

Artículo de investigación

Forensic examinations appointed at the investigation of crimes committed against journalists**СУДЕБНЫЕ ЭКСПЕРТИЗЫ, НАЗНАЧАЕМЫЕ ПРИ РАССЛЕДОВАНИИ ПРЕСТУПЛЕНИЙ, СОВЕРШЕННЫХ ПРОТИВ ЖУРНАЛИСТОВ**

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Abstract

The specifics of the implementation of special knowledge have been analyzed, in particular regarding the appointment of forensic examinations while the investigation of crimes committed against journalists. Taking into account the analysis of scientific literature, as well as existing practice regarding the investigation of criminal proceedings of this category, the author has presented a characteristic of typical types of forensic examinations. In particular, special attention has been paid to such types as merchandising, forensic and medical, computer and technological, phonoscopic, molecular and genetic, integrated forensic examinations, human odor traces, fingerprints, etc. It has been emphasized that the number and types of forensic examinations are assigned depending on the established circumstances. *The purpose* of the paper is to identify forensic examinations that are assigned to investigate crimes committed against journalists. To achieve this objective, the author has used general scientific and special methods of cognition. Thus, using the method of legal analysis, the author has

Аннотация

Проанализированы особенности применения специальных знаний, в частности, относительно назначения судебных экспертиз при расследовании преступлений, совершенных против журналистов. С учетом анализа научной литературы, а также имеющейся практики расследования уголовных производств указанной категории предоставлена характеристика таких видов судебных экспертиз, как товароведческой, судебно-медицинской, компьютерно-технической, фоноскопической, молекулярно-генетической, комплексной судебной экспертизе, запаховых следов человека, дактилоскопической. Обращено внимание, что количество и виды судебных экспертиз назначаются в зависимости от установленных обстоятельств, первичной квалификации совершенного преступления, этапа расследования. *Целью статьи* явилось определение перечня судебных экспертиз, назначаемых при расследовании преступлений, совершенных против журналистов. Для достижения поставленной

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determined that the appointment and conduction of forensic examinations in criminal proceedings, investigated on the fact of committing a crime against a journalist, has an important role in establishing the circumstances to be proved (the type and size of the caused damage; the severity and nature of the bodily harm, etc.). The comparative and legal method has been used in the course of studying the practice of the European Court of Human Rights and analyzing the criminal and procedural legislation of other countries. The statistical method is the basis for processing statistical data, materials of investigative and court practice. Therefore, attention has been paid to the fact that whole assigning a particular type of forensic examination, an investigator has to correctly determine the range of tasks that are put to an expert. An investigator must also use the methodological recommendations that have been developed by practice and set out in the Scientific and Methodological Recommendations on the Preparation and Appointment of Forensic Examinations and Expert Studies.

Key words: Forensic examination, crimes committed against journalists, ruling of an investigating judge, an investigator.

Introduction

One of the priority vectors for the development of a democratic society in Ukraine is ensuring the right to freedom of thought and speech, to free expression of one's views and beliefs, and, accordingly, to freedom of the media. Indeed, it is the Ukrainian mass media (hereinafter - the media) that focuses on the problems of corruption, violence, state security and other acute and topical issues and makes them public (Pavlykivskyi, 2017). However, despite the gradual resolution of various problems of the media functioning in Ukraine, the real protection of the rights, freedoms and legitimate interests of journalists is at a low level. The need to strengthen the protection of journalism is a constant concern of the international community. For example, in the report to the thirty-ninth session of the Human Rights Council (10–28 September 2018), the United Nations High Commissioner expressed “deep concern” regarding the increase in the number of

цели использованы общенаучные и специальные методы познания. С помощью метода юридического анализа определено, что назначение судебных экспертиз в уголовных производствах, расследуемых по факту совершения преступлению против журналиста, имеет важную роль при установлении обстоятельств, подлежащих доказыванию (например, таких как размер причиненного ущерба; тяжесть и характер телесных повреждений и др.). Сравнительно-правовой метод применялся в ходе изучения практики Европейского суда по правам человека. Статистический метод положен в основу обработки статистических данных, материалов следственной и судебной практики. За результатами проведенного исследования акцентировано внимание, что при назначении того или иного вида судебной экспертизы следователю необходимо верно определить круг задач, которые ставятся эксперту на разрешение. Также следователю необходимо воспользоваться методическими рекомендациями, которые сегодня наработаны практикой и изложены в Научно-методических рекомендациях по вопросам подготовки и назначения судебных экспертиз и экспертных исследований.

