PROBACJA, nr 2/2022, s. 85-108, ISSN 1689-6122, e-ISSN 2719-311X, www.probacja.com

Marcin Jurgilewicz[1ABDEF]

Andrzej Dana[2CDEF]

ZATRZYMANIE PENITENCJARNE W SYSTEMIE ŚRODKÓW PRZYMUSU POZAPROCESOWEGO

PENITENTIARY DETENTION IN THE SYSTEM OF OUT-OF-COURT COERCIVE MEASURES OUT-OF-COURT COERCIVE MEASURES

Received: December 20, 2021 Approved: June 13, 2022 Published: June 30, 2022

DOI: 10.5604/01.3001.0015.8796

Original Article

Source of funding – own research

A - study design; B - doing research; C - statistical analysis; D - data interpretation;

E - preparation of the manuscript; F - literature review

Streszczenie

Artykuł w swej treści odwołuje się do mało komentowanego zagadnienia wiążącego się z zatrzymaniem penitencjarnym jako środka reakcji prawnej i w swym ujęciu posiada on charakter de lege lata. Celem artykułu stało się zwrócenie uwagi na kwestię sfery proceduralnej, jak i technicznej wiążącej się z realizacją zatrzymania osoby w trybie zatrzymania penitencjarnego. Innym celem artykułu stała się także próba zwrócenia uwagi na to, czy możliwym jest uregulowanie zatrzymania penitencjarnego w sposób ujednolicony w jednym akcie normatywnym. Dokonana w opracowaniu egzegeza prawna wyraźnie wskazuje, że kwestia zatrzymania penitencjarnego została rozproszona w wielu aktach normatywnych. To z kolei tworzy sfery niedookreślone, bowiem jego realizacja zawiera się w czasie — od chwili zatrzymania osoby przez Policję aż do momentu doprowadzenia jej do jednostki penitencjarnej. Postawiono zatem w opracowaniu

[1] Dr hab. Marcin Jurgilewicz, prof. PRz, Zakład Prawa i Administracji, Politechnika Rzeszowska im. I. Łukasiewicza. Ekspert Polskiej Komisji Akredytacyjnej, e-mail: m.jurgilewicz@prz.edu.pl, ORCID: 0000-0003-2243-2165.

[2] Dr Andrzej Dana, Uniwersytet Przyrodniczo-Humanistyczny w Siedlcach, e-mail: andrzej.dana@uph.edu.pl, ORCID: 0000-0002-1035-5302.

DOI: 10.5604/01.3001.0015.8796

pytanie badawcze, na ile możliwe jest uproszczenie tej procedury na poziomie normatywnym, która obejmowałaby skonsolidowany akt prawny.

Słowa kluczowe: zatrzymanie procesowe, zatrzymanie penitencjarne, skazany, zakład karny, przepustka

Abstract

The paper refers to the little commented issue related to penitentiary detention as a measure of legal reaction and its approach concerns de lege lata. The aim of the paper is to draw attention to the issues of the procedural and technical spheres related to detaining a person under penitentiary detention regime. The paper also makes an attempt to address the question of whether it is possible to regulate penitentiary detention in a unified manner in a single normative act. The legal analysis presented in the study clearly indicates that the issue of penitentiary detention has been dispersed in many normative acts. This, in turn, creates undefined spheres, because the implementation takes place over a period of time — from the moment the person is arrested by the Police until they are brought to a penitentiary unit. Therefore, the study posed a research question to what extent it is possible to simplify this procedure at the normative level, which would include a consolidated legal act.

Keywords: trial detention, penitentiary detention, convict, prison, prison leave

Introduction

A custodial sentence in its legal dimension is a sanction applicable to a person who has committed a criminal act defined by law. It entails penitentiary isolation which is the most severe form of punishment that the state can impose on a person for the violation of the norms of criminal law. This criminal punishment is intended to be, by its nature, a form of hardship imposed on the person who has deserved it as a result of their unlawful conduct. The degree of hardship is largely determined by the length of isolation, which varies, as well as the form in which it is carried out. Another issue related to the severity of this punishment is its impact on the physical and social spheres, and it is the most noticeable in the mental aspects affecting the person deprived of liberty. Penitentiary isolation generally includes all of these elements. In its formal dimension, a custodial sentence is a consequence of the court's assessment of the offender's criminal act. In the general part of the Criminal Code[3] of 6 June 1997, in Article 32 thereof, the legislator determines three different forms of deprivation of liberty: imprisonment lasting from 1 month to 15

[3] Dz. U. z 2020 r. poz. 1444, ze zm.

years (the maximum limit cannot be exceeded even if extraordinary aggravation of sentence is applied), imprisonment for 25 years and life imprisonment. The sentencing of one of the indicated penalties reflects the court's assessment of the act of which the defendant was charged. The prison sentence itself, on the other hand, is linked to a concrete type of criminal offence and the offender's behaviour. It is indicated that a custodial sentence implemented in prisons involves restorative interventions aimed at shaping inmates' readiness to be active in changing their own behavioural style and personality traits.[4]

A prison sentence manifests the need for penitentiary isolation as the most severe form of response to the crime committed by the offender. This is one of the necessary responses of the state to the violation of the norms of criminal law. This punishment prescribes the necessary, compulsory isolation of a person from society as a consequence of their crime. It is a way of protecting society from an individual perpetrator. The purpose of any criminal punishment, including imprisonment, includes developing offenders' ability to function in society in accordance with the established rules and to refrain from re-offending.

