

UDC 343.985:343.147

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Search Tactics: Specific Issues of Technical Means Application

Article presents analysis of peculiarities of technical means application based on theory of criminalistics, criminal process and pre-trial investigation practices. In this context key theoretical provisions are provided with comparison of different search fixation formats in the course of pre-trial investigation, which allows to understand and evaluate the issues in question. There search was initiated due to amendments in applicable criminal legislation (provisions regarding search performance on specific stage of pre-trial investigation). Research subject is defined as search fixation formats with use of technical forensic support of pre-trial investigation. Methodological basis of research comprises description, comparison and analysis.

Article provides analysis of prominent scholars' opinions on audio and videorecording relevance. Specific aspects of forensic tactics – tactical techniques applied by SOG during search – are outlined, namely: requirements to technical means used to fix the process of search; identification of persons authorized to carry out the abovementioned; identification of starting point for the obligatory search videorecording; analysis of specific tactical techniques used by SOG during search. Also author provides justification for use of more progressive digital forms of visualization (computer technology). The article is aimed at analysis of specific issues regarding tactics of search performance with use of forensic support.

In conclusion author states that the procedure for technical means use in the course of investigative actions fixation including search must be reflected in legislation. Also it is necessary to draft an instruction defining persons authorized to carry out the abovementioned activity.

Keywords: investigative actions tactics; search; fixation format; forensic support in pre-trial investigation; technical means of fixation; continuous video recording.

Problem statement. Innovative dynamics and scientific progress have undoubtedly affected all areas of social relationship including criminal proceedings. In our opinion application of technical means in criminal process results in efficient accomplishment of criminal proceeding tasks, in particular, protection of proceeding parties' and other persons rights by law enforcement during pre-trial investigation.

According to opinion of J. Rybalko system of legislative acts and by-laws regulating procedures for use of technical means in criminal proceeding was previously focused on social relationship and scientific developments in 1960s [1, p. 6]. We can partially agree with this statement – still there some issues that are not fully regulated by applicable Criminal Procedure Code of Ukraine (here in after referred to as CPC) and these will be outlined in the article. Never the less, CPC contains provisions bringing use of technical means in effect aiming at fixation of data during interrogation, identification in videoconference format in pre-trial investigation etc.

The aim of article is to analyze specific issues related to tactics of search carried out with use of forensic equipment and means.

Many scholars contributed to research of technical means application in law enforcement activity including R. Belkin, V. Bakhin, O. Ierusalimov, A. Ishchenko, V. Konovalova, Y. Lukianchykov, M. Saltevskiy, V. Khakhanovskiy, V. Shepitko etc. Regarding the development of criminal procedure legislation it is necessary to mention P. Bilenchuk, V. Boiarov, A. Dubynskiy, V. Tertyshnyk, L. Udalova and other.

We agree with A. Husak that procedural form of data fixation is mostly directed at its perception and reproduction in further use. Ukrainian legislator defined the written form as the basic one but this fixation form demonstrates relatively low level of reproduction and basic ally depends on investigator's skills [2, p. 131]. Thus in order to ensure objective and authentic fixation and further visualization of evidence legislator stipulates the opportunity to use technical means (Art. 103, 107 of CPC). But according to provisions of criminal legislation use of technical means for fixation during search is aimed to support primary fixation means and not to replace it.

In our opinion in the context of search tactics and upon the condition of mandatory audio and videofixation it is appropriate to consider the following:

- formulating requirements to technical means used during the search;
- identification of persons held responsible for videorecording carried out during the search;
- identification of moment when the obligatory videofixation of search starts;
- analysis of specific tactical approaches of search-operative group (here in after referred to as SOG) applied during search.

Thus, regarding use of technical means for search videofixation, we consider the statement made by J. Rybalko to be relevant: expansion of list with technical means to be used for procedural actions fixation and refusal to specify it in CPC provisions not only eliminate the barriers for innovative technology to be applied in the course of criminal proceeding, in particular, digital technology, but also frees the legislator from obligation to regularly amend applicable legal acts [1, p. 9].

We partially agree with the above mentioned statement – establishment of list with technical means available for use during search is not considered relevant in the context of dynamic innovative development. But it is applicable to fix the requirements for technical specifications of videorecording equipment in order to ensure high-quality records. It will prevent any disputes between parties of criminal proceeding regarding low quality of records intended to be used as evidence.

