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TÍTULO: Lugar y papel de la voluntad del acusado en el sistema contencioso de los procesos penales.

AUTORES:

1. Ph.D. Elena Alexandrovna Artamonova.

2. Ph.D. Vladimir Mikhailovich Kornukov.

RESUMEN: Se investiga la correlación y el mecanismo de interacción de la voluntad del acusado y el principio de adversarialismo. Los amplios poderes del acusado, que le permiten influir efectivamente en la actividad procesal penal, adquieren una importancia práctica adecuada solo en condiciones de competencia, que debido a la igualdad de las partes, actúa como una forma de organizar y llevar a cabo procesos penales. Al mismo tiempo, la expresión de voluntad se convierte en el principal medio para defender la posición del acusado en un caso penal y proteger los derechos e intereses legítimos.

PALABRAS CLAVES: el acusado, la voluntad del acusado, el principio de confrontación, la relación de la voluntad y el principio de confrontación, la defense.

TITLE: Place and role of the will of the accused in an adversarial system criminal proceedings

AUTHORS:

1. Ph.D. Elena Alexandrovna Artamonova.

2. Ph.D. Vladimir Mikhailovich Kornukov.

ABSTRACT: The correlation and the mechanism of interaction of the will of the accused and the principle of competition are investigated. The broad powers of the accused, allowing him to effectively influence criminal procedural activity, acquire proper practical significance only in conditions of adversarial procedure, which, stipulating the equality of the parties, acts as a way of organizing and conducting criminal proceedings. At the same time, expression of will becomes the main means of defending the defendant's position in a criminal case and protecting the rights and legitimate interests.

KEY WORDS: accused, expression of will of the accused, competition, principle of competition, connection of expression of will and principle of competition, defense.

INTRODUCTION.

All the most important categories of law, including its sectoral types, are somehow interconnected. It is impossible to imagine and explain in isolation from each other the purpose of criminal proceedings, its principles, the subject composition and legal status of participants in the relevant activity, the nature of legal relations arising from its implementation, etc.

The will of the accused, from the point of view of its essence and significance in modern Russian criminal procedural reality, has acquired the character of one of the above categories of criminal proceedings. The main substantive elements of this new criminal procedural phenomenon (category) are present in the fabric of many existing criminal procedural norms and institutions, but their regulatory and structural expression is so blurred that it does not allow us to see their true legal significance and connection with the fundamental categories, and above all, principles of criminal proceedings. First of all, this concerns the principle of competitiveness, which, on the one hand, personifies and activates the activities of the main participants in the criminal process, and on the

other hand, cannot exist in the absence of these persons proper opportunities to defend and protect their own or represented interests.

Without an understanding and disclosure of the dialectic of the relationship of these aspects of criminal procedure matter, it is neither possible to correctly apply the current legislation, nor correctly identify the trends, ways and means of improving it.

DEVELOPMENT.

Research methodology.

In conducting this study, we used the dialectical method of scientific knowledge, analysis, synthesis, induction and deduction, a systematic approach, historical and legal, comparative legal and formal legal methods of cognition. Conclusions and suggestions are based primarily on the analysis of existing criminal procedure legislation and its enforcement, as well as the results of 2017-2018 in the city of Stavropol, the city of Saratov, the city of Novomoskovsk generalization of judicial and prosecutorial-investigative practice.

Study results.

The mechanism of interaction between the will of the accused and the principle of adversarial criminal proceedings is based on the substantive basis of this principle: separation of functions, equality of arms and broad powers of the accused, allowing him to effectively influence the course and results of criminal procedure. In this connection, adversarial acts as a way of organizing and carrying out criminal procedural activities, and the expression of the will of the accused is the main means of upholding by the indicated participant in the criminal process his position in the criminal case and protecting his legitimate interests.

The accused either directly or in agreement with the defense counsel chooses the line of his defense. As for the other representatives of this party, they generally cannot act without the consent of the accused or contrary to his position.