The Penal Enforcement Code[5] (PEC) refers in Article 67 to the purposes of the custodial sentence. The execution of the imprisonment sentence is to develop socially desirable attitudes in convicts, in particular, a sense of responsibility and the need to respect the law and thus refrain from re-offending. In order to achieve this objective, convicts are subject to personalised interventions within the framework of the punishment enforcement regimes set out in this Code, in different categories and types of prisons. The interaction with convicts includes respect for their rights and requires them to comply with their obligations. The focus is on work that promotes the acquisition of appropriate professional qualifications, learning, cultural, educational and sporting activities, maintaining contact with the family and the outside world, and therapeutic measures. The imprisonment of a convicted person takes place in the closed reality of prison, which entails restrictions on contact with the outside world, persons close to the inmate, the constraint of being in a cell with persons unfamiliar to the inmate, compliance with the rigours of imprisonment, and the need to observe discipline and order.

I. Prison (penitentiary unit)

A prison is an example of a penitentiary unit in which persons convicted by a final court judgment serve a sentence of imprisonment consisting of their forced

[4] Zob. M. Gordon, *Psychologiczne bariery procesu resocjalizacji* w: *Wiedza, doświadczenie, praktyka: interdyscyplinarne spojrzenie na problemy społeczne*, M. Marczak, Pastwa- Wojciechowska, M. Błażek, Kraków-Gdańsk 2010, s. 269-270.

[5] Dz. U. z 2021 r. poz. 53, ze zm. (dalej: k.k.w.).

DOI: 10.5604/01.3001.0015.8796

placement and detention for a specified period of time in a closed and guarded place. Each facility has an established order of internal functioning characterised, in particular, by a fixed daily schedule including prohibitions and orders concerning the inmates placed therein. It has established rules of discipline as orders for inmates to obey them. The need to establish rules for the functioning of such facilities is laid down in Article 249 of PEC, which imposes an obligation on the Minister of Justice to issue a regulation in the form of organisational and order rules for the execution of a custodial sentence, specifying, in particular: organisation of admissions to prisons and pre-trial detention centres, the regime under which inmates are placed in residential cells, the internal order regulations of prisons and detention centres, as well as the organisation of the reception of correspondence and the organisation of visits in prisons and detention centres. Based on this statutory delegation, the Minister of Justice issued a regulation of 21 December 2016 on the organisational and order regulations for the execution of a custodial sentence.[6]

A prison is a place established by statute where a person who has been sentenced by a final court judgment to imprisonment will serve their sentence. It is a closed and guarded facility in which the sentenced person is forced to be placed for a specified period of time. For a prisoner sentenced to this punishment, this means that their detention requires being in that designated place. The prisoner shall serve their sentence under strictly determined conditions, which are defined by the regulations as certain rigours applicable in prison. In particular, these rigours mean the need to remain in prison with restricted access of people from outside prison and restricted contact with them. Essentially, there is no possibility of exiting prison other than the legally normalized system of leaves and releases contained in the reward system. There is also an established system of regulatory punishment for offenses against discipline committed by the convict. Penitentiary interventions are carried out in every system of custodial sentence enforcement, with the aim of achieving the objectives of the penalty, and are defined in the Penal Enforcement Code. These interventions are performed, in particular, in penitentiary departments and divisions. They take the form of individualized interventions adapted to the mental and physical characteristics of the convict, as well as actions towards a group of convicts. The Regulation of the Minister of Justice of 14 August 2003 on the methods of conducting penitentiary interventions in prisons and pre-trial detention centres defines the methods of conducting penitentiary interventions towards convicts as part of the execution of the prison sentence in prisons and separate prison wards of pre-trial detention centres.[7] The intervention according to the provisions of this regulation is a set of measures and methods applied at the facility and aimed at activating in the convict the will to cooperate in

[6] Dz. U. z 2016 r. poz. 2231.
[7] Dz. U. z 2013 r. poz. 1067.

the formation of socially desirable attitudes. It is carried out in an educational group determined by accommodation with the participation of designated educators for each group of convicts.

There are currently four types of prisons in the Polish penitentiary system. Penalty of imprisonment (Article 69 of PEC) is served in the following types of penitentiary institutions: for juvenile offenders, for first-time offenders, for repeat offenders or for those serving a sentence of military detention. Then, pursuant to Article 70(1) of PEC, convicts may serve their sentences in open, semi-open and closed penitentiary institutions. The latter is for repeat offenders and those who have committed serious crimes and whose behaviour may be dangerous and may pose a threat to society. They differ, in particular, in the degree of security, the isolation of convicts and their resulting duties and rights in terms of movement inside and outside the facility (Article 70(2) of PEC). The penitentiary institution is managed by the director, and a separate ward may be managed by a manager reporting to the director (Article 72(1) of PEC).

II. System of temporary leaves

The most visible aspect of the rehabilitation process is the system of temporary leaves and rewards for convicts. It is designed to motivate inmates to behave in a desirable manner, and to facilitate ensuring law and order in penitentiary facilities. Temporary leaves and rewards are largely granted to convicts who have distinguished themselves through good behaviour while serving their sentences. However, proper and desirable behaviour of the convict is not sufficient to grant them the opportunity to leave prison for a specified period of time. The provisions of PEC provide for such an opportunity for the convicts to encourage an improvement in their behaviour; and the possibility of leaving the prison temporarily is regulated in several articles. The first regulation on granting a temporary leave is contained in Article 91(7) of PEC. On its basis, a prisoner may be granted a temporary leave from prison no more often than once every two months, for a total period not exceeding 14 days per year. Such a leave shall be granted to a convict who serves a custodial sentence in a semi-open prison facility. Another regulation giving a convict the right to get a temporary leave from prison is Article 92(9) of PEC. pursuant to which, a convict may be granted leave from prison no more than once a month, for a total of no more than 28 days per year. This regulation applies to a convict who serves a custodial sentence in an open-type prison facility.

The academic literature emphasizes that if a prisoner has the opportunity to temporarily leave the penitentiary unit and go home, this can reduce at least some of the problems that arise from imprisonment, including problems of a sexual nature and those related to relationships between prisoners and their partners.