Ключевые слова: судебная экспертиза; преступления, совершенные против журналистов; определение следственного судьи, следователь.

journalists and media workers who were killed, tortured, arrested or detained in recent years as a result of their professional activities. Moreover, he condemned unconditionally all attacks and violence against journalists and media workers, in particular their torture, murder, disappearances, arbitrary arrests and detentions, intimidation, threats and harassment (Human Rights Council, 2018). Regarding this issue, the Parliamentary Assembly of the Council of Europe has repeatedly called on the Ukrainian authorities to take appropriate measures to improve the conduct of quick and transparent investigations of all criminal cases related to the violence and death of journalists (Resolution no. 1239, 2001).

According to one of the documents of the Commissioner for Human Rights on the protection of journalists from violence (Strasbourg, October 4, 2011), in Ukraine, more

than 10 years after the murder of Georgy Gongadze, the organizers of the crime have not been punished. However, it is commendable that new efforts have been made to investigate and punish all participants. Authorities should consider all the evidence they have and do everything possible to find out the truth about the circumstances of this murder and bring all those responsible for this terrible murder to justice.

And now the Ukrainian government is faced with another challenge that is to identify, detain and prosecute those responsible for the disappearance of Vasyl Klimentiev, the editor of the newspaper *New Style*, in August 2010 (Case of Gongadze v. Ukraine, 2005). The European Court of Human Rights has repeatedly stated that Article 2 of the Convention requires some form of effective official investigation regarding individuals who have been killed as a result of the use of force. Thus, in the Judgment of November 8, 2005 in the case of Gongadze v. Ukraine, the European Court finds that there was a violation of Article 2 of the Convention due to the authorities' inability to protect the life of Georgy Gongadze. Moreover, the Court considered that during the investigation, the State authorities were more preoccupied with proving the lack of involvement of high-level State officials in the case than with discovering the truth about the circumstances of the disappearance and death of Gongadze.

Therefore, the Court concluded that there was a violation of Article 2 of the Convention concerning an ineffective investigation of the case (CommDH/ (2011)44). Obviously, one of the ways to collect evidence of the guilt of a person who has committed an unlawful act against a journalist is to carry out the necessary set of forensic examinations.

The purpose of the article is to determine the list of forensic examinations that are advisable in the investigation of crimes committed against journalists.

Methodology

To achieve this purpose, general scientific and special methods of cognition are used. The method of legal analysis enables to determine that the forensic examinations ordered in criminal proceedings on the commission of crimes against journalists are important in establishing the circumstances to be proved, for example, the type and size of the damage caused, the severity and nature of the bodily harm, etc. The comparative legal method enables to study

the practice of the European Court of Human Rights. The statistical method is the basis for processing statistical data, materials of investigative and judicial practice (100 criminal proceedings and 20 court judgements from the Unified Register of Court Judgements have been studied).

Results and discussion

At present, the right to freedom of thought and freedom of expression is guaranteed by a number of international legal acts, namely: Article 19 of the Universal Declaration of Human Rights (UDHR, 1948), Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms (CPHFF, 1950), Article 19 of the International Covenant on Civil and Political Rights, Article 11 of the Charter of Fundamental Rights of the European Union (CFREU, 2000). Moreover, Resolution no. 1165 (1998) of the Parliamentary Assembly of the Council of Europe states that the right to freedom of expression, as fundamental to a democratic society, is neither absolute nor hierarchical. Moreover, the right to privacy afforded by Article 8 of the European Convention on Human Rights should not only protect the private life of an individual against interference by public authorities, but also against interference by private persons or institutions, including the mass media (Resolution no. 1165, 1998). Given the significance of these fundamental rights and freedoms, Article 34 of the Constitution of Ukraine guarantees everyone the right to freedom of thought and speech, and to free expression of his views and beliefs. Everyone shall have the right to freely collect, store, use, and disseminate information by oral, written, or other means at his discretion (CU, 1996).

