

Zhuk Ilona, Associate Professor
of the Department of Criminal
Law of the National Academy of
Internal Affairs, PhD in Law

DEFECTS OF LEGAL REGULATION OF RELEASE FROM SERVING A PUNISHMENT WITH A PROBATION

Exemption from serving a sentence with a trial on the basis of Art. 75 of the Criminal Code (hereinafter - the Criminal Code) of Ukraine is one of the most widespread types of dismissal in judicial practice. However, the shortcomings of the legislative regulation of this measure create some difficulties in the process of law

enforcement. According to Part 3 of Art. 75 of the Criminal Code of Ukraine, the court, in cases provided for by law, decides to release a sentenced person from serving the sentence, if he does not commit a new crime within the specified probationary period and perform the duties assigned to him.

And in the case of a convict being executed during the probationary period of a new crime, the court orders him to punish according to the rules stipulated in Articles 71, 72 of the Criminal Code (part 3, Article 78). The ambiguous understanding of these provisions, in particular the phrase "committing a crime", leads to cases of refusal of the court to satisfy the petition of the authorized agencies on probation to release a person from serving a sentence in connection with the expiry of the probationary period if, at the time of the decision of this question, there is information about introduction of data on a criminal offense committed by the convicted person during the probationary period to the SRPI.

However, the adoption of such court decisions is somewhat premature. Proceeding from the content of these norms of the Criminal Code, it is logical to conclude that for the refusal to release a person from serving a sentence in connection with the expiry of the probationary period, it is necessary to establish the fact that the person committed the crime in question. The criminal law defines a crime as stipulated by the Criminal Code socially dangerous guilty act (action or inaction), committed by the subject of the crime (Part 1 of Article 11).

In accordance with Part 1 of Art. 3 of the Criminal Code, the legislation of Ukraine on criminal liability is based, first of all, on the Constitution of Ukraine. This means that the provisions of the Criminal Code should be consistent with the provisions of the Basic Law in accordance with the rule of law principle (Article 8 of the Constitution). According to Part 1 of Art. 62 of the Constitution of Ukraine "a person is considered innocent in committing a crime and cannot be subjected to criminal punishment until her guilt is proved in a lawful manner and established by a court sentence". In accordance with Part 2 of Art. 373 of the Criminal Procedural Code

of Ukraine "if the accused is found guilty of a criminal offense, the court shall issue a conviction and impose a punishment, exempt from punishment or from his serving in cases provided for by the law of Ukraine on criminal liability".

And in paragraph 10 of the decision of the Constitutional Court of Ukraine in the case about the consideration by the court of separate decisions of the investigator and the prosecutor dated January 30, 2003 No. 3, it was stated that "the conviction of the investigator and the prosecutor in the commission of a crime does not mean proving her guilt, which, according to the constitutionally enshrined the principle of presumption of innocence of a person can only be established by a conviction of a court (Article 62 of the Constitution of Ukraine) ".

Summing up the above, it can be noted that the wording of Art. 78 of the Criminal Code, in particular the content of the phrase "the person who committed the crime", establishes legal requirements for the need to prove the fact of committing a crime by a person (and not a minor act, for example) by a conviction as grounds for refusal of the court to release a person from the punishment imposed. Otherwise, this provision would not coincide with the principle of presumption of innocence, as defined by the Constitution of Ukraine.

Obviously, in order to avoid inaccuracy in the process of law enforcement, it is necessary to make the necessary clarifications of the mentioned norms of the Criminal Code (regarding the presence of a conviction to confirm the fact of committing a crime), for example, in the relevant resolution of the Plenum of the Supreme Court of Ukraine, or in Art. Art. 75, 78 of the CC, the words "a person who committed a crime" in the necessary context should be replaced by the phrase "a suspect, accused of committing a crime".