DOI: 10.5604/01.3001.0015.8796

Thus, if possible, the prisoner should receive leaves to go home regularly and the criteria for granting them should be subject to understandable, obvious rules. Should those leaves be granted as a privilege, based on arbitrary decisions, and as a reward for good behaviour, this will devalue prison leaves as a means of maintaining family ties and social contacts, and may create a sense of unfair treatment.[8]

Another possibility for a convict to temporarily leave prison is set forth in Section 8 of PEC, entitled "Rewards and Motivational Measures". Article 137 of PEC indicates that in the course of serving a prison sentence, a convict who distinguishes themselves by good behaviour may be given rewards. A reward may also be granted to a convict to encourage them to improve their behaviour. This norm specifies the general formal and material prerequisites that must exist for a convict to receive a reward while serving a prison sentence. Article 138(1) of PEC contains a catalogue of rewards, which are as follows:

1) permission for additional or longer visit;
2) permission for a visit without a guard;
3) permission for a visit in a separate room without a guard being present;
4) expungement of all or some disciplinary penalties;
5) a reward in kind or cash;
6) permission for unsupervised visit, outside the precincts of the prison, with a loved one or a trustworthy person, for a period not exceeding 30 hours at a time;
7) permission to leave prison unsupervised, for a period not exceeding 14 days at a time;
8) commendation;
9) permission to participate more often in cultural and educational activities in the field of physical culture and sports;
10) permission to give a gift to a person designated by the convict;
11) permission to receive visitors and wear the prisoner's own clothing at that time;
12) permission to receive an additional food package;
13) permission to make additional purchases of food and tobacco products, as well as items authorized for sale in the prison;
14) permission to a telephone contact with the person designated by the convict at the cost of a penitentiary facility.

The catalogue of these rewards provides, in points 6 and 7, the possibility of giving the convict a reward in the form of a temporary absence from prison, that is a kind of a leave Such a reward as a temporary permission to leave the prison constitutes the application of one of the elements of penitentiary interaction that

[8] Por. E. Dawidziuk, *Traktowanie osób pozbawionych wolności we współczesnej Polsce na tle standardów międzynarodowych*, LEX 2013, nr 166290.

performs an important function from the perspective of rehabilitation and the principle of normalization. A prerequisite for granting any of these rewards (Article 139(1) of PEC) is a positive prognosis based on an analysis that the convict's attitude while serving their sentence justifies the assumption that they will abide by the rule of law while outside prison. A precondition for this reward is that the convict has served at least half of their sentence. Rewards in the form of permitting unsupervised visits, outside the penitentiary premises, with a loved one or a trustworthy person, for a period not exceeding 30 hours at a time, or leaving the penitentiary facility unsupervised, for a period not exceeding 14 days at a time, shall be granted by the director of the penitentiary facility ex officio or upon written request of the convict's superior. In this regard, the director of the prison may authorize the ward manager to grant an unsupervised visit reward, outside the prison premises, with a loved one or a trustworthy person, for a period not exceeding 30 hours at a time. In contrast, granting these rewards to a pretrial detainee, who has the rights and duties of a convict serving a prison sentence, requires a consent order issued by the authority at whose disposal the detainee remains. Hence, the statement that the legality of leaving a prison or detention centre requires a permit issued by the competent enforcement authority. With respect to a convict serving a prison sentence, the legislation provides for several forms of such temporary leaves.[9]

Academic literature rightly notes that obtaining permission for a convict to leave prison temporarily (reward, leave) sends a signal to other convicts, too, that in prison the convict also has a say in determining their fate, and that it is up to the convict to decide whether they will spend a certain part of their sentence outside the prison walls.[10]

It is also emphasized that rewards create positive reinforcements and incentives for improvement, while punishments create negative reinforcements to eliminate undesirable behaviour. The rehabilitative nature of rewards and punishments is also confirmed by the fact that, by definition, their use must be subject to the objectives and principles of imprisonment.[11]

Permits to leave and rewards are legal instruments of rehabilitative influence where it is possible for a convict to temporarily leave prison. In their dimension, they are among the most prominent forms of influencing those deprived of liberty. Both these institutions create a system of permits that allow a convict to stay

[9] Zob. Z. Hołda, *Zatrzymanie penitencjarne (wybrane zagadnienia)*, w: *Nauka wobec przestępczości. Księga pamiątkowa ku czci Profesora Tadeusza Hanauska*, red. J. Błachut, M. Szewczyk, J. Wójcikiewicz, Kraków 2001, s. 217.

[10] Por. M. Melezini, G.B. Szczygieł, *Czasowe opuszczenie zakładu karnego formą przygotowania skazanego do wolności*, w: *Model społecznej readaptacji skazanych w reformie prawa karnego Aktualne problemy prawa karnego wykonawczego*, red. G.B. Szczygieł, P. Hofmański, Białystok 1999, s. 195.

[11] Zob. T. Szymanowski, Z. Świda, *Kodeks karny wykonawczy. Komentarz. Ustawy dodatkowe. Akty wykonawcze.* Warszawa 1999, s. 333; S. Lelental, *Kodeks karny wykonawczy. Komentarz,* Warszawa 2010, s. 358.

DOI: 10.5604/01.3001.0015.8796

outside prison for a short period of time. They are designed to have an individualized impact on the convict and are intended to contribute to ensuring proper process of rehabilitation. The temporary leave system, which provides an opportunity to temporarily leave a place of imprisonment, works as a dualistic model. First of all, it consists of the so-called systemic leaves referred to in Articles 91 and 92 of PEC; these leaves, which are granted to a convict serving a sentence of imprisonment, occur in relation to both open and semi-open prisons. They, undoubtedly, form part of a whole set of rehabilitation instruments providing those serving prison sentences with the opportunity to prepare for life after leaving prison on a permanent basis. The system of leaves clearly includes the possibility of a temporary absence, which a convict may receive in the form of a reward granted by the prison director as permission to leave the prison without supervision, as referred to in Article 138(1), (7) and (8) of PEC. Analysing the issue of the leave system as an opportunity to temporarily leave the penitentiary facility, one can identify the reward leaves specified in Article 138 of PEC and the systemic leaves (Article 91(2), (3) and (7) PEC).

