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Some types of procedural violations during the inspection in the process of investigating the illegal appropriation of a vehicle, which resulted in the recognition of evidence inadmissible

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■ **Abstract.** The purpose of the research – based on the study of the verdicts of the Unified State Register of Court Decisions, analysis of the materials of investigative practice and scientific and theoretical opinions of scientists to examine the most common procedural violations during the investigative (search) action of inspection in the process of investigation of illegal seizure of a vehicle, which resulted in the recognition of evidence inadmissible. The methodological foundation of scientific research is an integral and coherent system of methods that allowed proper analysis of the subject of research, in particular, scientific methods of analysis, synthesis, induction and deduction were used. The theoretical foundation of this publication is the works of domestic scientists on the criteria for recognition or non-recognition of evidence as inadmissible. The scientific originality of the publication is the systematic analysis of the most common procedural violations during the inspection in the investigation of illegal seizure of vehicles. Based on the analysis, the most common procedural violations of the provisions and procedures established by the Criminal Procedure Code of Ukraine during the investigative (search) inspection were identified, which resulted in the inadmissibility of evidence. Conclusions. Exploring the issue of the types of procedural violations committed during the investigative (search) action of inspection in the process of investigating the illegal seizure of a vehicle, which the court recognises as inadmissible, contributes to the identification of the most common, characteristic of this investigative action. To avoid the recognition of evidence as inadmissible, it is advisable to follow the case law on the most common procedural violations that most often occur during the relevant procedural actions. Full compliance with the provisions of the Criminal Procedure Code of Ukraine, the procedure for conducting, recording the investigative (search) action of the inspection by a law enforcement officer is an extremely significant circumstance for further court decision on the admissibility of the evidence obtained

■ **Keywords:** inadmissible evidence; investigative (search) action; inspection; procedure; provisions; Criminal Procedure Code; illegal seizure of a vehicle; investigation; procedural violations

■ Introduction

The success and speed of the pre-trial investigation of the illegal seizure of a vehicle mainly depend on the timely and skilful organisation of work on the inspection of the scene, organisation, consistency, and efficiency of using scientific and technical means and methods, since it is the qualified analysis and synthesis of information about the objects involved in the crime,

obtained from various sources, its interpretation and skilful use that is the foundation for solving crimes [1].

Notably, according to the analysis of the materials of the investigative practice, the quality of detection, research and fixation of these traces during the investigative inspection in the process of investigation of illegal seizure of vehicles is affected by the c0

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This fact is extremely significant for the court's further decision on the admissibility of the evidence. According to Part 1 of Art. 84 of the CPC of Ukraine, evidence in criminal proceedings is the factual data obtained in the manner prescribed by this Code, based on which the investigator, prosecutor, investigating judge, and court establish the presence or absence of facts and circumstances relevant to criminal proceedings and subject to proof. Thus, the factual data obtained in a manner not provided for by the CPC of Ukraine, in principle, cannot be evidence [2].

Criminal procedural activity is related to the evidentiary activity of the subjects of criminal proceedings. Determining the grounds for declaring information inadmissible facilitate law enforcement and contributes to the implementation of the tasks of criminal proceedings [3]. Despite the legal definition of the concept of admissibility of evidence and the list of cases of recognition of evidence obtained as a result of a significant violation of human rights and freedoms as inadmissible, it should be noted that the rules of admissibility (inadmissibility) of evidence are not systematised in the CPC of Ukraine [4; 5].

The issue of admissibility of evidence in criminal proceedings was explored by such domestic scientists as: N.M. Basay, V.V. Vapnyarchuk, M.A. Vereshchagina, A.S. Gumenyuk, Y.P. Zeikan, V.A. Ishchenko, N.M. Kipnis, A.A. Kozlenko, A.M. Lazebny, P.A. Lupinska, V.O. Malyarova, O.S. Osetrova, N.S. Rohatynska, V.V. Rozhnova, D.B. Sergeeva, D.O. Synytsyna, O.V. Smirnov, M.M. Stoyanov, M.S. Strohovych, O.S. Tkachuk, V.V. Tiutiunnyk, I.L. Chuprikova, S.A. Shafer, N.V. Yurikian etc.