To mention persons held responsible for videorecording during the search, unfortunately, this issue is still not regulated in practical context and accomplished by each investigator individually. At the same time, according to Chapter IV (3) of MIA of Ukraine Order dd. July 7, 2017, No. 575, SOG is led by investigator designated by the head of pre-trial investigation agency to take appropriate actions regarding investigation of criminal offence. That is why we may conclude that investigator must direct the search process and fixed in the record as well. There is an option for investigator to designate an operative who is a member of SOG to handle the recording. But this delegation of responsibility will not be considered appropriate taking into account that operatives do not possess special knowledge and skills for technical means application – this task must be given to specialists (according to Art. 71(2) of CPC specialists may be involved in operations requiring specific technical support, *inter alia* during search).

We agree with I. Pyrih that specialist's activity in the course of immediate testimony checking (investigative experiment) comprises the following tasks: fixation of investigative actions and detection/extraction of crime traces. Sometimes these action can not be taken simultaneously – if so, it is better to involve two specialists (one is responsible for videorecording, another detects and extracts potential evidence) [3, p. 181].

According to Chapter XI (1) of Regulation «On NPU Pre-Trial Investigation Agencies» status of specialist may be granted to forensic inspector (forensic technician) – person possessing any required specialized knowledge and skills regarding use of technical means able to provide practical support to investigators. This person is tasked to carry out videorecording, fixing all available crime traces and processing the video material after completion of investigation.

Unfortunately, not every SOG involves specialists during search. The main reason is lack of skilled staff and high-quality equipment. In our opinion it is necessary to amend the relevant provisions of criminal legislation on obligatory participation of specialists in search of dwellings and other personal property in order to carry out videorecording.

One of the most debatable issues is definition of moment when the obligatory videorecording should start. K. Chaplynskyi supposes that videorecording should start after investigator gives formal notice of search, clarifies rights and obligations to participants of investigative action and offers the person whose dwelling is searched to voluntarily provide items documents identified in notice [4, p. 173].

At the same time we consider three options to be possible: 1) at location of pre-trial investigation agency where relevant SOG holds its meetings; 2) at location which address is mentioned in search notice; 3) from the moment of contacting the persons present at the search location. Let us analyze these options more carefully.

Running the videorecording from the location of pre-trial investigation agency allows SOG members to launch the procedure in peaceful environment with due attention to all relevant data as required by the search regulations including: registration numbers of criminal proceeding and search notice, introductions made by SOG members etc. As a rule, search starts mostly in emotionally tense environment as any intrusion in dwelling or other personal property results in serious distress. That is why it is difficult for investigator to process the data in such conditions. After notification of videorecording procedure initiation is given it is terminated due to necessity to get to address where the search is planned to be carried out.

This option has a significant advantage – it ensures that intrusion it self will not be in any case expected by the dwelling residents. With the recording process already launched there will be no trouble with tactical planning as all actions will be discussed and

approved in advance with confidentiality preserved – abruptness in this case is a guarantee of successful search completion.

Still there are problems with procedure of attesting witnesses involvement. According to Art. 233(7)(2) of the CPC search of dwelling or other personal property is carried out with obligatory involvement of at least two attesting witnesses regardless of technical means application. In the context of obligatory search videorecording one issue is to be clarified: when exactly do we need to involve the attesting witnesses? Criminal legislation does not contain any prohibitions regarding selection of attesting witnesses before arriving at search location. At the same time it gives an opportunity to verify their identity with out any risk to jeopardize the abruptness in the course of intrusion. But in practice it may be not easy to involve attesting witnesses to take part in operation at distant locations. Also in many cases persons subjected to search have expressed concerns and anxiety when asked to allow attesting witnesses, selected by SOG, to enter the dwelling demanding to replace them with third parties. In this case there is no clear understanding of who and what should be fixed: person subjected to search, dwelling or the process of attesting witnesses replacement. We considerate appropriate for investigator to designate the operative for selection of third parties. Videorecording should not be terminated and investigative action is launched upon the new at testing witnesses arrival.

Regarding the options to start recording at location which address is mentioned in search notice or from the moment of contacting the persons present at the search location, the key disadvantage is loss of abruptness factor. Obligatory videorecording during search must be carried out according to established procedure: fixation of intrusion process, introduction of SOG members, at testing witnesses, presentation of search rounds, fixation of dwelling location/address etc. Still, specialized household technical equipment – entry phones, concealed surveillance cameras – allow persons to prepare for the SOG visit and destroy the evidence.