III. Penitentiary detention procedure

The primary obligation of a convict who has been granted the opportunity to leave prison for a specified period of time is to return (appear) at the appointed time at the place where the sentence was previously served. The literature points out the important issue, namely the dangers of granting leaves of absence or permissions to leave prison temporarily. At the forefront is the risk of the convict's failure to return to prison on time, or failure to return to prison or detention centre at all, and this is a crime under Article 242(2) of the Criminal Code.[12] Any inmate who is given the opportunity to leave prison for a short period of time under the leave system shall be aware that if they do not return within 3 days of the deadline, they commit an offence. Regardless, such person also risks disciplinary action if their return is delayed and unexcused. In accordance with Article 142(1) of PEC, a convicted person is subject to disciplinary liability for culpable violation of orders or prohibitions under PEC, the Rules and Regulations or other regulations issued pursuant thereto, or the order established in the prison or workplace. The catalogue of penalties that may be imposed on the convict is determined in Article 143(1) of PEC. A distinctive legal reaction to the convict's failure to return to prison is that the they will be wanted by the authorities, and once their whereabouts have been established, they will be detained under penitentiary detention regime.

[12] P. Daniluk, *O przestępstwach samouwolnienia się osoby pozbawionej wolności (art. 242 § 1 i 4 k.k.) oraz niepowrotu osoby pozbawionej wolności do zakładu karnego lub aresztu śledczego (art. 242 § 2 i 3 k.k.)*, w: *Pozbawienie wolności – funkcje i koszty. Księga Jubileuszowa Profesora Teodora Szymanowskiego,* red. A. Rzepliński, P. Wiktorska, I. Rzeplińska, M. Niełaczna, Warszawa 2013.

Penitentiary detention is not a strictly legal concept as it does not derive directly from the legal provision under which this action is carried out. It remains a term that originated in practice, as one of the forms of non-procedural detention of a person. It is one of the forms of detention of a person, and the current legal system distinguishes between procedural detention and non-procedural detention. The primary purpose of procedural detention is to ensure the proper execution of criminal proceedings. The basis for its application is Article 244(1), Article 247 of the Code of Criminal Procedure. and Article 45(1) of the Code of Procedure in Cases of Misdemeanour which regulate procedural detention *sensu stricto*. On the other hand, non-procedural detentions preempt possible threats to public order and security, and serve to eliminate a specific threat that a person poses to themselves or public order. This category of detention includes:

1) preventive detention to keep order, aimed at protecting public order and security, applied to persons who obviously pose a direct threat to human life or health, as well as to property (Article 15(1)(3) of the Police Act),
2) penitentiary detention applied to persons deprived of liberty who left the detention centre or prison pursuant to a consent of a competent authority, and failed to return within the determined deadline (e.g. Article 15(1)(2a) of the Police Act); it is intended to bring these persons to a detention centre or prison,
3) administrative detention, involving bringing a person to a specific authority, such as for placement in a sobering station (Article 40(1) of the Act on Upbringing in Sobriety and Counteracting Alcoholism of 26 October 1982), or placement in a psychiatric hospital (e.g., Article 32 of the Mental Health Act of 19 August 1994),
4) detention of a person for the purpose of their confinement implemented under Article 17(3) of the State of Emergency Act of 21 June 2002,
5) detention of a foreigner for deportation – with respect to a person for whom there are circumstances justifying their deportation, or who fails to comply with the requirements set forth in the decision on deportation, Article 101(1) of the Foreigners Act of 13 June 2003,
6) detention – at the request of the Head of the Office for Foreigners – of the applicant or the person on whose behalf the applicant is acting
   – pertains to proceedings for granting refugee status or supplementary protection under Article 87(3) of the Act on Granting Protection to Foreigners Within the Territory of the Republic of Poland of 13 June 2003,
7) short-term detention, in accordance with Article 15(1)(1) of the Police Act, e.g., for the purpose of identification, establishing a person's identity,

DOI: 10.5604/01.3001.0015.8796

instructing a person, or imposing a fine on a person.[13]

Penitentiary detention is a coercive measure used by authorized bodies against a convict for the purpose of bringing that person to a penitentiary facility or detention centre they have left under a permit and have not returned to it within the prescribed period. The name itself constructed for this type of detention is defined by the purpose to be achieved. On this principle, cases of preventive or administrative detention of a person are also defined. However, penitentiary detention is applied to a legally defined subject, has a well-defined procedural status – and that is the convicted person. It is always a person deprived of liberty on the basis of a final conviction by a court or as the effect of a preventive isolation measure in the form of pre-trial detention. A person like this is incarcerated in a penitentiary facility or detention centre. According to Article 1(1) of the PEC, the execution of judicial decisions in criminal proceedings, in proceedings for fiscal crimes and fiscal offenses, and in proceedings for misdemeanours, as well as penalties and coercive measures resulting in deprivation of liberty, shall be carried out in accordance with the provisions of the Penal Enforcement Code, unless otherwise provided by law.