Scientists explored this issue in general, defining the essence, and properties of evidence, and developing scientific criteria and grounds for recognising them as inadmissible. There was no emphasis on the specific grounds for declaring evidence inadmissible during a separate investigative (search) action in the process of investigating the relevant crime, thus such problematic issues require further investigation.

The list of grounds for declaring evidence inadmissible is indicative, as it does not fully consider such grounds as the inappropriate subject of proof, violation of procedural form, etc. The criteria for inadmissibility of evidence are developed by judicial practice [7].

To successfully implement the proceedings on the investigation of the illegal seizure of vehicles based on the investigation of the verdicts of the Unified State Register of Court Decisions in the commission of a criminal offence under Art. 289 of the Criminal Code of Ukraine, the most common grounds for declaring evidence inadmissible during the primary investigative (search) inspection were analysed and specified.

Thus, in the course of the investigation of a criminal offence under Article 289 of the Criminal Code of Ukraine, to prevent legal consequences of recognising

evidence as inadmissible (closure of criminal proceedings; change of qualification of the act; acquittal; change or reversal of the verdict in cassation) [6], it is advisable to rely on the case law on the most common procedural violations that most often occur during the relevant procedural actions.

The purpose of the research – based on the study of the verdicts of the Unified State Register of Court Decisions, analysis of the materials of investigative practice and scientific and theoretical opinions of scientists to examine the most common procedural violations during the investigative (search) action of inspection in the process of investigation of illegal seizure of a vehicle, which resulted in the recognition of evidence inadmissible.

To implement this purpose, the following tasks have been identified:

- to consider procedural violations of the investigative inspection in the process of investigation of illegal seizure of vehicles, which resulted in the recognition of evidence inadmissible;
- to identify the most common violations of the provisions of the Criminal Procedure Code of Ukraine during the investigation of the illegal seizure of vehicles, which resulted in the recognition of evidence inadmissible;
- to determine the provisions of criminal law that were not fully observed by the law enforcement officer during the public investigative (search) inspection during the investigation of the illegal seizure of vehicles.

■ Outline of the Main Material

At the initial stage of investigation regarding investigative (search) actions, it is advisable to distinguish different types of inspections. Thus, S.E. Petrov outlines the following types of inspection: inspection of the place of illegal seizure of the vehicle (hereinafter – the vehicle) (parking, garage, open area); inspection of the found vehicle or its parts; inspection of objects and documents left at the scene [8].

According to the authors, it is advisable to distinguish the such type of inspection as the detection of hiding places, the so-called places of “stowage” of illegally seized vehicles. These include: personal or rented garages; “blind spots”, where access of unauthorised persons is limited (parking lots, closed areas of various organisations and institutions, yards of private houses), abandoned enterprises, separate sections of county roads, forests, etc.

To identify and record information about the circumstances of the criminal offence, the investigator, and prosecutor inspect the area, premises, things and documents (Part 1 of Art. 237 of the CPC of Ukraine). According to Art. 223 of the CPC of Ukraine, inspection is an investigative action designed to obtain (collect) evidence or verify evidence already obtained in a particular criminal proceeding, which is

conducted within the framework of pre-trial investigation of criminal proceedings.

The grounds for inspection of the scene is the information about the illegal seizure of the vehicle, recorded in a specific procedural form. Without such information, the inspection of the scene is not allowed. This position is reflected in the decision of the Criminal Court of Cassation of the Supreme Court of June 7, 2018, in case No. 740/5066/15-к, case No. 51-3331km18. The urgency of the inspection of the scene is caused by the necessity to promptly obtain information to organise the search for criminals and to conduct other investigative (search) actions designed to solve the crime. The purpose of such a review is: to identify traces and material evidence, to clarify the circumstances of the incident, to propose versions of the crime and its participants, to obtain data on persons who could have seen the crime, to organise further investigative (search) actions and covert investigative (search) actions [10].

