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ROADS AND PITFALLS IN THE APPLICATION OF THE PENAL ORDER FROM THE CROATIAN PERSPECTIVE

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INTRODUCTORY NOTES

- the first consensual procedure introduced in Croatian criminal procedure 25 years ago (1997)
- expansion in normative and practical application
- the most neglected consensual legal mechanism from a normative, theoretical and practical perspective
- Unilateral and fixed offer of the state attorney, which the defendant cannot negotiate
- Based on the waiver of the fundamental rights of defense and guarantees of a fair procedure
- Very wide application in practice
 - 2019 – 5949 indictments, 38.5% of all indictments against adult defendants
 - 2017 - 37%, 2018 - 40.5%

CONDITIONS FOR ISSUING A PENAL ORDER

Types of sanctions and criminal offenses (1)

Normative framework

- *Extension of application – strengthening repression and weakening the fairness of the procedure*
 - *1997 - crimes until the 3rd year imprisonment + a fine of 10-100 daily income, court warning, confiscation of property benefits, public announcement of the verdict, ban on driving a motor vehicle and confiscation of objects*
 - *2002 – crimes up to 5 years prison - single judge + suspended sentence with a prison sentence of up to 3 months*
 - *2008 – suspended prison sentence of up to 1 year, for legal entities Not an unconditional prison sentence, but in the case of failure to meet the conditions of a suspended sentence or the commission of a new crime becomes a prison for up to 1 year.*

CONDITIONS FOR ISSUING A PENAL ORDER

Types of sanctions and criminal offenses (2)

Comparative experiences

- As a rule, a fine is allowed, but unconditional imprisonment is not excepted in Switzerland - unconditional imprisonment of up to 6 months is allowed
- Austria and Germany → suspended sentence up to 1 year.
- France and Italy → unconditional and conditional prison sentences excluded
France – up to 5,000 euros and alternative sanctions
- Italy - fines up to half of the maximum, does not bear the costs of the procedure

CONDITIONS FOR ISSUING A PENAL ORDER

Types of sanctions and criminal offenses (3)

Practice

- Ivičević - Novosel - research from 2004
- there are no significant differences between the sentences imposed by the criminal order and in the procedure, most often a suspended prison sentence
- Our research – 60 subjects (30 from Zagreb and 30 from Split)
 - 90% suspended prison sentence in Zagreb and all in Split Inter views Conditional sentence - all questioned (incomes are not determined, preferred by the defendant a fine less frequently for non-payment)
- Compensation for damage, confiscation of objects
- Expenses - mostly not requested?
- Criminal offenses and the amount of the penalty - should not be changed

CONDITIONS FOR ISSUING A PENAL ORDER

Types of sanctions and criminal offenses (4)

- The difference in the requested sanction by order and at the hearing in the same procedure
 - A higher penalty, a longer period of verification
 - Necessarily due to motivation, the procedure is not conducted, without defense counsel, they do not know how to evaluate the discount
 - It is not acceptable - the right to defense is penalized,
 - The increasing costs of the procedure are sufficient motivation
- The difference in the requested sanction by order and at the hearing
 - A prison sentence is pending
 - Recidivists, serious crime, personality
 - Criminal offenses with elements of violence
 - A criminal warrant is not issued if he is in pre-trial detention or as a precautionary measure
- Conclusion: from an accelerated procedure without a hearing that excluded conditional and unconditional prison sentences to a procedure in which a prison sentence is regularly imposed in the form of a suspended sentence

CONDITIONS FOR ISSUING A PENAL ORDER

Credible content of the criminal report and „research” (1)

Normative framework - Art. 540.(1) For k.d. for which a fine or a prison sentence of up to five years is prescribed, and for which the council is not competent, and which he learned about based on the credible content of the criminal report, state attorney in the indictment request that the court issue a penal order in which the district impose a certain penalty or measure without holding a hearing
Evidence standard,

Constitutional Court 2012 – high degree of probability

Chapter 26 of the CPC does not mention conducting research or evidentiary actions, only urgent evidentiary actions would be allowed

CONDITIONS FOR ISSUING A PENAL ORDER

Credible content of the criminal report and „research” (2)

Practice

- In practice, it is never based only on a credible criminal complaint
- Manual for the work of state attorneys
 - must interrogate the defendant and gather information about him and his assets, previous convictions and parallel proceedings
 - undertake or determine evidentiary actions before indictment, most often witness examination, expert testimony, confiscation of objects
 - an investigation has begun, which ends with a criminal order

Conclusion: In practice, the concept of the criminal order from 1997 has been abandoned, although it is normatively unchanged

There is no difference in the conduct of the investigation and in the procedure for issuing a criminal warrant

The concept of authentic document as a prerequisite for issuing a criminal warrant is abandoned

CONDITIONS FOR ISSUING A PENAL ORDER

Interrogation of the defendant

Normative framework - Art. 540.

The law does not prescribe the obligation to examine the accused

VSRH 2014 – ZZZ, violation of the CPA because the examination of formal presumption for the indictment

Research practice

In all cases, the defendant was questioned before the request for the issuance of a criminal warrant, 65% by the police, 35% by the state attorney

Comparative experiences

Austria → explicit assumption

Germany and Switzerland → state attorney has no such obligation

Italy - not required

CRITERIA FOR DECIDING ON MAKING REQUESTS (1)

Normative framework

- State Attorney MAY request the issuance

Practice

- Manual - not appropriate if "the work has a special weight or has caused significant public condemnation,,
- Criteria:
- Type of criminal offense and whether it is appropriate to request the issuing of a criminal warrant - minor crimes
- Previous convictions
- Confession of the defendant
- Amount of damage
- The existence of a victim in criminal offenses against life and limb

CRITERIA FOR DECIDING ON MAKING REQUESTS (1)

- Not used:
 - crimes against life and body
 - crimes violations of children's rights sexual offenses against children,
 - acts to the detriment of the elderly,
 - abuse of position and authority
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- The request is often asked, in about half of the cases
 - It has the advantage of application - the simplest form of consensual application procedure

PLEA-BARGAINING

As a rule, there is no negotiation regarding the content of the criminal order

- State attorneys
 - No - a possible reason is the amount of items
- Defenders
 - No - defense attorneys learn about the procedure only when they receive a judgment with a criminal order
 - Or they find out about the proceedings due to the act of questioning the defendant (after that, the warrant is issued)

Judges decision on issuing penal order

Judges

- They very often accept requests, according to their own statements from 90 to 100%
- They refuse if there are any significant defects, for example disputes over property benefits or property law claims
- Opinions are divided as to whether the issuing of orders is adequately valued
- Some state that the judges are calculating with extradition

Theses for discussion (1)

- 1. The simplest form of consensual procedure - advantage in application
- 2. "Reliable content of the criminal report" should be changed to: when filing an indictment, the state attorney may request the issuance of it
- 3. It should be explicitly prescribed the obligation to examine the defendant before submitting a request for the issuance of a criminal record.

Theses for discussion (2)

- 4. Judicial control of the indictment and requests should be extended to all formal prerequisites
- 5. State attorneys should relax the sentencing policy and propose lighter sentences than they do now
- 6. When imposing a suspended prison sentence due to the consequences that threaten the defendant, a mandatory defense should be prescribed.

Thank you for your attention!

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