This type of detention is carried out by the Police as well as by the Prison Service. The normative basis for this detention, carried out by the Police, is provided in Article 15(1)(2a) of the Police Act of 6 April 1990,[14] and is applied to persons deprived of liberty who, based on a decision of a competent authority, left a penitentiary facility or detention centre and failed to return to it within the prescribed period. The Prison Service, on the other hand, uses this form of detention of a person on the basis of Article 18(1)(7) of the Prison Service Act of 9 April 2010.[15] Its officers shall detain persons deprived of liberty who have left the detention centre or the penitentiary facility or absconded from employment site or from a convoy, and also those who left a detention centre or penitentiary facility while authorized to do so, and have not returned to these facilities within the prescribed time limit, or have been authorized to temporarily leave the detention of an arrest or a criminal establishment without the convoy of an officer. The activity involving the detention of a person sentenced to a term of imprisonment and bringing them to a penitentiary unit by the Police mainly results from the need to implement a court order issued to carry out the sentence imposed, as specified in Article 79(2) of PEC. Clearly, such a person cannot be brought in without first being detained by the Police. Penitentiary detention is in no way linked to ongoing pretrial or judicial proceedings. It is simply a result of a previously issued final

[13] A. Dana, *Instytucja pozaprocesowego zatrzymania osoby w polskim systemie prawnym*, Siedlce 2012, s. 17-22. Zob. też M. Jurgilewicz, *Rola podmiotów uprawnionych do użycia lub wykorzystania środków przymusu bezpośredniego i broni palnej w ochronie bezpieczeństwa i porządku publicznego*, Siedlce 2017, s. 200.
[14] Dz. U. z 2021 r. poz. 1882.
[15] Dz. U. z 2021 r. poz. 1064, ze zm. Zob. M. Jurgilewicz, *Rola podmiotów uprawnionych do użycia lub wykorzystania środków przymusu bezpośredniego…*, s. 266-267.

prison sentence.

The academic literature on the subject indicates that penitentiary detention can be applied only to convicts serving a sentence of imprisonment or pretrial detainees who left a penitentiary unit on the basis of a decision of the authorized authorities, i.e. they were legally at liberty, but did not return to the unit within the prescribed period of time.[16]

The possibility of a convict leaving a prison (or detention centre) always involves the issuance of a permit by the competent executive authority. The use of penitentiary detention is closely linked to the response of the prison authorities in any case identified by them when a convict fails to return from a granted leave within the prescribed period. This triggers search activities by the Police, who, in order to be able to implement such activities as actions to bring about the apprehension of such a person, must be informed of this in the prescribed legal form. The information is provided by prison authorities which are legally obliged to inform about any failure of a convict to return to a given penitentiary unit. The territorially competent Police unit is then informed. However, such behaviour of the convict that makes it necessary to initiate the search and detention is not explicitly expressed on the grounds of the Penal Enforcement Code. There is a lack of express regulation of this issue closely related to the course of serving a prison sentence and imposing an obligation to initiate a search for the convicted person. This issue is normalized outside the regulations of this law and is contained in the provisions of the Regulation of the Minister of Justice of 23 June 2015 on administrative activities related to the execution of pre-trial detention, and penalties and coercive measures resulting in deprivation of liberty, and on documenting these activities.[17]

In accordance with the provisions of Section 138(1) of the aforementioned Regulation, if an inmate has escaped or has not returned from leave within the prescribed period, it is necessary to:

1) notify by fax the county (district, city) Police station having jurisdiction over the inmate's place of permanent residence, if needed, through the Provincial (or Capital) Police Headquarters;
2) send a request for detention of an inmate, together with information that may facilitate the detention, to the Provincial (or Capital) Police Headquarters with jurisdiction over the penitentiary unit, and send a copy thereof either to the disposing authority – in the case of a temporary detainee, or to the competent court – in the case of a convicted or punished person, or to a penitentiary court;
3) complete the inmate's documentation, attaching the personal-recognition file, health book, identification card and identity card to the record file, and

[16] I. Kobus, I. Dziugieł, *Zatrzymanie, ujęcie, doprowadzenie, sprowadzenie osoby*, Szczytno 2006, s. 217.
[17] Dz. U. z 2020 r. poz. 869, ze zm.; dalej: rozporządzenie MS z 23 czerwca 2015 r.

DOI: 10.5604/01.3001.0015.8796

keep it in the records department separately from the other files.

Such notification is issued: immediately – in the case of an escape, or after the evening roll call – in the case of an inmate taking a leave, or one hour after the deadline set for the inmate to return from leave – if this deadline expires after the evening roll call. In the event that the inmate returns or is admitted to another penitentiary unit, the unit in whose records the inmate has previously been listed sends a notification and cancellation of the detention request to the Police. The entity obliged to take such action shall be the director of the prison facility, and it is the prison director who shall each time notify the territorially relevant Police Headquarters – locally competent for the place of residence or stay of the convict. Prison authorities shall prepare and send a request for the detention of the convict and any other information that may facilitate the determination of the convict's whereabouts.

Upon receipt of the information by the Police unit, such a person will be sought, and as soon as their whereabouts are determined, they will be taken into penitentiary custody and action will be initiated to bring them to prison. The performance of police officers carrying out official activities of escorting and bringing persons into custody is regulated by the Announcement of the Chief of Police dated 16 November 2018 on the publishing of the consolidated text of the Regulation of the Chief of Police on the forms and methods of carrying out escorts and bringing persons into custody by police officers.[18]

Bringing a person in custody is a set of activities related to the movement of a person deprived of liberty or intoxicated to the headquarters of a Police unit or other place designated by law or determined by an authorized body. Bringing persons in custody according to the section 34(1) of the Regulation shall be carried out with respect to:

1) persons indicated in the written order of the court, prosecutor and other authorized bodies, instructing the enforcement of such a set of activities;
2) persons detained or brought in for the purpose of:
   a) placement in the premises of Police organizational units intended for detainees or persons brought in for sobering up, to a temporary transitional room, a transitional room or a Police children's room,
   b) being subject to medical examinations or medical procedures,
   c) participation in the activities of criminal proceedings, criminal fiscal proceedings, administrative proceedings, misdemeanour proceedings, or juvenile proceedings,
   d) incarceration in a penitentiary unit,
   e) sobering up.

