pre-trial investigation is the registration of a criminal offense report in the Unified Register of Pre-Trial Investigations or the first urgent investigative action and it can be the personal search. However, without going into the controversy about the prospects for the development of domestic criminal justice [1], [5], [6], [8], [35], we express the opinion that in modern realities the stage of initiating a criminal case does not need to be eliminated, but the mechanism of its legal regulation by gradual reforming should be improved [17].

The variant suggested by B.V. Rossinsky and S.B. Rossinsky, who propose to legalize the mechanisms of direct introduction of the results of administrative activities (including personal inspections) in criminal proceedings, without the need for any imaginary procedural documenting [27]. However, this proposal should be treated carefully, since if it is possible to use directly in proving the results of administrative activity, there are potential risks of abuse of such powers by law enforcement officials, and also, theoretically, we do not exclude that this can lead to the distortion of the process of proving into administrative law sphere.

3. Conclusion

As an idea to solve this problem, which seems to us the most acceptable, taking into consideration the formalized nature of the Russian criminal procedure legislation, we dare to propose to introduce a personal inspection procedure into the criminal procedure regime by making the appropriate changes to Art. 74. of the Criminal Procedure Code, in systemic unity with Art. 144 of the Criminal Procedure Code of the Russian Federation, having foreseen the production of a personal inspection as a procedural act performed at the stage of checking a crime report and the possibility of using the results of such an inspection as one of the types of evidence.

References

- [1] Azarov V A 2014 On the improvement of the legal framework (or possible “withering away?”) Of the stage of initiating a criminal case *Library of the Criminalist. Science Magazine* **1** pp 20-21
- [2] Aleksandrov A S, and Grachev S A 2015 The draft of the new order of opening a criminal investigation on the message of the crime *Criminal trial* **7** p 18
- [3] Supreme Court of the Russian Federation 2016 *Appeal definition* (October 10, 2016 No. 32-APU16-12)
- [4] Baev O Ya 2009 *Fundamentals of the methodology of criminal prosecution and professional protection against it (on the example of criminal procedure study of official and official crimes)* (Moscow, Russia)
- [5] Belkin A R 2012 *Criminal proceedings in Ukraine and in Russia* (Moscow, Russia)
- [6] Vitsin S Ye 2003 Institute of a criminal case in criminal proceedings *Russian Justice* **6** p 56
- [7] Gavrilov B Ya 2014 Criminal policy of Russia: scientific and legislative myths and the realities of law enforcement *Library of the Criminalist* **3** pp 236-239
- [8] Grigoriev V N, and Prokhorova E A 2015 Criminal case initiation: old problems, modern materials, different solutions *Problems of Jurisprudence* **5** p 84
- [9] Derishev Yu V 2003 The stage of initiation of a criminal case is a relic of the “socialist” legality *Russian Justice* **8** pp 34-36
- [10] Dulov A V, and Nesterenko P D 1971 *Tactics of investigative actions* (Minsk, USSR)
- [11] Kalinovskiy K B 2015 “Pre-investigation” search: an illegal know-how *Criminal Trial* **1** p 9
- [12] Kalinovskiy K B 2016 A recess before the initiation of a criminal case violates the constitutional principle of proportionality of the restriction of citizens' rights *Criminal Trial* **3**

- [13] Karagodin V N 2012 *Inspection of the scene, search or seizure?* (Ekaterinburg, Russia: Publishing House of the Ural State Law University)
- [14] Karetnikov A, and Koretnikov S 2019 *Investigative actions as methods of checking a crime report* (Moscow, Russia)
- [15] Karetnikov A S, and Karetnikov S A 2015 Appointment of the stage of initiation of a criminal case: declared or valid *Russian Investigator* **23** pp 17-21
- [16] Karetnikov A S, and Karetnikov S A 2015 Do I need a stage of initiation of criminal proceedings? *Legality* **1** pp 41-46
- [17] Kozlov V V 2017 Stage of initiation of a criminal case: pros and cons *Eurasian Law Journal* **7**(110) pp 214-218
- [18] Kozak D N, and Mizulina E B Ed. 2004 *Comment to the Criminal Procedure Code of the Russian Federation* (2nd ed.) (Moscow, Russia: Yurist)
- [19] Kornukov V M, and Valiev R Sh 2007 *Personal search and its role in criminal procedural evidence* (Saratov, Russia)
- [20] Naumov A M 2016 The problem of performing investigative actions before initiating a criminal case *Russian Investigator* **7** pp 8-12
- [21] Supreme Court of the Russian Federation 2006 Definition of the Supreme Court of the Russian Federation of 10.08.2006 (No. 11-D06-40)
- [22] Supreme Court of the Russian Federation 2007 *Determination* of February 22, 2007 (No. 5DP-06-171)
- [23] Supreme Court of the Russian Federation 2006 *Definition of April 27, 2006* (No. 67-O06-11)
- [24] Constitutional Court of the Russian Federation 2009 *Determination of October 13, 2009* (No. 1232-OO)
- [25] Constitutional Court of the Russian Federation 2009 *Determination of October 13, 2009* (No. 1346-OO)
- [26] Voskobitova L A Ed. 2015 *Article-based scientific and practical commentary* (Moscow, Russia)
- [27] Rossinsky B V, and Rossinsky S B 2018 The results of administrative activities as evidence in a criminal case *Bulletin of St. Petersburg University. Law* **9**(3)
- [28] Rossinsky S B 2018 *Investigative actions* (Moscow, Russia: Norma)
- [29] Sementsov V A, and Safonov V Yu 2006 *Legal prerequisites and stages of implementation of the results of operational search activities in pre-trial proceedings* (pp 105-106) (Ekaterinburg, Russia)
- [30] Smirnov A V, and Kalinovsky K B 2007 *The criminal process: a textbook* (Moscow, Russia)
- [31] Sopneva E V 2010 *The theoretical model of the procedural status of the suspect in the criminal process* (Stavropol, Russia)
- [32] *Criminal Procedure Code of the Russian Federation. Chapters 1* p 321
- [33] Russian Federation 2013 *Federal Law "On Amending Articles 62 and 303 of the Criminal Code of the Russian Federation and the Criminal Procedure Code of the Russian Federation"* (March 4, 2013 No. 23-FZ)
- [34] Khalikov A 2013 Collecting evidence in the course of checking a crime report *Legality* **12** pp 54-57
- [35] Khimicheva G P 2003 *Pre-trial criminal proceedings: the concept of improving criminal procedure* (Dissertation of Dr. Legal Sciences) (Moscow, Russia)
- [36] Shefer S A 2008 *Evidence and evidence in criminal cases: problems of theory and legal regulation* (Moscow, Russia: Publishing house "Infra-M" Norma)
- [37] Yakimovich Yu K 2015 *Participants in the criminal process* (Saint Petersburg, Russia)