

**АКТУАЛЬНІ ПИТАННЯ ЗАПОБІГАННЯ І ПРОТИДІЇ  
ПРАВОПОРУШЕННЯМ: АДМІНІСТРАТИВНО-ПРАВОВІ,  
КРИМІНАЛЬНО-ПРОЦЕСУАЛЬНІ, КРИМІНАЛІСТИЧНІ  
ТА ОПЕРАТИВНО-РОЗШУКОВІ АСПЕКТИ**

UDC 343.98

DOI: 10.31733/2078-3566-2023-1-240-245



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**VIDEO RECORDING AS A WAY TO FORM JUDICIAL EVIDENCE**

**Євген Лук'янчиков, Борис Лук'янчиков, Ольга Микитенко. ВІДЕОЗАПИС ЯК СПОСІБ ФОРМУВАННЯ СУДОВИХ ДОКАЗІВ.** Стаття присвячена проблематиці використання сучасних наукових досягнень у процесі кримінального судочинства. Звертається увага на те, що під час розкриття та розслідування кримінальних правопорушень з давніх часів використовують надбання різних галузей знань. На початковому етапі такі знання використовувалися для з'ясування обставин кримінального правопорушення (встановлення причин смерті, дійсності чи підробленості відповідного документа тощо). З часом необхідність застосування спеціальних знань у кримінальному судочинстві знаходить закріплення у відповідних нормативних документах. У Кримінальному процесуальному кодексі України (далі – КПК України) визначається перелік обставин, для з'ясування яких в обов'язковому порядку має призначатися експертиза. Окрім того, для фіксації процесу і результатів проведення процесуальних дій починають застосовувати фотозйомку, а у подальшому кінозйомку і відеозапис. Ці способи фіксації процесуальної діяльності поступово набувають поширення, що сприяє повноті, об'єктивності та всебічності відображення процесу слідчих дій та отриманих

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результатів. Відеозапис процесуальної діяльності в сучасних умовах набуває особливого значення. В умовах воєнного стану і ведення бойових дій не завжди у слідчого є об'єктивна можливість скласти протокол на місці проведення слідчої дії, а об'єктивно і повно зафіксувати її процес та результати є вкрай необхідним. У такому разі допомагає повний відеозапис процесуальної дії з наступним оформленням протоколу її проведення. Також варто зазначити, що відеозапис слід розглядати не тільки як ефективний і об'єктивний спосіб фіксації ходу проведення процесуальної дії і отриманих результатів. Він є процесуальною гарантією забезпечення прав та законних інтересів учасників слідчої дії від можливих порушень або обмежень з боку осіб, які проводять слідчу дію. У низці випадків, передбачених КПК України, відеозапис звільняє слідчого від обов'язку запрошувати до участі в слідчих діях понятих.

**Ключові слова:** *технічні засоби фіксації, відеозапис, процесуальні дії, слідчі дії, допит, обшук, слідчий, процесуальні гарантії, протокол слідчої дії.*

**Relevance of the study.** The process of investigation of criminal offenses is an informational and cognitive activity. The investigator has the task not only to find traces of a criminal offense and obtain information about the circumstances of the incident and the person who committed it. A significant role in this is played by the investigator's ability to use modern technical means and processes of objective reflection and storage of information about the circumstances of the offense. First of all, this concerns the use of video recording of the course and results of investigative actions, as well as the legal regulation of this activity in the Criminal Procedure Code of Ukraine (further – the CPC of Ukraine), which attracted the attention of the authors.

**Recent publications review.** The works of domestic and foreign scientists, both criminalists and proceduralists, are devoted to the use of video recording in criminal proceedings. Thus, the textbook of I. Naidis highlights the theoretical and practical aspects of the use of film and video recording in the investigation of crimes (1986). In the work of E. Ishchenko, P. Ishchenko and V. Zotchev the state of development of forensic photography and video recording is revealed, as well as the prospects for their improvement are determined (1999). O. Kobylanskyi analyzed the general provisions of video recording, defined its system, revealed the tactics and methods of its application (2020). The possibilities of using sound and video recording materials as evidence in criminal proceedings as a kind of documents or material evidence were investigated by M. Gaponiuk. Despite the attention of scientists to this problem, a number of issues related to the regulatory regulation of the use of video recording in criminal proceedings require further research, especially in the current conditions of martial law.