In our opinion the most appropriate and efficient option is to run the videorecording from the location of pre-trial investigation agency where SOG members meet. This tactical technique ensures optimal abruptness of intrusion and allows to follow the established procedure for videorecording to be carried out during dwelling search.

There fore it is essential to clarify the specificity of tactical techniques of dwelling search to be carried out with videorecording ensured by technical means – combination of items and documents search procedures (according to search notice) and fixation both in records and by technical means. In practice SOG mostly stick to two tactical techniques of search performance – the first one stipulate simultaneous detection of items and documents with fixation both in records and by technical means. This method is detailed and includes visualization but it is not optimal for large areas and premises and for multiple items and documents subjected to extraction. Other method stipulated search of all necessary material evidence «in bulk» with following accumulation in one specified place and recording. In order to save time this method is usually more preferable: operatives may carry out search upon the investigator's approval (items and documents identified in notice) while investigator may fix the extracted property in the record. It is necessary to clarify, though, which process to fix – evidence search or data recording?

Taking the above mentioned into account we consider that this separation of search formats is not appropriate. First of all, it contradicts requirements of Art. 170(1)(2) of CPC related to court's notices on search performance with obligatory use of technical means (audio and videorecording equipment). It must be stated that there are cases when investigator terminates videorecording to fix the recorded data in documents. Such decisions are made due to intention to save time and technical resources. In our opinion such decisions are relevant if there is a possibility to verify individual features of item or document in the recording with further detailed description documents. But if it is not possible e.g. during the extraction of folder with multiple documents, videorecording of data documentation process is obligatory.

Still, currently more progressive digital forms of visualization are prioritized. A. Husak mentions a few of them [2, p. 132–133]: software which allows to create animated models of investigative actions taken; CT; programs used to create panoramic images of locations in order to allow virtual orientation in specified premise. It must be mentioned that forensic visualization is already applied by foreign law enforcement agencies. The only barrier restraining Ukrainian police from application of similar technology is absence of relevant provisions in domestic legislation with appropriate scientific implementation methodology.

Taking the above mentioned into account, the procedure for technical means use in the search process must be fully reflected in separate provision of Order dd. July 7, 2017, No. 575. Also it is necessary to draft an instruction defining persons authorized to carry out the above mentioned activity.

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Стаття надійшла до редколегії 27.04.2018

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Тактика обшуку: окремі питання застосування технічних засобів фіксації

Розглянуто особливості застосування технічних засобів фіксації на основі теорії криміналістики, кримінального процесу та практичної сучасної діяльності органів досудового розслідування. Розкрито ключові теоретичні положення, а також здійснено порівняння форм фіксації обшуку під час досудового розслідування, що надає можливість повною мірою зрозуміти й оцінити досліджувану проблематику. Актуальність дослідження зумовлена змінами чинного кримінального процесуального законодавства в контексті провадження обшуку на стадії досудового розслідування. Предметом дослідження є

форми фіксації обшуку, зокрема із застосуванням техніко-криміналістичного забезпечення досудового розслідування. Методологічну основу дослідження становлять: опис, порівняння та аналіз. Проаналізовано погляди авторитетних науковців щодо наукової значущості проблематики звуко- та відеофіксації. Основний зміст статті присвячено розгляду окремих питань криміналістичної тактики щодо аналізу тактичних прийомів слідчо-оперативної групи під час проведення обшуку, а саме: окреслення вимог до технічних засобів, за допомогою яких відбувається фіксація обшуку; визначення кола осіб, на яких покладається обов'язок ведення відеозапису під час обшуку; встановлення моменту, з якого починається обов'язкова відеофіксація обшуку; аналіз окремих тактичних прийомів слідчо-оперативної групи під час проведення обшуку. Також розглянуто більш прогресивні форми візуалізації, що уможливлюються завдяки комп'ютерним технологіям. Головною метою статті є розгляд окремих питань тактики проведення обшуку із застосуванням техніко-криміналістичного забезпечення досудового розслідування. Доведено, що порядок застосування технічних засобів фіксування слідчих (розшукових) дій, зокрема обшуку, має бути відображений в окремому нормативно-правовому акті. Також підкреслено доцільність розроблення відповідної інструкції, із визначенням кола осіб, уповноважених на відеозйомку, вимог до технічних засобів фіксації тощо.

Ключові слова: тактика слідчих (розшукових) дій; обшук; форми фіксації; техніко-криміналістичне забезпечення досудового розслідування; технічні засоби фіксації; безперервна відеозйомка.