One of the main ways of organizing the activities of the accused in the indicated direction is the manifestation by him of his attitude to the ongoing criminal procedural actions and the adopted procedural decisions through the expression of will regarding emerging issues. First of all, the accused denotes his attitude to the indictment, expresses his views on the order and content of the investigation, he is one of the subjects that influence the determination of the jurisdiction of a criminal case and the judicial form of its consideration.

As a rule, the accused's participation in criminal proceedings begins with his interrogation, in which he independently decides whether to testify or not, and if so, when, what and to what extent. Their completeness and reliability entirely depend on the attitude of the accused to the criminal case. If he repents, admits his guilt, wishes to make amends for the harm done, he gives truthful, detailed confessions, the contents of which serve as the source material for the formation of the evidence base. And even when the accused gives incomplete and inaccurate testimonies, it is possible that he will send a law enforcer, who is obliged to check every evidence received, including especially that received from the accused, in the right direction of the investigation.

The adversarial start provides the accused with the opportunity to actively participate in proving the entire duration of the criminal proceedings. And even in pre-trial stages, where the action of competition is very doubtful, and the accused is in a particularly vulnerable position, the prosecution is obliged to prove his version of the case, without resorting to evidence obtained against the will of the accused (1) (p. 176; (2), p. 180). In some cases, the evidentiary power of the information received is preserved solely due to the will of the accused; for example, according to the law, verification of

evidence on the spot is possible only for a person who has previously testified (Article 194 of the Code of Criminal Procedure).

An arbitrary change by the law enforcer upon receipt of evidence of a combination of cognitive means established by law (interrogation, the result of which is to obtain evidence, verify these evidence on the spot) leads, as a general rule, to inadmissibility of the evidence obtained (3), due to a violation of the procedure for collecting and fixing them established by the Code of Criminal Procedure of the Russian Federation (4). Meanwhile, the Supreme Court of the Russian Federation, when considering one of the criminal cases, recognized as an admissible evidence a protocol of verification of evidence on the spot, which was carried out at the request of the accused without preliminary interrogation, indicating that the lack of evidence of the accused prior to verification, with his positive attitude to this, is insufficient for the recognition of evidence obtained in this way unacceptable (5).

Putting questions to the expert, petitioning for investigative actions, asking questions to another confrontation participant or challenging the testimony of the person who testifies against him, denying and refuting them, questioning their authenticity, the accused activates the evidentiary process in conditions of competition, thereby truth-finding in the case. The most common way for an accused to participate in proving in criminal cases is to submit documents and objects, as well as submit applications for their reclamation. Most often, the accused present characteristics from the place of work, study, residence, birth certificates, certificates of employment, etc.

The study of criminal cases has shown, that as a rule, the investigating authorities and the court satisfy the requests of the accused and attach the documents and objects they submit to As evidence, they claim the materials indicated by the party of protection. And this positively characterizes the Russian criminal process. However, this positive, in our opinion, now looks flawed, since one of the basic foundations of the principle of competition is the requirement of equality of arms. This circumstance in modern conditions requires expanding the powers of the accused to prove by empowering him to

independently, or with the help of a lawyer, private investigator, legal representative, collect evidence that would be accepted and attached to the case regardless of the discretion of the law enforcer and had equal legal force with evidence collected by the party the charges.

Not entirely justified, in our opinion, is the temporary restriction on the will of the accused to determine a simplified procedure for the trial. The current criminal procedure law allows the accused to submit such a motion only when the requirements of Art. 217 of the Code of Criminal Procedure of the Russian Federation or at a preliminary hearing, if it is held (part 2 of article 315 of the Code of Criminal Procedure). Meanwhile, the main differences between the simplified court trial and the proceedings in the general order are manifested in the judicial investigation and consist in the order and volume of the investigation of the evidence gathered in the case, and, in fact, without harm to the proceedings, a transition from the general order to a special one in the preparatory part of the trial is quite acceptable. Therefore, the legislator should extend this right of the accused to the indicated stage of judicial proceedings. The negative consequences of such a decision can only be expressed in a "single" subpoena of witnesses, experts, experts, but their severity is mitigated by the fact that in practice at the initial court session many of these persons, as a rule, are not. Otherwise, it appears in the form of a significant advantage for legal proceedings: the procedure is simplified, terms are shortened, and mitigation is guaranteed.

