



**Evidence Admissibility
Based On Results
Of Law Enforcement
Intelligence Operations**



EVIDENCE ADMISSIBILITY BASED ON RESULTS OF LAW ENFORCEMENT INTELLIGENCE OPERATIONS

ADMISIBILIDAD DE EVIDENCIA BASADA EN RESULTADOS DE OPERACIONES DE INTELIGENCIA DE APLICACIÓN DE LA LEY

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Abstract

The timeliness of the problem under study is justified by the questions occurring in the evaluation process of admissibility of evidence formed on the base of the results of law enforcement intelligence operations, existing situation in Russian Federation at the present stage of development of state and public institutions, as well as with the difficulties emerging in the statutory regulation of the specified groups of procedural relations. In this regard, this article is aimed at a comprehensive analysis of the admissibility of the use of the operational investigative activities results in evidence in criminal cases arising from attempts to resolve them in the national criminal procedure legislation. The leading approach to the study of this problem is the analysis of criminal cases practice, where the operational investigative activities results were provided. The article summarizes the



problem points related to the search for optimal ways to use the actual data obtained by operational means as evidence, as well as the doctrinal approach to the subject under consideration.

Keywords: criminal procedure, criminal case, evidence, admissibility, law enforcement intelligence operations, operative investigations activity, operational investigative information.

Resumen

La oportunidad del problema en estudio se justifica por las preguntas que ocurren en el proceso de evaluación de la admisibilidad de la evidencia formada sobre la base de los resultados de las operaciones de inteligencia de aplicación de la ley, la situación existente en la Federación de Rusia en la etapa actual de desarrollo de las instituciones estatales y públicas, así como con las dificultades que surgen en la regulación legal de los grupos específicos de relaciones procesales. En este sentido, este artículo está dirigido a un análisis exhaustivo de la admisibilidad del uso de las actividades de investigación operativas que dan como resultado pruebas en casos penales que surgen de los intentos de resolverlos en la legislación procesal penal nacional. El enfoque principal para el estudio de este problema es el análisis de la práctica de casos penales, donde se proporcionaron los resultados de las actividades de investigación operativas. El artículo resume los puntos problemáticos relacionados con la búsqueda de formas óptimas de utilizar los datos reales obtenidos por medios operativos como evidencia, así como el enfoque doctrinal del tema en consideración.

Palabras clave: procedimiento penal, caso penal, evidencia, admisibilidad, operaciones de inteligencia de aplicación de la ley, actividad de investigaciones operativas, información de investigación operativa.

Introduction

The issue of admissibility of using the operational investigative activities results in evidence of criminal cases merits the special consideration.

It is established that evidence can be any factual information, everything that serves to establish the truth, if the legal rules of proof are observed. This statement is clearly described in Art. 75 Code of Criminal Procedure of Russian Federation and states that the evidence is recognized as inadmissible and have no legal force, unless obtained in accordance with the requirements of the Code of Criminal Procedure of Russian Federation.¹ The admissibility property, which is absent from the information provided, shows that this information cannot be recognized evidence. That is, the admissibility of evidence depends on the legal methods provided for by the Code of Criminal Procedure. This simple concept of the theory is disputed by some authors, and instead of logical simplicity, researchers supplement the concept of evidence with information about significant circumstances obtained without observing due process procedures.

¹ The Russian Federation Code of Criminal Procedure dated December 18, 2001 No. 174-FZ (as amended on June 27, 2018) // Collection of legislation of the Russian Federation. 2001. № 52 (p. I). Art. 4921.



“The results of the cognitive activity of the investigator or the prosecutor cannot a priori correspond to the essence of the concept of evidence as objectively existing, independent of the cognizing information subject” -Lazareva V.A. writes².

Therefore, "any information about the crime committed, regardless of whether it was obtained in the procedure prescribed by law," is recognized as evidence³. Such a voluminous, and importantly, non-normative concept of evidence should not even be refuted due to its insignificance.

A similar assessment is applied to the results of operational investigative activities in the form of a striving to show that the information obtained in this way also has the necessary evidence⁴

The relevance of the study is confirmed by the debatable nature of the resolution of the question, not only in investigative and judicial practice, but also in the criminal process theory. So, a number of scientists exclude the possibility of using operational information in the form of independent evidence⁵, others see it as a real tool in the hands of the law enforcer, note the positivity from amalgamation of the criminal and investigative proceedings.