Bringing such persons in custody is the responsibility of police officers

[18] Dz. Urz. KGP z 2018 r. poz. 119.

designated by the Head of the relevant organizational unit of the Police. In a legal sense, they carry out the order of a court, prosecutor or other authorized body. The purpose of penitentiary detention in this case is to bring the sentenced person to a penitentiary unit, to which they did not return after the expiry of the temporary leave. Until an escort is organized, the convict shall be placed in a room of the police unit designated for detainees and held for the necessary time.

Prior to the commencement of forced detention, the Police officer is obliged to (Section 37(1) of the Regulation):

1) check and, if necessary, establish the identity of the person to be escorted and inform this person of the legal basis for the escort;
2) check whether the person being escorted is carrying objects that may pose a threat to the life or health of police officers or other persons.

Once the convicted person is brought to the prison facility, a formalised handover takes place, consisting of the police officer receiving a written confirmation from the competent authority that this action has been completed. It indicates the execution of the inmate's delivery with a note of the time, date and place. From the moment of penitentiary detention until the convicted person is brought in and handed over, such a person is subject to supervision carried out by the Police.

In light of the Code of Criminal Procedure, the Penal Enforcement Code and the Police Act, the bringing in precedes the detention of such a person. This is stipulated by regulations, such as Article 74(3a), Article 244, Article 285(2), Article 376(1), Article 382 of the Code of Criminal Procedure, Article 204d(4) of the Penal Enforcement Code, and Article 15(1)(2a) of the Police Act. Since Article 79(2) of PEC does not use the concept of detention of a person, or forcible transfer, it cannot be said that it is voluntary and takes place with the consent of the convicted person. If this were the case, these two actions by the Police would not entitle them to use such specific coercive measures when bringing the person to a prison to which, for some reason, they do not want to return. There is a succession of legal actions and a chronology of proceedings involving, first, the prior detention of the convicted person who has failed to appear in prison and refuses to return, then overcoming their resistance with the possibility of applying direct coercive measures prescribed by law, and then bringing the person against their will. In this case, the Police are carrying out their statutory task involving the act of penitentiary detention in accordance with Article 15(1)(2a) of the Police Act, which concludes with bringing the convict to the penitentiary facility. This sequence of proceedings to bring a person in is also indicated in Article 38(1) of the Regulation of the Minister of Justice of 23 June 2015, which stipulates that in the case of bringing in a convicted or punished person, the detaining authority shall serve a document stating the date, time and minute of that person's detention. It should be noted that the action involving bringing a convict to a

DOI: 10.5604/01.3001.0015.8796

prison facility is contained in Article 79(2) of PEC and should be applied through the standard derived from Article 1(2) of PEC. This is referring to the provisions of the Code of Criminal Procedure in the section governing detention – Chapter 27 of Section VI.

The Penal Enforcement Code itself does not directly regulate the issue involving the detention and transportation of a convicted person. The convict's bringing into custody ends with the act of their handover to the penitentiary unit, which is regulated by Article 38(1) of the Regulation of the Minister of Justice of 23 June 2015. The handover of the convict is effected by the delivery by the Police of a document stating the date, time and minute of the convict's detention. This course of action may suggest that a detention report is not required here. However, it would be unlawful to handover a convict without first drawing up this document as an act of detaining a person. There is a statutory obligation to prepare a detention report, and in addition, the person being brought shall be in possesses a copy of the report, which contains detailed information about the detention by the Police. Bringing a convicted person to a penitentiary unit should be viewed as their prior detention, bringing them in, and handing them over for the purpose of continuing to serve their sentence of imprisonment, of which, in accordance with Article 143(2) in conjunction with 244(3) of the Code of Criminal Procedure in conjunction with Article 1(2) of the Penal Enforcement Code, a report shall be always prepared. In a situation where the convict has not returned to prison and their whereabouts are unknown, there is a presumption that they are in hiding. In such situation, the court will issue an arrest warrant associated with the formal search procedure. This is based on a fact that the whereabouts of the convicted person are not known, and the court, pursuant to Article 278 of the Code of Criminal Procedure, orders a search for the convicted person, and, if necessary, issues an arrest warrant (Article 279(1) of the Code of Criminal Procedure). Activities involving the search for persons fleeing from justice are carried out by the Police. This is one of the tasks indicated in Article 14(1)(2) of the Police Act. It stipulates that, within the limits of its tasks, the Police perform search activities for people who are hiding from law enforcement or justice. This provision is a legal instrument through which a custodial sentence is executed against a convicted person who, while in hiding, does not intend to fulfil this obligation.

Pursuant to Section 140(1) of the Regulation of the Ministry of Justice of 23 June 2015, if an inmate has absconded or has not returned from leave within the prescribed period, and fails to report or is not apprehended within six months, then the penitentiary unit shall send the disposing authority or the competent court a request for the issuance of decisions to suspend the proceedings and search the inmate by the arrest warrant, unless such decisions have been issued previously. Upon receipt of the disposing authority's decision to suspend the

proceedings or the competent court's decision to suspend the enforcement proceedings, the inmate shall be removed from the records of the penitentiary unit. The organizational units of the Police shall be notified that the inmate has been removed from the records, along with the information that in order to re-admit the inmate to the detention centre, it is necessary to have an admission order and copies of documents issued by an authorized body, which had constituted the legal basis for the inmate's stay in the penitentiary unit until the inmate was removed from the records. A copy of the notification shall be sent to:

1) the disposing authority – in the case of a temporary detainee;
2) the competent court – in the case of a convicted or punished person;
3) penitentiary court;
4) the authority listed in Section 44(1), and in the case referred to in Article 31a(1) of the Act on the Universal Duty to Defend the Republic of Poland of 21 November 1967.