However, the legislator establishes certain restrictions (exceptions). For example, the exercise of these rights may be restricted by law in the interests of national security, territorial integrity or public order for the purposes of preventing disturbances or crimes, protecting the health of the population, protecting the reputation or rights of other persons, preventing the publication of information received confidentially, or supporting the authority and impartiality of justice. The above constitutional regulations fully comply with international legal standards that guarantee these rights and freedoms. Therefore, journalists are also obliged to observe the private rights of each person, and are not entitled to go beyond the powers granted to them by law performing their professional

activities. Otherwise, journalists may also be prosecuted.

Nowadays, more and more frequently, in separate items and materials journalists began to conduct their own "investigations" of the most resonant incidents. In addition, under competition with their opponents from other media, in pursuit of "hot" facts, they assume the functions of investigators unusual for them, using similar techniques and methods of work: collecting, analyzing information, constructing theories, observing, including overt one, interviewing citizens, an experiment, a request for various materials relevant to the case and more (Skobelina, 2013).

During 2013-2018, 1,135 criminal proceedings were opened on crimes related to the hindrance of the legitimate activities of journalists (CCU, 2001). As of the end of 2018, 100 indictments were sent to court (i.e. 8.9% of the total number of criminal proceedings), based on the results of which 29 indictments and only 6 acquittals were passed. At the same time, the number of closed criminal proceedings amounted up to 762 (i.e. 67.2% of total criminal proceedings), and the number of proceedings for which no judgements were made was 286 (Kovtun, 2019). These data indicate the presence of certain challenges for law enforcement bodies in investigating crimes committed against journalists. In addition, this is the indicator that clearly demonstrates the need to find effective legal instruments for the effective investigation of such crimes, including the development of scientific and practical recommendations for the order of forensic examinations.

Without a doubt, in these types of criminal proceedings an important means of proof is to conduct an appropriate range of forensic examinations. Primarily, this is due to the fact that in accordance with Part 2 of Article 84 of the CPC of Ukraine, the expert opinion is one of the procedural sources of evidence in criminal proceedings (CPCU, 2012). And the significance of the expert's conclusion is the possibility to confirm or refute circumstances relevant to the criminal proceedings on its basis. Therefore, the formation of the expert's opinion greatly depends on the qualification of the expert, whose analytical activity leads to the formation of the final conclusion obtained by logical inferences based on existing specialized knowledge (Hetmantsev, 2018). It should be considered that according to the requirements of Part 1 of Article 94 of the CPC of Ukraine, each evidence is evaluated from the perspective of adequacy,

admissibility, and in respect of the aggregate of collected evidence, sufficiency and correlation, in order to take a proper procedural decision.

According to the research of A. V. Kovalenko, among National Police investigators surveyed, 9.7% of respondents attributed a forensic examination to the list of the most difficult investigative (search) actions in investigating attacks on the life and health of journalists (Kovalenko, 2017). It must be emphasized that one of the characteristic features of a forensic examination is the inadmissibility of conducting it for addressing issues related to law (part 1 of Article 242 of the Criminal Procedure Code of Ukraine), while the specificity of an expert's findings is that it shall not be binding for the person or body conducting proceedings. any disagreement with it must be reasoned in the relevant decision, ruling or judgment (part 10 of Article 101 of the CPC of Ukraine).

As A. A. Mazola rightly states, the success of an investigation in criminal proceedings of crimes related to the interference in legitimate professional activities of journalists depends largely on the investigator's ability to conduct a forensic examination in a timely manner. In her opinion, the most promising types of examinations for this category of criminal proceedings are fingerprinting, technical examination of documents, phonoscopic and forensic computer examination. If the investigator has a letter or another message containing threats or unlawful demands, then an appropriate examination should be urgently ordered and carried out to establish the authorship of the text and identify the person who transmitted the message (Mazola, 2015).

According to the study of criminal proceeding materials, in 90% of cases, journalists suffer material damage (for example, their camera phone are broken, or a microphone is ruined), as well as injuries in the course of their professional activities. In this regard, during the pre-trial investigation it is necessary to determine the amount of material damage caused by the criminal offense, which is directly specified in paragraph 6 of Part 2 of Article 242 CPC of Ukraine. It regards the carrying out of a merchandising examination, which enables to determine the material damage caused to the journalist, in particular, to establish the cost of a damaged video camera, photo camera, mobile phone, voice recorder, etc. In order to establish the gravity and nature of injuries (paragraph 2 of Part 2 of Article 242 of the CPC), a forensic medical examination shall be conducted.