Methodology

This study methodologically represents an analysis of both the criminal procedural legislation as a whole, as well as judicial and investigative practice, the practice of applying Russian legislation in law enforcement intelligence operations. Methods used: statistical, comparative legal, sociological. Based on the data obtained, key conclusions are formulated that made it possible to reasonably determine the problems of assessing the admissibility of evidence in the Russian Federation and give recommendations to both law enforcement officers, law enforcement officials, and the legislator.

A.G. Markushin explains that the data from the results of law enforcement intelligence operations (hereinafter referred to LEIO), i.e. if operative investigations activities (hereinafter referred to as the OIA) have been carried out that are directly related to the restriction of the constitutional rights and freedoms of the person and of the citizen, where judicial authorization is required to conduct such an LEIO but for some reason this will not happen, there will be not a subject to assessment of admissibility as evidence in a criminal case.

D.A. Karamyshev believes that the situation in which unscheduled demands for involvement in the field of criminal procedure evidence are put forward to the results of

2 Lazareva V.A. Problems of proving in the modern criminal process in Russia. Moscow: "U right" Publishing House, 2016. P. 49.

3 Lazareva V.A. On some indictment tendencies in judicial practice and the emancipation of the procedural form of evidence//Actual problems of criminal proceedings: issues of the theory of legislation, application practices (for the fifth anniversary of the Code of Criminal Procedure of the Russian Federation). M., 2015. P. 182.

4 Vorobyova Yu.Yu. Modern problems of the process of proving in the Russian criminal proceedings: abstract. dis. PhD in Laws Orenburg, 2006. P. 70.

5 Groshevyi Yu., Stakhivsky S. Evidence and proving in criminal proceedings: Scientific and practical collection. Kiev: KNT, 2006. P. 150; Agutin A.V., Karamyshev D. A. The legal mechanism for ensuring the admissibility of evidence in pre-trial proceedings. M.: Yurkompani, 2010. P. 21; Lotorev E.N., Shchukina T.V., Brusentseva V.A., Zabaikalov A.P., Kolomoets E.E., Sedunov R.A., Zeinalov R.G. Protection of rights and legitimate interests of performers of entrepreneurial activities in modern Russia // International Journal of Advanced Biotechnology and Research. 2016. V. 7. № 4. P. 1951-1958.



law enforcement intelligence operations does not correspond to the concept of ensuring admissibility of evidence. Such a decision is considered to be devoid of a methodological basis in proceedings in criminal cases; from the point of view of knowledge, the results of law enforcement intelligence operations are considered identical with evidence since they have the same features.

Current problem shall be considered from the point of view of the current theory of evidence together with the tasks assigned to the criminal case, taking into account the complexity and sophistication of the methods of committing criminal activity, and the forced prompt response of law enforcement agencies to criminal attacks. In this case, the position of D.A. Karamyshev, cannot be accepted because of allegations regarding the concept of evidence - primarily because only materials obtained taking into account the procedure of the Russian Federation Code of Criminal Procedure with the specified official information can be converted into evidence.

Because of this, such possibility is spelled out in Art. 11 of the Law on LEIO but taking into account the implementation of all processual procedures, in full accordance with the provisions of the criminal procedure legislation, the regulation of which provides for the collection, verification and evaluation of evidence. Since the Russian Federation Code of Criminal Procedure primarily aims to protect the person from crimes, illegal and unreasonable charges, restrictions on rights and freedoms, the existing ambiguities to regulate the implementation of the results of law enforcement intelligence operations in the criminal process are simply unacceptable (Article 6 of the Russian Federation Code of Criminal Procedure).

Researchers who adhere to a different position have their own arguments. First of all, this concerns art. 6 of the Law on LEIO, which spells out the rules to conduct operative investigations activities, which can provide materials for law enforcement intelligence operations with admissibility properties, if the rules for law enforcement intelligence operations have not been violated. However, such rules cannot serve as a guarantee of the information preservation (participation of witnesses, warning of responsibility for making false statements, recordation, etc.). in its original form, as they are not procedural, and are adopted by closed departmental acts. Only compliance with these rules does not affect the admissibility of evidence.