Inspection of the place of illegal seizure of the vehicle (the place of parking of the vehicle; ways of approaching the criminals to the object of the encroachment; ambush, where the criminals observed the vehicle and the actions of the driver; ways of leaving the vehicle from the parking place; other premises or areas that can serve as carriers of traces of illegal seizure of the vehicle) was performed in 75% of cases [11].

Inspection of the scene has its specific features. Depending on the place of illegal seizure of the vehicle (garage, guarded parking lot, adjacent territory, a yard of the household, parking lot of shopping malls, cinemas, cafes, etc, it may establish the method of penetration into the vehicle and the place of its storage, which, in particular, describes the method of committing a criminal offence and determines the professional abilities, skills, and features of the actions of the offenders, which are manifested in the material environment of the scene. Thus, considering the fact of the illegal seizure of the vehicle in the appropriate place, various specific search tasks are determined.

Having analysed the verdicts of the Unified State Register of Court Decisions on Illegal Seizure of Vehicles, it is possible to identify procedural violations of the pre-trial investigation during the inspection, which resulted in the recognition of evidence as inadmissible, namely:

- in the process of assessing the admissibility of evidence obtained during the inspection of the scene, it is considered that in each case there is a possibility of eventually losing such an opportunity and not fixing the traces of the crime on time [12];

- inspection of the detected places of hiding vehicles that were illegally seized (rented garages, private garages, boxes, hangars) without the decision of the investigating judge [13];

- appeal to the investigating judge after a long period has elapsed after the investigative action, which was performed as urgent, results in the inadmissibility of evidence obtained during such an investigative action [14].

According to Part 1, 2 of Art. 233 of the CPC of Ukraine, no one has the right to enter the home or other property of a person for any purpose other than with the voluntary consent of the person who owns it or based on the decision of the investigating judge, except as provided for in Part 3 of this Article. Other possessions of a person – a vehicle, land plot, garage, other buildings or premises for domestic, official, economic, industrial and other purposes, etc. A search of a person's home or other property may be performed with the voluntary consent of the person who owns it, provided that procedural safeguards have been in place to protect the person's ability to express their true opinion in the event of such consent.

The absence of the accused's objections to the inspection of his possessions does not indicate voluntary consent to the conduct of the said investigative action and is not a procedural guarantee of the accused's right to defence, which determines the inadmissibility of evidence obtained during the investigative action [15].

Art. 13 of the Criminal Procedure Code of Ukraine (hereinafter – the CPC) states that it is not allowed entering a dwelling or other property of a person, conduct an inspection or search therein except for cases provided for by the CPC of Ukraine. The investigator and prosecutor have the right to enter the home or other property of a person only in urgent cases related to saving lives and property or immediate prosecution of persons suspected of committing a crime before the decision of the investigating judge. In this case, the prosecutor, the investigator in agreement with the prosecutor is obliged to immediately after such actions apply for a search to the investigating judge.

The investigator should not apply to the court for permission to inspect the garage as a crime scene if they have the consent of at least one of the co-owners of the household [16; 17].

The consent of another or all is not necessary. In the materials of the proceedings, there is a written consent of one of the co-owners for such an inspection and the inspection itself was performed in the presence of this co-owner, although at night. Thus, the evidence obtained - the report of the inspection of the scene and the derived conclusions of the examination of the seized materials of biological origin and physical evidence are admissible. Calling the police and notifying other persons about a crime committed on the territory of a person's household indicates voluntary consent to enter the household and excludes the recognition of the evidence obtained as inadmissible on the grounds of lack of such consent.

By Part 2 of Art. 237 of the CPC of Ukraine, the inspection of a person's home or other property is performed according to the rules of the CPC of Ukraine provided for the search of a person's home or other property.