**The research paper's objective** is to analyze the normative regulation of video recording during certain procedural actions, to prove its dual significance for criminal proceedings: a means of complete and objective recording of the procedural action and a procedural guarantee of protection of the rights and interests of its participants from possible violations by the persons conducting it. In addition, it is necessary to develop proposals for further regulatory regulation of the use of video recording during pre-trial investigation.

**Discussion.** Crime accompanies humanity at all stages of its development, goes step by step (sometimes ahead) with the development of science and technology and uses modern achievements of civilization. According to V. Sokurenko, it can threaten security and stability both within the state and at the transnational level. The OSCE Ministerial Council has repeatedly stressed that crimes not only violate the security of individuals, but can also lead to wider conflicts and violence [1, p. 7].

Given the real threats of crime, developed countries have assessed the situation in society, and therefore focused on the use of the latest technologies in management and law enforcement [2, p. 12–14].

Law enforcement activity consists of a wide range of areas and types, one of which is criminal procedural activity, which takes place in a certain criminal procedural form, which is a procedural guarantee of ensuring the rights and legitimate interests of people involved in its sphere.

Crime as a real human activity is reflected in the environment in the form of reflections, which in forensics are considered as traces. To solve a crime means to find its traces, investigate them and get the necessary information about the circumstances of the incident and the person who committed it. Such work should be carried out in a short time, as traces of the crime may disappear due to natural processes (snow, rain, storm, etc.), as well as under the influence of the actions of interested parties. In order to detect traces of crime, their

fixation and further preservation for use in the process of proof, technical means and processes that correspond to a certain level of development of scientific knowledge have been used since ancient times. The possibility of using scientific knowledge and technical means is regulated by the norms of the criminal procedure law, which makes the data (information, data) obtained with their help admissible as evidence in criminal proceedings. That is why in this article we will consider the normative consolidation of such a method of fixing procedural activity as video recording and the use of video recording materials in the process of proof.

In forensics, video recording is understood as a system of scientific provisions, technical means, methods and techniques used in the manufacture, demonstration and storage of video films for the purpose of investigation and prevention of criminal offenses [3, p. 126]. A slightly different understanding of the video is offered by M. Haponyuk. This term, she notes, should be understood as a wide range of technologies for recording, processing, transmission, storage and reproduction of visual and audiovisual material on monitors. Video is a video material recorded on a physical medium (disk, flash drive, etc.) [4]. The above shows that the differences between the definitions are not significant, but indicate the authors' attempts to include the most essential, in their opinion, features. Today it can be stated that video recording as a method of recording, storing and transmitting information has become widely used in criminal proceedings and is a natural result of the gradual introduction of technical means and methods of working with sources of information about the circumstances of criminal offenses and the persons who committed them in criminal proceedings.

Regulatory consolidation of the permitted use of technical means and methods in criminal proceedings was gradual. Thus, the Criminal Procedural Code of the Ukrainian SSR of 1922 in the norms devoted to the procedure for drawing up and content of the protocol (Articles 81-86), as well as conducting such investigative actions as interrogation (Articles 165-171), search and seizure (Articles 178-191), examination and examination (Articles 192-198) does not mention the possibility of using any technical means.