Conclusions

Summarizing the above provisions of Art. 11 of the Law on LEIO and paragraph 20 of the Instructions on the procedure for presenting the results of law enforcement intelligence operations to an investigating officer, investigative authority, investigator or court approved by the Order of September 27, 2013 of law enforcement agencies, it should be indicated that they regulate the issue of quality and criteria presented to the provided results of law enforcement intelligence operations and “shall allow (the addressees) to generate evidence that meets the requirements of the criminal procedure law applicable to evidence in general ... contain ... indications of operative investigations activities during which opinion evidence has been obtained.”⁶

⁶ Order of the Ministry of Internal Affairs of Russia No. 776, Ministry of Defense of Russia No. 703, Federal Security Service of Russia No. 509, Federal Security Service of Russia No. 507, Federal Customs Service of Russia No. 1820, Russian Foreign Intelligence Service No. 42, Federal Security Service of Russia No. 535, Federal Security Service of



It clearly follows from these regulatory requirements that the results of LEIO themselves outside the procedural form are not evidence⁷. However, they can be converted into evidence in compliance with the requirements of the Russian Federation Code of Criminal Procedure, which include the knowing of the origin of evidentiary information.

Researchers agree that they will not meet the requirements for evidence, intelligence information that does not have the property of admissibility⁸. Such information does not meet the admissibility criteria until such time as the information is verified in the manner established by the Russian Federation Code of Criminal Procedure. The procedure is as follows; the court should have a real opportunity to verify this information, i.e. establish when the information was received, directly by which entity and what conditions were upon receipt.

The information contained in the results of the LEIO should be evaluated twice in terms of admissibility. Firstly, the lawfulness of any OIA is checked, the grounds are examined, including the presence of the sanction of officials to conduct certain OIAs related to the restriction of constitutional rights and freedoms of citizens. After that, the correlation between the conducted OIA and the basis of whether it has been permissible from the point of view of the nature of the criminal actions of the person. Secondly, the verification of the grounds, that is, whether there have been sufficient and compelling reasons for conducting an OIA⁹.

The reviewed criminal case practice, where the results of the warrants had been provided, showed that very often such information was not recognized as admissible and, therefore, was not recognized as evidence, this is due to the commission of errors by the authorized officers during the production of the OIA. So, the main errors that led to the recognition of the inadmissibility of evidence have been the following: the conduct of such actions that are not enshrined in the law on the LEIO. The Law on the LEIO has a closed list of permitted ongoing search operations, the conduct of another event leads to a violation of this law. For example, employees of the drug control department actually conducted an OIA “Test purchasing operation”, i.e. a purchase of drugs has been made from a person who has been reliably aware that he has been a seller. An employee, under the guise of an ordinary buyer, makes a purchase, after which documents are drawn up on the conducted OIA. But after providing such documents to the investigator according to the stipulated rules, the investigator assessed the admissibility of such information, during which it was established that the “Control Procurement” action had been carried out, which was not reflected in the list of permitted activities in the Law on Ordinance. The reflection of the incorrect name of the OIA in the documents of the LEIO led to the fact that such results of the OIA were recognized as unacceptable.

Russia No. 398, Russian Security Code No. 68 of 09/27/2013 . “On the approval of the Instructions on the procedure to present the results of law enforcement intelligence operations to the investigative authority, investigator or court” // Rossiyskaya Gazeta. Number 282. 12/13/2013. p. 41.

7 Makarov A.V., Firsov O.V. “Problems of registration the results of open law enforcement intelligence operations” // Rossiyskii sledovatel. 2013. No. 12. p. 38.

8 Ryzhakov A.P. “New means of verifying a crime report” // Legal Reference System “Consultant Plus”. URL: <http://www.consultant.ru/cons/cgi/online.cgi?req=doc&base=CJI&n=70668#06956257248038293>.

9 Stelmakh V.Yu. “Some problems of admissibility of the results of operational investigative activities and as evidence in criminal cases” // Bulletin of the East Siberian Institute of the Ministry of Internal Affairs of Russia. 2015.p. 21.



Another common mistake in the study has been the performance of OIA by an inappropriate person. Several types of such errors have been revealed: firstly, the decision to conduct an OIA was signed by a person who did not have the competence to sign such a document (by the deputy body that conducts the LEIO); secondly, the OIA was carried out by employees of such units of the Ministry of Internal Affairs who do not have the right to conduct operational investigative activities; thirdly, the OIA was carried out by an employee of the unit who has the competence to conduct the OIA, but this person was not indicated in the decision to conduct the OIA.

A sufficient number of crimes of any category cannot be solved without the help of such information. In this regard, we recommend distinguishing between the use of law enforcement intelligence operations in order to solve a crime or detect criminals and attempt to consider the operation itself as evidence, and equate its results with evidence that will serve as the conclusions of the case.

