

Procedural procedure for obtaining witness status by persons engaged as attesting witnesses

Shkelebei V. A.

National University of «Kyiv-Mohyla Academy», Skovorody str., 2, Kyiv, Ukraine

shkelebei_vika@ukr.net

Yatsyk T. P.

University of the State Fiscal Service of Ukraine, Universytetska str., 31, Irpin, Kiev region, Ukraine

zvezda171088@gmail.com

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The article analyses the legal regulation of the status of attesting witness in criminal proceedings. Proposals were made to address issues of fixing of the rights and obligations of witnesses in criminal proceedings. The author's definition of attesting witness in criminal proceedings is provided, which means an adult capable person who is involved by a prosecutor and an investigator in the conduct of investigative (search) actions, whose duties are to monitor the procedure for carrying out such actions, as well as to assist the investigator in his or her requests for such actions.

It is proposed to supplement the Code of Criminal Procedure of Ukraine with article 72-2 «Rights of the attesting witness» and article 72-3 «Obligations of the attesting witness», which clearly provide for an exhaustive list of rights and obligations of the attesting witnesses, this will avoid in practice the involvement of inappropriate persons as the attesting witnesses.

Процесуальний порядок отримання статусу свідка особами, залученими як поняті

Шкелебей В. А.

Національний університет «Києво-Могилянська академія»,

вул. Г. Сковороди, 2, м. Київ, Україна

shkelebei_vika@ukr.net

Яцик Т. П.

Університет державної фіскальної служби України,

вул. Університетська 31, м. Ірпінь, Київська область, Україна

zvezda171088@gmail.com

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поняті, свідок, кримінальне провадження, права та обов'язки понятото, слідчий, прокурор.

У статті проаналізовано правову регламентацію статусу понятото в кримінальному провадженні. Запропоновано пропозиції для вирішення питань щодо закріплення прав та обов'язків понятото у кримінальному провадженні.

Внесено пропозиції щодо регламентації прав та обов'язків понятото у кримінальному провадженні. Визначено перелік слідчих (розшукових) дій, до яких залучаються поняті: 1) пред'явлення особи, трупа чи речі для впізнання; 2) огляд трупа, в тому числі пов'язаного з ексгумацією; 3) слідчий експеримент; 4) освідування особи. Визначено винятки, коли участь понятото у кримінальному провадженні може замінюватися на безперервну відеофіксацію слідчої (розшукової) дії.

Звернено увагу на випадки, коли участь свідків є обов'язковою і не може бути замінена безперервним відеозаписом: обшук чи огляд будинку чи іншого володіння особи, обшук особи.

Зауважено на чіткій регламентації кримінальним процесуальним законом категорій осіб, які не можуть бути залучені для участі у проведенні слідчих (розшукових) дій як поняті.

Важливість визначення статусу, зрозумілого в кримінально-процесуальному законодавстві, доведено тим, що: 1) вони забезпечують процесуальні гарантії прав особи у кримінальному судочинстві; 2) виключається можливість фальсифікацій із боку працівників правоохоронних органів; 3) їх наявність має важливе дисциплінуюче значення для слідчого та прокурора; 4) підвищується надійність достовірності отриманих доказів; 5) забезпечується участь народу у здійсненні правосуддя; 6) гарантується дотримання правильності фіксації факту, змісту та результатів процесуальних дій; 7) у ході судового розгляду понятій може стати свідком однієї зі сторін кримінального провадження тощо.

Представлено авторське визначення понятого у кримінальному провадженні, під яким розуміється повнолітня дієздатна особа, яка залучається слідчим, прокурором під час проведення слідчих (розшукових) дій, в обов'язки якої входить спостереження за порядком проведення таких дій, а також допомога слідчому за його зверненням у їх проведенні.

Запропоновано доповнити КПК України статтю 72–2 «Права понятого» та статтю 72–3 «Обов'язки понятого», в яких чітко передбачити вичерпний перелік прав та обов'язків понятих, що дозволить уникнути у практичній діяльності залучення неналежних осіб як понятих.

Statement of a problem. The current Criminal Procedure Code of Ukraine does not pay due attention to those attesting witnesses as participants in criminal proceedings. Only there is a mention in article 3 and 223 of the Code of Criminal Procedure of Ukraine, and a clear procedural status is not defined.

Analysis of modern researches. Various aspects related to the legislative consolidation of the procedural status of attesting witnesses have been repeatedly considered in their works by scientists in the field of criminal procedure and forensic science. This issue was studied in more detail by O.L. Buleyko, O.A. Strutz, L.V. Cherechukina and O.V. Hitrova. Legal, organizational and procedural issues of participation of those attesting witnesses in criminal proceedings were reflected in their works by such famous scientists of law Yu.P. Alenin, V.P. Bahin, R.S. Belkin, A.F. Volobuyev, Yu.M. Groshevy, V.O. Konovalova, V.T. Malarenko, O.R. Mikhaylenko, V.T. Nor, M.A. Pogoretsky, S.M. Stakhovskaya, V.M. Tertisnik, V.Yu. Shepitko, M.E. Schumilo and others.

The purpose of the article is to define and regulate the status of what is attesting witness in criminal proceedings and to make proposals to address these issues to the current procedural law.

Statement of the main material. Analysing the norms of the Code of Criminal Procedure of Ukraine, there is a lack of full regulation of the status of the attesting witness.

Often in the legal literature there is an error in determining the status of attesting witness (prior to investigative (search) actions, persons who do not have the right to be attesting witness is involved).