Thus, according to Part 2 of Art. 234 of the CPC of Ukraine, the search is conducted based on the decision of the investigating judge.

According to Part 1 of Art. 107, para. 10 of Art. 236 of the CPC of Ukraine, a search of a person's home or other property based on the decision of the investigating judge must be recorded by audio and video recording.

The absence of an appendix, in particular in the protocol of video recording of the inspection of the scene, as required by Part 2 of Art. 104, Art. 105 of the CPC of Ukraine, prevents immediate investigation in the manner prescribed by Art. 23 of the CPC of Ukraine and gives the court reasonable grounds to believe that such recording was not performed.

According to Part 6 of Art. 107 of the CPC of Ukraine, failure to use technical means of recording criminal proceedings in cases where it is mandatory entails the invalidity of the relevant procedural action and the results obtained as a result of its commission. By Art. 105 of the CPC of Ukraine, the person who conducted the procedural action attaches annexes to the protocol, such annexes maybe photo tables. Appendices to the protocols must be duly prepared and certified by the signatures of the investigator, prosecutor, specialist, and other persons who participated in the preparation of such appendices: the protocol of inspection of the scene does not contain the signature of the investigator who conducted the procedural action, which prevents the identification of the person who prepared this protocol, or there is a signature without specifying the name of the person.

The introductory part of the protocol should contain information about the place, time and name of the procedural action; the person conducting the procedural action (surname, name, patronymic, position), and all persons present during the procedural action (surnames, names, patronymics, dates of birth, places of residence). Violation of paragraph 1 of Part 3 of Article 104 of the CPC of Ukraine is the lack of information about all persons present during the procedural action.

In practice, the investigator and prosecutor use the general rule, which provides for their right to entrust the investigative action to the operational units.

There are cases when in criminal proceedings there are no written orders from the investigator (prosecutor) to conduct investigative actions [18]:

– the inspection of the detected hiding places for illegally seized vehicles (rented garages, private garages, boxes, hangars) was performed by operational officers, but they were not provided with orders (unauthorised persons, Part 2 of Art. 234);

– a violation of Part 2 of Art. 234 of the CPC of Ukraine is the inspection of other property of a person (vehicle, land, garage, other buildings or premises for household, office, economic, industrial and other purposes, etc.

According to Part 2 of Art. 237 of the CPC of Ukraine, the inspection of a person's home or other property is performed by the rules of the CPC of Ukraine provided for the search of a person's home or other property. Employees of operational units do not belong, by paragraph 25 of Part 1 of Article 3 of the CPC of Ukraine, to the participants of criminal proceedings, and therefore cannot be invited by the investigator to search for a person's home or other property, by Part 1 of Article 236 of the CPC of Ukraine. The materials of the criminal proceedings should include a written order of the investigator, the investigator for their involvement in the relevant investigative action, as required by Articles 40, 40, and 41 of the CPC of Ukraine.

During the inspection at the enterprise, institution or organisation, the second copy of the protocol is handed to the head or representative of the enterprise, institution or organisation. The violation of Part 9 of Art. 236 of the CPC of Ukraine during the inspection at the enterprise, institution or organisation is the failure to deliver the second copy of the protocol to the head or representative of the enterprise, institution or organisation.

Such inspection is performed with the mandatory participation of at least two witnesses regardless of using technical means of recording the relevant investigative (detective) action. It is a violation of Part 7 of Art. 223 of the CPC of Ukraine to inspect with the participation of fewer than two witnesses.

Witnesses cannot be the victim, relatives of the suspect, accused and victim, law enforcement officers, and persons interested in the results of criminal proceedings [19]. These persons may be interrogated during the trial as witnesses of the relevant investigative (search) action.

The violation is: the witnesses did not check their identity documents (Law of Ukraine “On the Unified State Demographic Register and documents confirming the citizenship of Ukraine, identity or special status”).