Evidence can only be such information, only such factual data that has been collected in compliance with all criminal procedural requirements that detail the rules of evidence, all investigative and judicial actions.

The results of law enforcement intelligence operations, as an element of procuring evidence, is subject to regulation by criminal procedure legislation. So, the Russian Federation Code of Criminal Procedure contains article 89 "Use in proving the results of operational search activities". It seems that the processual procedure for introducing and recognizing the results of the LEIO as evidence in a criminal case will be disclosed here, but this article contains such a norm that the results of the LEIO cannot serve as orienting information and are used in the collection of evidence, verification and evaluation. That is, the presence of such an article does not allow us to understand the very procedure for proving the results of the LEIO.

Indeed, as evidenced by E.A. Dolya, the view, prevailing in the theory of law enforcement intelligence operations, the theory of criminal process that the results of the LEIO are the same information that form the content of evidence in the criminal process, in practice, is untrue and needs to be reviewed¹⁰.

Such an interpretation of the relationship between the results of the LEIO and the evidence disorients practitioners. For operational workers, it creates the illusion that they form procedural evidence, thereby fettering their actions. This approach guides authorities of criminal procedure by the formation of evidence to obtain information that has been generated in the framework of the operative investigations' activities, which is incorrect in principle. This leads to a distortion of the content of evidence, an unacceptable confusion of criminal and investigative proceedings, violation of the rights and freedoms of citizens.

The bodies that carry out law enforcement intelligence operations are not participants in the criminal process, also in accordance with Art. 86 of the Russian Federation Code of Criminal Procedure, they cannot collect evidence in a criminal case, thereby the authorities presenting the results of law enforcement intelligence operations do not have competencies in the criminal process. This is one of the reasons for the problems to provide with the results of the LEIO, as well as the subsequent assessment of these admissibility results.

10 Dolya E.A. "Formation of evidence based on the results of law enforcement intelligence operations". Monograph. M.: Prospect, 2017. p. 167.



The results of the LEIO and the evidence are heterogeneous for various reasons: by legal nature, by the source of occurrence and, most importantly, by purpose.

The information contained in the results of the LEIO often includes circumstances that are relevant to the criminal case. This fact does not give the right to speak about the identity of the same information arising from the results of the LEIO and information obtained already during the criminal process. As an example, we can consider a situation where the same information is equivalent in value, first for law enforcement intelligence operations, and then for the criminal process, the same person reports, they have a different legal nature, i.e. information in the framework of law enforcement intelligence operations can be obtained from the agent and the same information will be received from the same person but who will act as a witness in the framework of criminal procedure.

The legal nature of such information remains different even if the content is the same.

Their legal nature remains different even in those cases when they coincide in content. They are formed in various time and legal framework, by different entities (criminal and investigative proceedings), in various ways. The legal status of the sources of this data is also different¹¹. In other words, as V.N. Karagodin, the results of the LEIO are only the basis for the formation of procedural evidence¹².

Based on this, the purpose and use limits of the specified data are different. Their possible coincidence in terms of content, due to the fact that they can reflect the same facts and circumstances, is not a basis for identification, let alone substitution of the results of the LEIO for judicial evidence. If it were the same data, then different legal forms — criminal and investigative proceedings — would not be used to obtain it.

Summarizing the above, it can be concluded that, in general, operational information can be used in criminal cases in the following areas: as excuses and grounds for initiating a criminal case as an orienting, supporting information for planning and conducting investigative actions, proposing versions and, finally, as a direct independent source (type) of evidence.

It seems that the data obtained by the results of law enforcement intelligence operations can be used as evidence if it meets the general requirements for evidence in criminal proceeding, that is:

- 1) the ability to establish circumstances relevant to the proper resolution of the case with their help;
- 2) factual data has been obtained by bodies authorized to carry out law enforcement intelligence operations (both on behalf of and on their own initiative);
- 3) the procedure to conduct law enforcement intelligence operations has been followed (in particular, the law enforcement intelligence operations has been authorized by the court) upon receipt of them;
- 4) the information gathered about the facts can be verified by process.

11 Sheifer S.A. "Evidence and proof in criminal matters: problems of theory and legal regulation. M.: NORMA, 2009. p. 125.

12 Karagodin V.N. "Operational experiment as a means of verifying information about the upcoming bribery // Rossiyskii sledovatel. 2011. No. 8. p. 2.



Thus, the problem of using actual data obtained by operational means as evidence is directly dependent on compliance with the rules of their admissibility.

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