Significant changes in this regard took place in August 1971. The Criminal Procedure Code of our country was supplemented with Articles 85<sup>1</sup> «Use of sound recording during pre-trial investigation» and Article 85<sup>2</sup> «Use of cinematography, video recording during investigative actions». Further development of the normative regulation of the process of using video recording in criminal proceedings can be observed in the CPC of Ukraine 2012. Video recording is a reliable and effective way to record the process of conducting procedural actions and the results obtained. No protocol can reflect the procedure and conditions of the procedural action to the extent and with the completeness that is possible with the use of video recording. The use of video recording during interrogation allows the investigator not to include its content in the protocol, if none of the participants in the procedural action insists on it. Video recording of the interrogation, during its subsequent viewing, allows to obtain not only substantive (verbal) information that came from the interrogated person, but also non-verbal information, which is important in assessing both the content of the testimony received and the conditions under which they were provided. According to Art. 105 of the CPC of Ukraine, video recording is an annex to the protocol of procedural action, complements it and makes it more meaningful. In cases when it comes to recording the search, Article 104 of the CPC of Ukraine emphasizes that video recording is an integral part of the protocol, which should be reflected in Article 105 of the CPC of Ukraine, which sets out the general rules on attachments to protocols. It should also be noted that the legislator focuses the investigator on a comprehensive and complete video recording of the procedural action. Actions and circumstances of the search not recorded in the record cannot be entered into the protocol and used as evidence in criminal proceedings (Part 2 of Article 104 of the CPC of Ukraine). Such a requirement should apply to all procedural actions, not only to the search.

It can be seen from the above that video recording is considered as an effective means of recording procedural actions. At the same time, it serves as a procedural guarantee aimed at protecting the rights and interests of persons during investigative actions, primarily those in which witnesses must be involved [5, p. 224–226]. The presence of witnesses during such investigative actions as presentation of a person, corpse or thing for identification, examination of a corpse, including those related to exhumation, investigative experiment, examination of a person has long been a mandatory requirement of the legislator. The presence of witnesses during these investigative actions was considered to be a procedural guarantee against possible violations by the investigator, investigator, prosecutor, with which we can only partially agree. Apparently, that is why the current CPC of Ukraine provides a real alternative to the

involvement of witnesses in the investigative actions – the use of continuous video recording of the course of the relevant investigative (search) actions, the list of which we have given earlier.

As a general rule, the decision to use technical means of recording procedural actions, including video recording, is made by the investigator (other person conducting them). If a participant in the procedural action requests the use of technical means of recording, it becomes mandatory for the investigator (Part 1 of Art. 107 of the CPC of Ukraine).

From this general rule, the legislator makes an exception for investigative actions that involve significant interference with the rights and interests of a person. It is a search pursuant to the decision of the investigating judge or court (Part 1 of Art. 107 of the CPC of Ukraine). From the analysis of the articles devoted directly to the search, it is clear that this refers to the search of housing or other property or parts thereof (paragraphs 5, 6 of Part 3 of Article 234, Articles 235, 236 of the CPC of Ukraine).

In the theory of criminal procedure and forensic science, depending on the object, the search is divided into the following types: a) search of housing (ie, premises that are in permanent or temporary possession of a person, regardless of its purpose and legal status, and adapted for permanent or temporary residence of individuals, as well as all components of such premises); b) search of other possessions of a person: vehicles, land (garden, vegetable garden, yard, etc.), garages, other buildings or premises of household, office, economic [6, pp. 308–309]. Other authors, in our opinion, rightly add to this list organizations [7, P. 264], enterprises and institutions [8, p. 381], which can also be searched in order to find traces of a criminal offense in the broad sense of the word.

In all these cases, the search is carried out on the basis of the decision of the investigating judge or court, and the legislator requires mandatory recording of the process and the results obtained by video recording (Part 10 of Article 236 of the CPC of Ukraine), despite the mandatory participation of witnesses during its conduct.

However, as V. Tertyshnyk rightly points out, in urgent cases related to saving lives and property or direct prosecution of persons suspected of committing a crime (Part 3 of Article 233 of the CPC of Ukraine), the search may be carried out on the basis of a decision of the investigator or prosecutor [9, p. 484]. For such cases, the legislator does not require mandatory recording of the search using video recording, which is considered to be an insufficiently consistent solution. The general provisions on conducting a search should state that its process and results should be recorded by video, regardless of the legal basis for this – the decision of the investigating judge or court, the decision of the investigator or prosecutor.

The prospects for the development of procedural legislation in this direction are evidenced by the provisions of Chapter IX<sup>1</sup> of the CPC of Ukraine «Special regime of pre-trial investigation, trial under martial law». Conducting a search or inspection of a person's home or other property, search of a person, if the involvement of witnesses is objectively impossible or associated with a potential danger to their life or health, is allowed without the involvement of witnesses. In this case, the course and results of these investigative actions shall be recorded by available technical means through continuous video recording (paragraph 1 of Part 1 of Article 615 of the CPC of Ukraine).