If an offender tried to destroy the journalistic equipment, on which the relevant information on illegal activities was recorded, but the information carriers remained (for example, a flash memory card of the telephone, camera, voice recorder), a forensic computer-technical examination should be ordered. This examination enables to establish files, including deleted ones, the storage medium has had.

The study of criminal proceedings proves that today a journalist providing the investigator with audio files from a mobile phone or voice recorder, on which a conversation between two people is recorded, is not the exception, for example, a journalist with a suspect, where the latter makes certain demands, threats, etc. At the same time, the suspect denies the fact of such a conversation, therefore there is a need to establish whether he has really participated in the conversation recorded on the phonogram, and what specific words and phrases he has pronounced. In this case, a forensic phonoscopic examination should be ordered for determining whether the audio file provided by the journalist contains signs of editing, and whether the suspect has taken part in the conversation recorded on the phonogram. If his/her participation is established, the expert will be able to determine which words and phrases the suspect has pronounced. To do this, the expert shall provide: 1) a storage medium containing a file to be examined; 2) optical media (laser disk) in a paper envelope containing a video of the interrogation of a journalist and a suspect (each separately); 3) a copy of the inspection protocol of the transcript file sent for research. If necessary, the following may be established: 1) whether one or more technical devices were used to record specific fragments of a phonogram? 2) whether the provided phonogram is an original or a copy? 3) whether the phonogram is recorded continuously? 4) whether the phonogram provided has been changed? Similar issues can be resolved in relation to video phonograms. To do this, the investigator shall send the relevant materials of criminal proceedings, which will allow the expert to provide a more objective conclusion.

A phonoscopic examination is usually carried out to solve the following problems: voice identification; exclusion of installation, that is, the artificial creation of a conversation on magnetic tape (by gluing tape, electro-acoustic or digital editing, etc.); establishing the number of participants in the conversation and the presence of signs of a staged conversation; in which room or place the conversation could be recorded; what

equipment was used for recording, etc. This examination is required because in court the accused can completely reject the authenticity of the audio recording with his/her voice. This is especially important when sound recording is one of the important evidence. If during proceedings an examination has not been carried out to exclude installation, it will be difficult for the court to evaluate this type of evidence, since it has certain technical parameters (Khalikov, 2011).

The authors advocate the perspective of A. V. Kovtun that a molecular genetic examination should be conducted during the investigation of this category of criminal proceedings, because its conclusions affect significantly the process of proving, since the contact of a certain person with the relevant object is confirmed to an accuracy of 99.9% (Kovtun, 2019). Indeed, the method of DNA analysis is most effective for determining the origin of biological traces from a particular person. In this case, the purpose of an identification study is to establish an identity (complete similarity or coincidence) according to the stable properties of a biological object. Therefore, traces of biological origin, taken at the scene, are used in order to establish the probability of an accidental coincidence of the person's genetic features with the genetic features of biological traces or to exclude the possible origin of these traces from a specific person. In addition, it is positive that the results of a molecular genetic examination, other than cytology, are easily documented, which enables to save primary materials and provide them to the court.

Therefore, using the DNA analysis method the units of molecular genetic studies of the Expert Service of the MIA of Ukraine can implement the following tasks for person identification as regards: 1) identifying objects of biological origin (blood, semen, saliva, hair, muscle and bone tissue) with a specific person; 2) identifying traces of the biological origin of a particular person in mixed traces (for example, in case of rape); 3) identifying the remains in cases of dismemberment of the corpse and identifying victims of disasters when close relatives are alive.

The scientific literature review reveals that today in many countries during the investigation of crimes against the person, one of the promising areas of using scientific and technological achievements in law enforcement is the identification of a person by DNA analysis with

the subsequent formation of DNA records. Such micro-objects are direct evidence found at the crime scene (Kosarev, Makogon, 2007). The development of the research such as DNA analysis of human biological traces is one of the most significant scientific achievements of the last decades of the 20th century in criminalistics and forensic medicine. Molecular genetic research plays a special role in proving in criminal cases, since it enables to identify with high accuracy a biological trace with a specific person (Stepaniuk et al., 2019).