Procedural searches for individuals are another of the Police's many tasks. Their purpose is to establish the whereabouts of such individuals and to apprehend them, in this case, detain a convict evading further imprisonment. Searching for a convicted person is a coercive measure, but it is not a preventive measure; there is no reciprocal relationship. Once the convict's whereabouts have been established, the convict is arrested and brought to prison. The objective of such searches is not related to obstructing criminal proceedings, but is to detain individuals for the purpose of bringing them to a place of imprisonment. Any activity taken by the Police as part of this procedural action involves establishing the whereabouts of the convicted person who has gone into hiding, and doing it against their will. The convict's failure to return to prison over a long period of time creates a state of factual presumption that the individual is hiding from justice and does not want to serve the prison sentence imposed on them by the court. A consequence of this behaviour of the convict will be the issuance of a formalized procedural act, such as a decision on an arrest warrant, which is not regulated by the Penal Enforcement Code but by Article 279 of the Code of Criminal Procedure. This procedural action in enforcement proceedings is reflected in Article 1(2) of PEC, which stipulates that in matters not regulated by PEC, the provisions of the Code of Criminal Procedure shall apply *mutatis mutandis*. Thus, an arrest warrant is issued at the stage of enforcement proceedings, i.e., when a convicted person with a final criminal sentence evades appearing in prison or fails to return to it after the temporary leave deadline. The contents of the arrest warrant letter indicate the final judgment that was issued, which replaces the order for temporary arrest. In such situations, instead of an order for pretrial detention, the court always refers to the contents of the final judgment. Of course, the factual basis for the issuance of an arrest warrant in enforcement proceedings will be the established fact that the convicted person is in hiding, and the warrant is intended to enforce the sentence imposed on the

DOI: 10.5604/01.3001.0015.8796

convicted person. Article 279(1) of the Code of Criminal Procedure regulates the institution of an arrest warrant, refers to the accused for whom a temporary arrest order has been issued and who is in hiding; the court or prosecutor may issue an order to search for the accused on this basis. This standard also applies to the convict since their failure to return to prison will involve hiding. The legal basis for issuing an arrest warrant is always related to a final conviction, and there is no need for a preventive measure in the form of pre-trial detention against the person involved. It is always equivalent to the need to take procedural steps due to the fact that the convicted person is in hiding. An arrest warrant is a coercive measure aimed at bringing a convicted person by the Police to a place of imprisonment. The institution of the arrest warrant is a standard procedural instrument for searching also for convicted persons. These activities are carried out by the Police, and their scope includes people who are hiding from justice, and the convicted individuals classify as such. The arrest warrant in such cases is a procedural coercive measure used to enable the enforcement of the law in the course of enforcement proceedings – in a case of a convicted person hiding from justice. For this reason, the jurisprudential form of the arrest warrant has been developed thus and not otherwise.

IV. Criminal form of failure to return to prison

One should also bear in mind that failure of a convicted person to return to prison from a temporary leave or a break in his sentence no later than 3 days after the expiration of the prescribed period, constitutes an offense against the administration of justice, as defined in Article 242(2) of the Criminal Code. From the wording of this provision, it follows that whoever, using permission to temporarily leave a penitentiary or detention centre without supervision or a psychiatric facility with basic security conditions, fails to return thereto within 3 days after the expiration of the prescribed deadline at the latest, without justifiable reason, shall be subject to a fine, restriction of liberty or imprisonment of up to one year. Referring to the case-law, convicts who fail to return to prison within 3 days after the deadline commit an offence. The Supreme Court has held that a day should be understood as any 24-hour segment of time, regardless of at what moment its counting begins. The Supreme Court has adopted the concept of *computatio naturalis (a momento ad momentum)* meaning that the 3-day period is calculated taking into account not only the day, but also the hour and minute of the event.[19] The fact that the convict does not return to the penitentiary facility from a leave without an excusable reason after the expiration of the deadline specified in this way constitutes unlawful behaviour under the norms of criminal law. Thus,

[19] Wyrok SN z 28.06.2017 r., III KK 35/17, Legalis.

the act of a convicted person's failure to return without a justifiable reason within the time limit after using the permit for temporary leave from a penal institution or detention centre, or after using a break in serving a prison sentence, has been criminalised. The words used in Article 242(2) of the Criminal Code, namely "the failure to return to prison no later than 3 days after the expiration of the prescribed period", as well as the *ratio legis* of this provision, indicates that the act specified therein has the nature of a permanent offense. The doctrine also expresses the view that the crimes specified in Article 242(2) and (3) of the Criminal Code have the nature of permanent offenses.[20]

The essence of the crime specified in Article 242(2) of the Criminal Code is the evasion of the obligation to report to prison for further serving of a sentence of imprisonment and staying without justifiable reason at liberty rather than in prison. The offender's obligation to return to prison does not cease to exist with the expiration of the time limit specified in this provision. This obligation is binding on the offender at all times. Throughout this period, the criminal condition persists, and the crime is only terminated when the offender appears in prison to continue serving their sentence. This appearance may be voluntary or involuntary.[21]

In Article 242(2) of the Criminal Code, the legislator defines the behaviour of the perpetrator that triggers a state of unlawfulness; it is of a completed nature and amounts to the failure to return to a penitentiary facility or detention centre before the expiration of a prescribed deadline. Thus, a state of unlawfulness is generated by the offender and is maintained by them until their return to the penitentiary or until they are arrested. It is in this, namely, in the conscious maintenance of a state of unlawfulness, that the permanency of this type of offence is expressed.[22] Article 242(2) of the Criminal Code leaves no doubt – the offender's condition and punishment is related to failure to return from a leave that exceeds the deadline by more than three days. The permanence of this criminal act is its defining characteristic, it extends from day four and lasts until the end of the last day when the convict either returns to prison or is detained. In this regard, one must agree with the position[23] of the Supreme Court that the conduct criminalized in Article 242(2) of the Criminal Code is the time of unlawful stay at liberty, i.e. the period from the fourth day counted from the expiration of the designated return date until the moment of actual return to the penitentiary facility (as a result of self-reporting or detention).