The use of video recording is possible to record the course and results of other procedural actions in the absence of an objective possibility of drawing up procedural documents during the proceedings under martial law. For this purpose, the investigator may use currently available technical means of video recording. Based on the results of the procedural action and the materials of the video recording, no later than 72 hours from the moment of such procedural actions, the investigator must draw up a protocol (paragraph 1 of Part 1 of Art. 615 of the CPC of Ukraine).

During criminal proceedings under martial law, the current CPC of Ukraine provides for exceptions to the general rule of direct examination in court of testimony of previously interrogated persons. They are due to objective circumstances that make it impossible to interrogate certain persons in court. The use of witness and victim testimony as evidence in court, including testimony obtained during the simultaneous interrogation of two or more already interrogated persons, is allowed only if the course and results of such interrogation were recorded using available technical means of video recording.

The testimony of the suspect, including those obtained during the simultaneous interrogation of two or more already interrogated persons, in criminal proceedings conducted under martial law, may be used as evidence in court only if the defense counsel participated in

such interrogation, and the course and results of the interrogation were recorded using available technical means of video recording (Part 11 of Article 615 of the CPC of Ukraine).

**Conclusions.** The use of video recording during criminal proceedings is not only a modern and effective way to record the process of conducting procedural actions and the results obtained, but also serves as one of the procedural guarantees of protection of the rights and interests of participants in procedural actions from possible violations by officials who conduct them.

Further improvement is needed in the wording of Part 2 of Article 104 of the CPC of Ukraine, which should indicate that: a) video recording is an integral part of the protocol of the procedural action during which it was used, and not only to the protocol of the search, as it is stated in the current version; b) circumstances not recorded in the video recording cannot be included in the protocol of the procedural action and used as evidence. This provision should apply not only to the recording of search results, but also to other investigative (search) actions (presentation for identification, examination, expertise, investigative experiment, etc.).

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*Надійшла до редакції 27.01.2023*

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#### ABSTRACT

The article deals with problems of using modern scientific achievements in criminal proceedings. The attention is drawn to the fact that the achievements of various branches of knowledge have long been used in the process of detection and investigation of criminal offenses. At the initial stage, such knowledge was used to clarify the circumstances of the criminal offense (establishing the causes of death, the validity or forgery of the relevant document, etc.). Over time, the need to apply special knowledge in criminal proceedings is enshrined in the relevant regulations. Under of martial law and hostilities, the investigator does not always have an objective opportunity to draw up a protocol at the place of the investigative action, and it is extremely necessary to objectively and fully record its process and results. In this case, a full video recording of the procedural action with the subsequent execution of the protocol of its conduct helps. Video recording should be considered not only as an effective and objective way to record the course of the procedural action and obtained results.

**Keywords:** *technical means of fixation, video recording, procedural actions, investigative actions, interrogation, search, investigator, procedural guarantees, protocol of investigative action.*

УДК 343.982.33

DOI: 10.31733/2078-3566-2023-1-245-251



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### МОЖЛИВОСТІ ВИКОРИСТАННЯ КРИМІНАЛІСТИЧНИХ ОБЛІКІВ ПІД ЧАС РОЗСЛІДУВАННЯ КРИМІНАЛЬНИХ ПРАВОПОРУШЕНЬ

У статті приділено увагу практичному використанню криміналістичних обліків при розслідуванні кримінальних правопорушень. Акцентовано на використанні обліків оперативно-пошукового та інформаційно-довідкового призначення для вирішення ідентифікаційних і діагностичних завдань розслідування. Розглянуто особливості використання окремих видів обліків для вирішення конкретних завдань розслідування на початковому та подальшому етапах розслідування залежно від завдань розслідування та слідчої ситуації, що склалася на певному етапі розслідування.

**Ключові слова:** *кримінальне провадження, криміналістичні обліки, слідчий, етапи розслідування, типові слідчі ситуації, інформаційні системи.*

**Постановка проблеми.** Основним завданням інформаційного забезпечення

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