There are often complications in modern investigative practice due to the uncertainty of the status of the attesting witness as a participant in criminal proceedings and the problem of involving attesting witness to participate in investigative (search) actions, which in the context of increasing pressure on investigators, officers of operational and other units of the National Police often become prerequisites for violations of procedural form by them (and sometimes official abuses), which may eventually lead to undesirable procedural consequences, both at the pre-trial and trial stages [1]. The current Code of Criminal Procedure of Ukraine still does not define a specific concept of who is attesting witness, so for its regulation it is necessary to turn to the theory of criminal procedure and the experience of processual scientists. Having analyzed the legal literature, it is possible to formulate a concept of attesting witness in criminal proceedings, which may be an adult capable person, who is engaged by an investigator, a prosecutor in the conduct of investigative (search) actions, whose duties are to monitor the procedure for carrying out such actions, as well as to assist the investigator in his or her request for such actions. The main purpose of attesting witnesses in the conduct of investigative (search) actions at the pre-trial investigation is to

create the necessary conditions for the most objective and legitimate conduct of these actions and is an important legal guarantee of the rights and legitimate interests of the participants in the process, as well as to attest by its signature the conformity of the records in the protocol with the actions performed.

It should be noted that the definition of the status of other participants in criminal proceedings is regulated by the Code of Criminal Procedure, namely, the applicant; civil claimant; civil defendant; A representative of the civil plaintiff, the civil defendant; The legal representative of the civil plaintiff; A representative of the legal entity against which the proceedings are being conducted; The third person in respect of whose property question of the arrest is to be decided; witness; translator; expert; Specialist, representative of probation body personnel; court clerk; judicial manager.

As we can see, there is no such participant as “attesting witness” in the above-mentioned list. The basis for participation in the process is the involvement of his by investigator, the prosecutor, but this statement can be made only by analysing certain articles of the Code of Criminal Procedure of Ukraine. A separate article that would fully regulate the procedural status of attesting witness is not available.

The part 7 of Art. 223 of the CPC of Ukraine provides for the participation of the attesting witnesses during the conduct of individual investigative (search) actions. This standard defines qualitative (disinterest) and quantitative (at least two) criteria for persons who are involved as attesting witnesses.

The attesting witnesses are involved in carrying out such investigative (search) actions: 1) presentation of a person, corpse or things for identification; 2) examination of the corpse, including exhumation; 3) investigative experiment; 4) personal identification. Despite the development of technical means of continuous video recording of the procedure for carrying out relevant investigative (search) actions, the legislator establishes an exception and allows the carrying out of these actions without the participation of the witnesses. At the same time, investigative (search) actions related to substantial interference in the personal rights and interests of a person – search or inspection of a home or other possession of a person, search of a person are carried out with the mandatory participation of at least two attesting witnesses regardless of the use of technical means of recording such investigative (search) actions. This list of investigative (search) actions is exhaustive. However, it should be noted that the legislator does not deprive the investigator or the prosecutor the right to invite attesting witnesses to other proceedings if they consider it appropriate (art. 223, paragraph 7, of the Code of Criminal Procedure) of Ukraine [2].

The expediency of inviting attesting witnesses to participate in other proceedings is determined by the investigator or prosecutor, whose carries out criminal proceedings, possess the full amount of necessary material and can take into account objective and subjective factors affecting the process and results of a particular procedural action.

In our opinion, the need to involve attesting witnesses investigative (search) actions can be argued by the fact that (1) they provide procedural guarantees of the rights of the individual in criminal proceedings; 2) the possibility of falsification by law enforcement officials is excluded; 3) their presence has an important disciplinary value for the investigator and prosecutor; 4) improving reliability of the obtained evidence; 5) the participation of the people in the administration of justice shall be ensured; 6) observance of correctness of recording of fact, content and results of procedural actions is guaranteed; 7) during the trial the attesting witness may witness one of the parties to the criminal proceedings and the like.

The criminal procedural law clearly defines the categories of persons who cannot be involved in investigative (search) actions as attesting witnesses (Code of Criminal Procedure, art. 223, paragraph 7). Thus, the victim, relatives of the suspect, accused and victim, law enforcement officials, as well as persons interested in the results of criminal proceedings cannot be attesting witnesses.

Considering the above, it is expedient to supplement the Code of Criminal Procedure of Ukraine with article 72-2 “Rights of the attesting witnesses” and article 72-3 “Obligations of the attesting witnesses”, which clearly provide for an exhaustive list of rights and obligations of the attesting witnesses will avoid in practice the involvement of inappropriate persons as the attesting witnesses.

Attesting witnesses are also invited to certify by signature the refusal of the person to sign the protocol, as well as the fact of providing written explanations of the person about the reasons for such refusal in case of absence of her defender (legal representative) of Part 6 of Article 104 of the Code of Criminal Procedure of Ukraine [1]. Attesting witnesses may be invited to participate in other proceedings if the investigator or prosecutor deems it appropriate. Attesting witnesses must be at least two. The attesting witnesses to the proceedings may be questioned during the trial. Attesting witnesses must meet such procedural requirements as being an adult, not interested in the results of criminal proceedings, careful about compliance with the procedure of carrying out investigative (search) actions and about compliance of carried out actions with the content of the procedural document, which they signed.

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Conclusions. A number of key questions on attesting witnesses remain unclear to date, in particular their status as participants in criminal proceedings, the procedure for involving in investigative (search) actions and other procedural actions, grounds for challenge and security. Therefore, in our opinion, for attending witness worthwhile devote separate articles in the Criminal Code of Ukraine referred to above. This will make it possible to specifically regulate and establish the institution of attending witness in the criminal procedural legislation, to ensure the safety of persons (as witnesses), to minimize official abuses by employees of the National Police and to fully ensure the implementation of the tasks and principles of criminal proceedings.

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