The investigative (search) action includes actions for the proper packaging of things and documents and other actions that are important for verifying the results of the procedural action.

According to Part 3 of Art. 105 of the CPC of Ukraine, the annexes to the protocols must be properly made, packed for reliable storage, and certified by the signatures of the investigator, prosecutor, specialist, and other persons who participated in the preparation and/or seizure of such annexes.

Violation of Part 3 of Art. 105 of the CPC of Ukraine is the production, and packaging of annexes

to the protocols in an improper manner, and failure to certify the signatures of all persons who participated in the investigation: investigator, prosecutor, specialist, and other persons who participated in the production and/or seizure of such annexes.

Evidence is admissible if it is obtained by the procedure established by the CPC of Ukraine (Part 1 of Article 86 of the CPC of Ukraine). The criterion for general inadmissibility of evidence that may be declared inadmissible is a violation of the procedure for obtaining it.

The criterion that the court is guided by in the case of recognition or non-recognition of evidence inadmissible at the stage of the trial is the criterion of obvious inadmissibility, which is the absence of doubt that the CPC of Ukraine has been violated, and such a violation can be established by the court immediately during the examination of evidence and does not require additional actions, in particular the examination of all evidence [20]. Any doubts about factual findings and evidence and the interpretation and application of legal provisions should be resolved in favour of the suspect. It is an absolute rule according to the directive, i.e. all exceptions are omitted [21].

Thus, having considered the issue of procedural violations during the inspection in the process of investigating the illegal seizure of the vehicle, which the court generally recognizes as inadmissible, is a violation of the rules and procedures established by the CPC of Ukraine regarding their receipt.

A systematic analysis of the most common procedural violations during the investigative (search) inspection in the process of investigating the illegal seizure of vehicles was performed. Based on the analysis, the most frequent procedural violations of the provisions and procedures enshrined in the CPC of Ukraine during the investigative (search) action of the inspection, which resulted in the recognition of evidence inadmissible, were identified, namely:

- untimely recorded traces of the crime [12];
- inspection of the detected places of hiding illegally seized vehicles (rented garages, private garages, boxes, hangars) without the decision of the investigating judge [13];
- appeal to the investigating judge after a long period of time has elapsed after the investigative action, which was performed as urgent, as a result, the evidence obtained in the course of such an investigative action is inadmissible [14];
- the investigator should not apply to the court for permission to inspect the garage as a crime scene if they have the consent of at least one of the co-owners of the household;
- The absence of an appendix, in particular in the protocol of video recording of the inspection of the scene, as required by Part 2 of Art. 104, Art. 105 of the CPC of Ukraine, prevents immediate investigation in the manner prescribed by Art. 23 of the CPC

of Ukraine and gives the court reasonable grounds to believe that such recording was not performed.

- the report of the inspection of the scene does not contain the signature of the investigator who conducted the specified procedural action, which prevents the identification of the person who compiled this report, or there is a signature without specifying the name of the person;

- violation of paragraph 1 of Part 3 of Article 104 of the CPC of Ukraine – absence in the inspection report of information about all persons present during the procedural action;

- inspection of the detected places of hiding of illegally seized vehicles (rented garages, private garages, boxes, hangars) by operational officers, without authorisation (unauthorised persons, Part 2 of Art. 234);

- violation of Part 2 of Art. 234 of the CPC of Ukraine – inspection of other property of a person (vehicle, land, garage, buildings or premises for household, office, economic, industrial and other purposes, etc);

- violation of Part 9 of Art. 236 of the CPC of Ukraine – failure to deliver the second copy of the protocol during the inspection at the enterprise, institution or organisation to the head or representative of the enterprise, institution or organisation;

- violation of Part 7 of Art. 223 of the CPC of Ukraine – less than two witnesses were present during the inspection;

- The witnesses did not check their identity documents (Law of Ukraine “On the Unified State Demographic Register and documents confirming the citizenship of Ukraine, identity or special status”);

- violation of Part 3 of Art. 105 of the CPC of Ukraine – the annexes to the protocols were improperly made, packed, and not certified by the signatures of all persons who participated in the investigation: investigator, prosecutor, specialist, other persons who participated in the production and/or seizure of such annexes.

