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PECULIARITIES OF QUALIFICATION

OF ACTIONS OF LAW ENFORCEMENT OFFICERS ON PLANTING DRUGS ON SUSPECTS. REVIEW OF JUDICIAL PRACTICE

PECULIARIDADES DE LA CALIFICACIÓN DE LAS ACCIONES DE LOS AGENTES DEL ORDEN AL PLANTAR DROGAS A LOS SOSPECHOSOS. REVISIÓN DE LA PRÁCTICA JUDICIAL

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ABSTRACT

In investigative practice, the question periodically arises about the possibility of qualifying actions for planting drugs on suspects of crimes related to the circulation of narcotic drugs and psychotropic substances, in order to bring them to criminal responsibility, qualify under Art. 228.1 of the Criminal Code of the Russian Federation as a variety of drug sales. The study of the normative material and judicial practice allows us to draw conclusions.

Keywords: Law, legislation, criminal law, legal regulation, drugs, law enforcement.

RESUMEN

En la práctica investigativa, periódicamente surge la pregunta sobre la posibilidad de calificar acciones de plantación de drogas sobre sospechosos de delitos relacionados con la circulación de estupefacientes y sustancias psicotrópicas, con el fin de llevarlos a la responsabilidad penal, calificarse en el art. 228.1 del Código Penal de la Federación de Rusia como una variedad de venta de drogas. El estudio del material normativo y la práctica judicial nos permite sacar conclusiones.

Palabras clave: Ley, legislación, derecho penal, regulación legal, drogas, cumplimiento de la ley.

INTRODUCTION

The Criminal Code of the Russian Federation provides for criminal liability for illegal production, sale or shipment of narcotic drugs, psychotropic substances or their analogues. *“The object of this crime is public relations for the protection of public health, which is understood as the normal physical and mental health of the entire population of the country associated with the illegal consumption of narcotic drugs, psychotropic substances or their analogues.”* (Kozachenko et al., 2013)

“The social danger of crimes related to the illegal circulation of narcotic drugs and psychotropic substances is expressed in the fact that the sale of narcotic drugs is carried out for the purpose of their non-medical consumption, which significantly disrupts the physical and mental health of both a specific individual and the health of the population as a whole.” (Radchenko & Tayurskaya, 2014)

The behavior of police officers or other persons who plant narcotic drugs or psychotropic substances on suspects is not associated with an encroachment on the object of criminal law protection of the corpus delicti under Art. 228.1 of the Criminal Code of the Russian Federation. Their behavior did not encroach on the health of either a specific person, including those people to whom they plant drugs, or the health of the population as a whole. Narcotic drugs are planted on certain individuals with the aim of illegally bringing them to criminal responsibility for crimes related to drug trafficking.

Thus, the main object of encroachment by persons planting drugs in the framework of operational-search measures is public relations for the protection of the interests of justice, and an additional object should be considered the legitimate interests of victims, who have the right to demand that they be brought to criminal responsibility only for what they have actually committed a crime, and not for an act provoked by those other persons and falsified by them.

MATERIALS AND METHODS

The article is based on the analysis of judicial practice, contains a large number of quotes from the judicial practice of the Russian Federation. The article presents an analysis of the statistics of crimes in the field of drug trafficking from 2017 to November 2020.

Various scientists have studied crimes and drugs in different years. Recently, these issues have been addressed by Esimovich (2015); Sudakova & Suturin (2016); Khanov, et al (2017); Dennison (2019); Cortes Castillo (2020); Payne & Langfield (2021).

A series of articles devoted to drug trafficking crimes was published in the journal “Yuridicheskaya nauka i praktika: Bulletin of the Nizhny Novgorod Academy of the Ministry of Internal Affairs of Russia”: Omigov (2012); Kislukhin (2013); Chirkov (2013); Dolgacheva, et al. (2014); Koblenkov (2020); Kobets & Ilyin (2018); Antonov & Serova (2018).

The objective side of the corpus delicti under Art. 228.1 of the Criminal Code of the Russian Federation, is expressed, among other things, in the illegal sale of narcotic drugs. According to clause 13 of the Resolution of the Plenum of the Supreme Court of the Russian Federation of 15.06.2006 N 14 “On judicial practice in cases of crimes related to narcotic drugs, psychotropic, potent and poisonous substances”, *“illegal sale of narcotic drugs, psychotropic substances or their analogues, plants containing narcotic drugs or psychotropic substances, or parts thereof containing narcotic drugs or psychotropic substances, it should be understood any means of their repayable or gratuitous transfer to other persons (sale, donation, exchange, payment of debt, lending, etc.), and also other ways of implementation, for example by injection”*.