Furthermore, it should be noted that if during the inspection of the scene of the murder of a journalist, items, which contain traces of a substance similar to blood or sweat (for example, formed as a result of fight), are found and seized, a comprehensive forensic examination should be conducted, and not only biological. This enables to detect and fix microfibers, as well as establish a mechanism for the origin of traces of blood or sweat.

If possible, an examination of human odor traces (olfactory) should be conducted to identify a person by the traces of odorous substances of his/her sweat that do not contain cellular structures. Considering that odor traces are not perceived and not controlled by a person, therefore, are not destroyed by him/her, but are stable in the external environment, they serve as an important source of personal information that functions continuously, regardless of the will and desires of the individual (Gribunov, 2016). That is, it is possible to obtain information relevant to the investigation on the participant in the crime event, in particular, about the odor traces left by the journalist during the commission of a criminal offense against him. It is a matter of identifying and confiscating from the person, who has committed the crime, objects (for example, things) that contain the odor traces of a journalist-victim.

In a number of cases, a fingerprint examination of hands is conducted for this category of criminal proceedings to establish the following:

- 1) With which hand and finger marks have been left, and what is their localization;
- 2) Whether any structural features of the hand (scars, lack of phalanx of the fingers, etc.) are present;
- 3) What gender, age and approximate height of the person is, etc.

It should be emphasized that nowadays, a common way of intimidation of a journalist is the

arson of his/her property or the property of the company where he/she works. In such cases, an examination of petroleum products and fuels and lubricants (physic-chemical) is advisable. For example, in one of the criminal proceedings conducted on the grounds of a crime under Part 2 of Article 347-1 of the Criminal Code of Ukraine (damage to the property of a journalist by arson), it was found that in the presented fragment of the bottle with traces of thermal exposure, residues of substances which carbohydrate composition is similar to a mixture of light oil products (gasoline and diesel fuel) were present (Kovtun, 2019). That is, according to this examination, it is possible to determine the composition of the substance, identify the group, brand and the like.

Along with the types of examinations listed, in particular, if it is necessary to identify the executor of the handwritten text, limited with the total handwritten notes (alphanumeric), in order to study signatures, to establish the content of documents, a handwriting examination may be ordered. The object of this examination is handwriting material, which reflects the signs of the person's handwriting to the extent possible to be found to achieve the targets. For handwriting tests of manuscripts and signatures, original documents are provided. In this case, the investigator, prosecutor shall consider that according to paragraph 3.5. of the Instruction on the Order and Conduct of Forensic Examinations and Expert Studies, handwriting examination of copies of objects of research cannot be carried out (MJU, 1998). However, the authors argue that it is advisable to provide for the possibility of handwriting examination of copies of the objects under study after the resolution of expert in technical examination of documents on the absence of installation.

Evidently, the list of forensic examinations cited, conducted during the investigation of crimes against journalists, is not exhaustive, because depending on the circumstances of the case, the investigator, prosecutor may decide on the advisability of conducting other types of them.

It should be noted that if an investigator, prosecutor refers to court a request for an expert examination, it shall indicate which materials (objects) will be provided to the expert for research. Indeed, the relevance of the expert's opinion depends on the information that is contained directly in the materials (objects) sent to examination. Moreover, the materials (objects) provided for examination should be relevant to criminal proceedings, in particular, contain information on the facts and circumstances to be

proved. This is important, because according to the requirements of Part 4 of Article 101 the CPC of Ukraine, the conclusion should be based on information that the expert directly perceived or became aware of during examination of the materials provided for examination.

In order to compile properly and correctly a list of questions for the expert, the investigator shall consult with the expert and use the methodological recommendations developed practically and provided in the Scientific and Methodological Recommendations on the preparation and order of forensic examinations and expert analysis approved by the Order of the Ministry of Justice of Ukraine no. 53/5 of October 8, 1998 (as amended on December 26, 2012).

Conclusions

The study reveals that currently the legal practice of a forensic examination in the investigation of crimes committed against journalists puts forward completely new requirements for the methodology of research, development and conduct of expert examination. In this regard, the investigator shall constantly master the modern scientific and technological achievements, make full use of the available forensic techniques at various stages of crime investigation. This is because forensic activity is one of the priority areas in the investigation of each type of crime, as it enables to establish circumstances that are relevant to criminal proceedings and are to be proved.

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