The connection between the will of the accused and the principle of adversarial relations between the accused and the prosecution appears quite expressive. The realization of many of the powers of the preliminary investigation bodies is, to one degree or another, related to the will of the accused, and sometimes directly depends on him. In particular, the conduct of a second interrogation, the conclusion of a pre-trial agreement on cooperation, the termination of a criminal case on any non-rehabilitating grounds are allowed only with the approval of these actions by the accused or on his initiative, and even in those cases, when the law enforcement authority is free to make a decision

on its own and at first glance does not need to be approved by the accused, its actual execution depends on the attitude of the accused. In particular, the decision to conduct an investigative experiment with the participation of the accused is taken by the investigator independently, but its actual production depends on the desire of the accused. If the accused does not want to participate in it, then the production of this investigative action practically loses its meaning. As can be seen, but from this example, the prosecution in some cases directly needs the accused's approving attitude to her actions and decisions, that is, the "right" expression of the will of the accused.

As for the trial, here the accused (defendant) enjoys absolutely equal rights with the prosecutor (part 4 of article 15 of the Code of Criminal Procedure of the Russian Federation), and his will to become one of the necessary elements of activity not only of the defense, but also of other subjects of legal proceedings (charges, resolution of the case).

The position-adversarial activity of the accused, his views and attitudes regarding judicial proceedings at this stage are directly related to the activities of the subjects on the part of the prosecution, since protection is carried out from the prosecution. Through the will of the accused, the accused gets the opportunity to determine his attitude to the activities of the prosecutor, directly challenge his arguments regarding the evidence of the prosecution, the value of this or that evidence, as well as the conclusions made by the prosecutor in his speech in the court debate. Objecting, agreeing, subjecting to critical analysis, the activities of the prosecutor, the defendant participates in the formation of the evidence base, on the basis of which the final court decision is decided. And not only through the will of the defendant, the accused has the opportunity to directly influence the intermediate judicial decisions taken at the initiative of the prosecutor.

The technology of judicial criminal procedural activity, based on the principle of competitiveness, is such that the accused, through the expression of his will, also interacts with the entity performing the function of administering justice (court, judge). In particular, the defendant is guaranteed the right to

testify on the charges. According to Part 3 of Art. 274 of the Code of Criminal Procedure, the defendant is entitled to testify at any time during the judicial investigation, but only with the permission of the presiding judge. Therefore, the possibility of giving evidence to the defendants is connected with the court decision, but the defendant himself determines the immediate time (moment) of giving evidence. Using this opportunity, he can express his attitude to the accusation and voice his defense arguments. This structure of the relationship between the powers of the defendant and the powers of the court just allows the defendant to exercise this right. Failure to provide the defendant with the opportunity to testify does not just limit the exercise of his will, but violates the principle of competition and is a significant violation of the criminal procedure law (7).

The practical interaction of the investigated legal phenomena in many respects depends on their legal regulation, which suffers from many flaws. Firstly, the category of expression of the will of the accused and the form of reaction of the law enforcer to him are not clearly reflected in it. Secondly, in the process of the accused manifesting his will-phenomenon, he is confronted with wide discretion of officials conducting the process.

The law currently in regulating the relationship of the accused, as a representative of the defense, with the prosecution, as well as with the court, often uses the term “entitled”, which allows the law enforcer, accepting the accused’s petitions, to arbitrarily refuse to satisfy them. In particular, this applies to the accused’s petitions to provide him with the opportunity to additionally familiarize himself with the materials of the criminal case at the stage of preparation and appointment of the hearing (part 3 of article 227 of the Code of Criminal Procedure) and in the trial itself; petitions for acceptance, introduction to the case and taking into account when determining the punishment, duly executed documents containing additional information about the identity of the accused, his dependents or other circumstances that could affect the mitigation of punishment (part 3 of article 226.9 of the Code

of Criminal Procedure), defendants during criminal cases, the investigation of which was conducted in a shortened form of inquiry.