As follows from this clarification of the Supreme Court of the Russian Federation, selling means various actions, but all of them ultimately represent a two-way transaction (sale, donation, lending, payment of a debt), in which the will of both parties must be clearly expressed - and that, who sells, and to whom drugs are sold. Meanwhile, when the drugs are planted, they end up on the other side against their will. This circumstance also, in our opinion, indicates that there are no signs of the sale of narcotic drugs in the behavior of persons planting narcotic drugs.

The subjective side of the corpus delicti under Art. 228.1. The Criminal Code of the Russian Federation provides for guilt in the form of direct intent. In this case, the intention of the perpetrator should cover all the signs of the objective and subjective side, including the special purpose - sale, that is, the release of drugs into illegal circulation. Any persons who plant drugs as part of operational activities pursue other goals by their actions - falsification of evidence with the aim of illegally bringing citizens to criminal responsibility.

Thus, when planting drugs in the behavior of the perpetrators, there are at least three mandatory signs of the corpus delicti under Art. 228.1 of the Criminal Code of the Russian Federation, which excludes the criminal-legal assessment of such behavior under Art. 228.1 of the Criminal Code of the Russian Federation. The deed, in our opinion, has some signs of deliberately false denunciation (Article 306 of the Criminal Code of the Russian Federation) and

falsification of evidence (Article 303 of the Criminal Code of the Russian Federation).

RESULTS AND DISCUSSION

Our conclusions are also based on an analysis of the positions of the European Court of Human Rights (2005) and the Supreme Court of the Russian Federation, which they have repeatedly formulated in specific criminal cases.

According to these positions, even the actions of those persons who actually fulfill the objective side, that is, sell narcotic drugs, cannot be qualified as sale, if the behavior of the perpetrator lacked signs of the subjective side of the crime, i.e. intent for the sale and release of drugs into illegal circulation.

As an example, we can cite the Determination of the Judicial Collegium for Criminal Cases of the Supreme Court of the Russian Federation of October (2007), in the case of A., in which the Supreme Court gave the following arguments: *“Considering A’s actions as a criminal offense under Art. 228.1 of the Criminal Code of the Russian Federation, the court did not take into account that the subjective side of this crime is characterized by a deliberate form of guilt, i.e. the intent of the perpetrator must be aimed at the distribution of drugs.*

In the present case, no such information has been established. A. himself denied that he had any intention to sell drugs, claiming that he had acquired the drug with M’s money and at his request.

Moreover, as can be seen from the materials of the case, and this is established in the verdict, A’s actions against

M. were single. At the same time, M., being a police officer, acted within the framework of an operational-search activity - a test purchase. A., having no drugs to sell, acted at M’s request and with his money. To fulfill M’s request, whom A. perceived as a person in need of the acquisition of a narcotic drug, he (A.) turned to B., who had narcotic drugs for sale and sold through A. the drug that M. needed from which means that A. acted at the request and in the interests of M. - a police officer, thus being an accomplice in the acquisition of narcotic drugs by a police officer who was aware of A’s own lack of narcotic drugs for sale.

There is no evidence in the case file that A. had previously performed similar actions against other persons. In such circumstances, the arguments of A’s complaint that he had no intent to sell the drug must be satisfied.

The panel of judges considers it necessary to cancel the court decisions against A. due to the absence of corpus delicti in his actions”. (Determination of the Judicial Collegium for Criminal Cases dated September 20, 2007 in case No. 49-DO7-152).

The Supreme Court of the Russian Federation adheres to a similar point of view in its decisions: in the supervisory ruling of the Judicial Collegium for Criminal Cases of September 20, 2007 in case No. N 80-D07-17 and a number of other court decisions.

The legal positions of the Supreme Court of the Russian Federation are based, inter alia, on the decisions of the European Court of Human Rights, in particular on the Decree of the European Court of Human Rights of December (2005) (Table 1).

Table 1. Drug trafficking in the Russian Federation (2017-2020).