Notably, according to the analysis of the materials of the investigative practice, the quality of detection, examination and recording of these traces during the investigative inspection in the process of investigation of illegal seizure of vehicles is affected by the complete non-compliance with the provisions of the criminal procedural law by a law enforcement officer. This circumstance is extremely important for the court's further decision on the admissibility of the evidence [22]. Legal rule I. D. P.R. (“In case of doubt for the accused”) is a rule of modern criminal law, according to which in case of doubt the judges' assessment of the evidence should be interpreted in favour of the accused, or a less serious punishment should be imposed, or there should be an acquittal as a central principle of the rule of law. In criminal proceedings, the quotation is of fundamental significance as the highest principle of criminal law and criminal procedure law [23].

■ Conclusions

Having considered the issue of the types of procedural violations committed during the investigative (search) action of the inspection in the process of investigating the illegal seizure of the vehicle, which were declared inadmissible by the court, it allows identifying the most common of them, which are characteristic of this investigative action. To avoid the recognition of evidence as inadmissible, it is advisable

to follow the case law on the most common procedural violations that most often occur during the relevant procedural actions. Full compliance with the provisions of the Criminal Procedure Code of Ukraine, the procedure for conducting, recording the investigative (search) action of the inspection by a law enforcement officer is an extremely significant circumstance for further court decision on the admissibility of the evidence obtained.

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Окремі види процесуальних порушень під час проведення огляду в процесі розслідування незаконного заволодіння транспортним засобом, що призвели до визнання доказів недопустимими

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■ **Анотація.** Мета статті – на підставі вивчення вироків Єдиного державного реєстру судових рішень, аналізу матеріалів слідчої практики та науково-теоретичних поглядів учених проаналізувати питання щодо найпоширеніших процесуальних порушень під час проведення слідчої (розшукової) дії огляду в процесі розслідування незаконного заволодіння транспортним засобом, що призвели до визнання доказів недопустимими. Методологічне підґрунтя наукової статті становить цілісна й узгоджена система методів, що дала змогу належно проаналізувати предмет дослідження, зокрема використано наукові методи аналізу, синтезу, індукції та дедукції. Теоретичним підґрунтям цієї публікації стали праці вітчизняних учених щодо критеріїв у разі визнання чи невизнання доказу недопустимим. Наукова новизна публікації полягає в системному аналізі найпоширеніших процесуальних порушень під час проведення огляду в процесі розслідування незаконних заволодінь транспортними засобами. На підставі здійсненого аналізу визначено найпоширеніші процесуальні порушення норм і порядку, що встановлено Кримінальним процесуальним кодексом України під час проведення слідчої (розшукової) дії огляду, що призвели до визнання доказів недопустимими. Висновки. Вивчення питання щодо видів процесуальних порушень, допущених під час проведення слідчої (розшукової) дії огляду в процесі розслідування незаконного заволодіння транспортним засобом, які суд визнає недопустимими, сприяє виокремленню найпоширеніших, характерних для цієї слідчої дії. Для уникнення визнання доказів недопустимими, доцільно орієнтуватися на судову практику щодо найпоширеніших процесуальних порушень, які найчастіше трапляються під час проведення відповідних процесуальних дій. Цілковите дотримання норм, положень Кримінального процесуального кодексу України, порядку проведення, фіксації слідчої (розшукової) дії огляду працівником правоохоронного органу є надзвичайно важливою обставиною для подальшого вирішення судом питання щодо допустимості отриманих доказів

■ **Ключові слова:** недопустимий доказ; слідча (розшукова) дія; огляд; порядок; норми; положення; Кримінальний процесуальний кодекс; незаконне заволодіння транспортним засобом; розслідування; процесуальні порушення