The law allows the court in some cases (in practice they are quite common) to respond differently to such statements and petitions of the prosecution and the defense. When they are filed by the prosecutor, the term “entitled” in the above cases, in the interpretation of some judges, acquires the meaning of duty.

Meanwhile, the noted regulation does not fit into the above system of interconnection of the components of the adversarial principle, one of the main requirements of which is the equality of parties, and the will of the accused. The equality of the parties implies not only equal rights (equal rights), which in itself is undeniably important for criminal proceedings, but also the equal reaction of the law enforcement to the same situation in relations with both the prosecution and the defense.

The accused has the right to petition and the prosecutor has the right to petition the court. The equal opportunities of the parties to bring their position on a certain issue to the law enforcer imply an equal attitude to these rights and an equal reaction of the law enforcer, to which the parties apply, to substantively made single-order applications.

Beyond this requirement, any meaning of the conversation about equality is lost. However, in practice, the court’s reaction to the essentially identical applications filed by these entities is often different. Such rationing and such enforcement is explained, first of all, by the fact that the current terminology was introduced into the current legislation from previously existing criminal procedural normative acts that did not fix the principle of competition, and when this principle appeared in the criminal procedure law and began to be regulated, then all the consequences arising from it regarding the powers of the posts of persons carrying out criminal procedure activities were settled using the old terminology.

The consolidation of the adversarial principle as the basis of Russian criminal proceedings required and now requires updating of normative and terminological turnovers and means of regulating the relations arising from it of the subjects of the criminal process, primarily those that perform the main procedural functions: participants from the defense, prosecution and court.

CONCLUSIONS.

In those cases, when the expression of the will of the accused expressed in court concerns important circumstances that are essential for defending his legitimate interests and establishing the truth in the case, it is necessary to legislatively use the term “right”, which allows both satisfaction and refusal of satisfaction petition filed, mandatory order (“must” or “obligated”).

It should be clearly emphasized in which cases the law leaves the resolution of the issue, which is the content of the will of the accused, at the discretion of the law enforcer, and when obliges to resolve it positively. In particular, all those petitions of the defendant, which are aimed at obtaining evidence relevant to the criminal case, must be satisfied by the court without fail, in the same way as is done today with respect to the petitions and petitions of the public prosecutor, but first, in the Code of Criminal Procedure of the Russian Federation, it is necessary to legalize and properly regulate the category of “expression of the will of the accused,” since in all respects the expression of the will of the accused acquires the theoretical and practical significance of one of the system-forming factors of criminal sub-production.

Providing maximum consideration of the opinion of the accused in criminal proceedings will be promoted by the rules containing general instructions on how law enforcement responds to the will of the accused. For this purpose, it is proposed to supplement:

- H. 4 tbsp. 15 of the Code of Criminal Procedure of the Russian Federation with the words: “The will of the accused and the statements of the prosecutor and the arguments they give regarding legal proceedings are of equal importance for the court”.

- Art. 16 of the Code of Criminal Procedure of the Russian Federation with a new part of the following content: “5. Any expression of the will of the accused or suspect expressed in the manner established by this Code shall be accepted, examined on the merits and taken into account as much as possible by the inquiry officer, the head of the inquiry unit, the body of inquiry, the head of the body of inquiry, the investigator, the head of the investigative body, the prosecutor, the judge or the court”.

Conflict of interest.

The authors confirm the absence of a conflict of interest.

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DATA OF THE AUTHORS.

1. Elena Aleksandrovna Artamonova. Candidate of Law, Associate Professor, Associate Professor of the Department of Criminal Law and Procedure of the North Caucasus Federal University.

E-mail: ea.artamonova@yandex.ru

2. Vladimir Mikhailovich Kornukov. Doctor of Law, Professor, Professor of the Department of Criminal Law and Procedure of Togliatti State University. E-mail: vm-kornukov@rambler.ru

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