Regions	2017	2018	2019	01.11.2020
	Value	Value	Value	Value
Russian Federation	208681	200306	190197	177337
Central Federal District	44622	43068	40499	38056
Volga Federal District	36063	34633	35593	35658
Siberian Federal District	28518	24916	23198	20094
Ural Federal District	23341	21428	20625	18435
Southern FD	20886	19887	18010	17233
Northwestern Federal District	21392	21482	18490	17135
Far Eastern Federal District	12638	14661	13576	12098
Moscow	18672	17107	12761	12068

North Caucasian Federal District	10161	9980	10694	10682
Moscow region	8001	7970	8330	8033
St. Petersburg	12802	11497	8240	7385
Chelyabinsk region	8832	8024	7618	6128
Krasnodar region	7632	7170	6480	6081
Sverdlovsk region	6656	6041	5765	5338
Republic of Bashkortostan	5765	5577	5435	5289
Rostov region	6727	6069	5324	5079
Republic of Tatarstan	3975	3753	4224	4573
Samara Region	4162	3609	4294	3975

If we turn to the all-Russian statistics, then over the past three years, the total number of crimes related to drug trafficking has been decreasing by 1-2 percent every year (Figure 1). Of this total, one can also single out crimes related to planting drugs by law enforcement officers. It can be concluded that the dynamics as a whole is decreasing for this category of crimes. However, a number of questions arise both in theory and in practice. Why are law enforcement officers committing these drug planting crimes? What is the level of legal awareness of law enforcement officials? What is the motive? Why are these crimes so widespread? Why is the judicial practice in this category of crimes not the same? Is it worth tightening the punishment for law enforcement officers who have committed these crimes? Why is the criminal law interpreted by judges in different ways? Why is judicial practice not the same in different regions of Russia? How to stop these crimes? These and many other issues require a separate study, perhaps a sociological survey among both law enforcement officials and judges.



Figure 1. Dynamics of crime in the area of drug trafficking in RF in 2017-2020.

Further, it is important to consider the practice of the European Court of Human Rights.

The story of the same case, in a summary, was as follows: *“Mr V., who lived in Moscow, received a call in June 1998 from his longtime acquaintance, O., and asked him to buy heroin for her, as she began to feel withdrawn due to lack of drugs. Otherwise, O. threatened to commit suicide. All these and subsequent actions of O. and other persons in relation to V. took place within the framework of an independent reconnaissance patrol under the control of police officers. V. purchased a drug for O. that he intended to transfer to her, but was detained by the police as part of the ORM - test purchase. In*

April 1999 V. was convicted by the Lyublinsky District Court of Moscow under Part 4 of Art. 228 of the Criminal Code of the Russian Federation for the illegal sale of drugs.

However, already in November 2000 the case was considered by the Presidium of the Moscow City Court by way of supervision, and V.'s actions were reclassified to Part 1 of Art. 228 of the Criminal Code of the Russian Federation (aiding in the illegal acquisition of narcotic drugs). The Presidium of the Moscow City Court did not see the sale of narcotic drugs in V.'s actions”.

The European Court of Human Rights in its Decision of December 15, 2005 on this case indicated that such violations of the principle of fair trial indicate a violation of paragraph 1 of Art. 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

Thus, the European Court of Human Rights (2005), both in the Vanyan case and in a number of other cases, also points out that in the commission of such actions, the interests of justice (fair trial) suffer, and not the health of the population, which serves as an additional argument in favor of the advocated in this case. the conclusion of the position regarding the erroneous qualification of actions under Art. 228.1. Of the Criminal Code of the Russian Federation.

An indirect proof is also the fact that the Federal Law of 29.11.2012 N 207-FZ Art. 303 of the Criminal Code of the Russian Federation, providing for liability for falsification of evidence, was supplemented by Part 4, which establishes responsibility for

“Falsification of the results of operational-search activities by a person authorized to conduct operational-search activities for the purpose of criminal prosecution of a person who is knowingly not involved in the commission of a crime, or for the purpose of causing harm to honor, dignity and business reputation”: (Ageshina, et al., 2016)

The objective side of this crime just provides for actions in the form of “planting drugs, weapons or ammunition in an apartment, false documents in an organization or apartment” and other similar actions.

CONCLUSIONS

The foregoing allows us to conclude that the actions of persons planting narcotic drugs within the framework of operational-search measures cannot be qualified under Art. 228.1. Of the Criminal Code of the Russian Federation.

Indirectly, this position is confirmed by clause 14 of the Resolution of the Plenum of the Supreme Court No. 14: **“Evidence obtained on the basis of the results of an operational-search activity is recognized as legally obtained**

if the event was carried out to solve the tasks defined in Article 2 of the Federal Law “On operational-search activity” if there are grounds and subject to the conditions stipulated by Articles 7 and 8 of the said Federal Law, respectively”.

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