[20] W. Dadak, *Przestępstwo tzw. niepowrotu do zakładu karnego lub aresztu śledczego* (art. 242 § 2 k.k.), PWP 1999, nr 24-25, s. 22-23.
[21] Wyrok SN z 12.01.2000 r., V KKN 515/99, „Prokuratura i Prawo. Dodatek" 2001, nr 5, poz. 3.
[22] Wyrok SN z 17.10.2000 r., V KKN 370/2000, „Prokuratura i Prawo. Dodatek" 2001, nr 4, poz. 4.
[23] Postanowienie SN z 29.11.2006 r., IV KK 417/06, LEX nr 324597.

DOI: 10.5604/01.3001.0015.8796

Summary

In its normative dimension, penitentiary detention is, undoubtedly, related to the convicted person. The behaviour of the convict, which manifests itself in the failure to return to prison, creates a state of unlawfulness resulting in the need for detention. Detention is mainly carried out by the Police and is one of their statutory tasks. As soon as such a person is detained, they are brought to the relevant penitentiary unit; however, the very procedure for carrying out this action is contained in several normative acts (the procedure is quite complicated). *De lege ferenda*, a uniform act could possibly be drafted that would unambiguously regulate the treatment of such a person from the moment of their detention until the moment of their handover to a relevant facility.

Bibiografia

Literatura

Dadak W., *Przestępstwo tzw. niepowrotu do zakładu karnego lub aresztu śledczego (art. 242 § 2 k.k.),* „Przegląd Więziennictwa Polskiego" 1999, nr 24—25.

Dana A., *Instytucja pozaprocesowego zatrzymania osoby w polskim systemie prawnym,* Siedlce 2012.

Daniluk P., O *przestępstwach samouwolnienia się osoby pozbawionej wolności (art. 242§ 1 i 4 k.k.) oraz niepowrotu osoby pozbawionej wolności do zakładu karnego lub aresztu śledczego (art. 242 § 2 i 3 k.k.)* w: *Pozbawienie wolności – funkcje i koszty. Księga Jubileuszowa Profesora Teodora Szymanowskiego*, red. A. Rzepliński, P. Wiktorska, I. Rzeplińska, M. Nie- łaczna, Warszawa 2013.

Dawidziuk E., *Traktowanie osób pozbawionych wolności we współczesnej Polsce na tle standardów międzynarodowych*, LEX 2013, nr 166290.

Gordon M., *Psychologiczne bariery procesu resocjalizacji* w: Marczak M., Pastwa-Wojciechowska, M. Błażek, *Wiedza, doświadczenie, praktyka: interdyscyplinarne spojrzenie na problemy społeczne,* Kraków—Gdańsk 2010.

Hołda Z., *Zatrzymanie penitencjarne (wybrane zagadnienia)* w: *Nauka wobec przestępczości. Księga pamiątkowa ku czci Profesora Tadeusza Hanauska*, red. J. Błachut, M. Szewczyk, J. Wójcikiewicz, Kraków 2001.

Jurgilewicz M., *Rola podmiotów uprawnionych do użycia lub wykorzystania środków przymusu bezpośredniego i broni palnej w ochronie bezpieczeństwa i porządku publicznego*, Siedlce 2017.

Melezini M., Szczygieł G.B., *Czasowe opuszczenie zakładu karnego formą przygotowania skazanego do wolności* w: *Model społecznej readaptacji skazanych w reformie prawa karnego Aktualne problemy prawa karnego wykonawczego,* red. G.B. Szczygieł, P. Hofmański, Białystok 1999.

Szymanowski T., Świda Z., *Kodeks karny wykonawczy. Komentarz. Ustawy dodatkowe. Akty wykonawcze,* Warszawa 1999.

Kobus I., Dziugieł I., *Zatrzymanie, ujęcie, doprowadzenie, sprowadzenie osoby,* Szczytno 2006.

Akty prawne

Ustawa z dnia 6 czerwca 1997 r. — Kodeks karny (Dz. U. z 2020 r. poz. 1444, ze zm.).

Ustawa z dnia 6 czerwca 1997 r. — Kodeks karny wykonawczy (Dz. U. z 2021 r., poz. 53 ze zm.).

Ustawa z dnia 9 kwietnia 2010 r o Służbie Więziennej (Dz.U. z 2021 r. poz. 1064, ze zm.).

Rozporządzenie Ministra Sprawiedliwości z dnia 14 sierpnia 2003 r. w sprawie sposobów prowadzenia oddziaływań penitencjarnych w zakładach karnych i aresztach śledczych (Dz. U. z 2013 r. poz. 1067).

Rozporządzenie Ministra Sprawiedliwości z dnia 21 grudnia 2016 r. w sprawie regulaminu organizacyjno-porządkowego wykonywania kary pozbawienia wolności (Dz. U. poz. 2231).

Obwieszczenie Komendanta Głównego Policji z dnia 16 listopada 2018 r. w sprawie ogłoszenia jednolitego tekstu zarządzenia Komendanta Głównego Policji w sprawie form i metod wykonywania przez policjantów konwojów i doprowadzenia (Dz. Urz. KGP z 2018 r. poz. 119).

Orzecznictwo

Wyrok SN z 28.06.2017 r., III KK 35/17, Legalis.

Wyrok SN z 12.01.2000 r., V KKN 515/99, „Prokuratura i Prawo. Dodatek" 2001, nr 5, poz. 3.

Wyrok SN z 17.10.2000 r., V KKN 370/2000, „Prokuratura i Prawo. Dodatek" 2001, nr 4, poz. 4.

Postanowienie SN z 29.11.2006 r., IV KK 417/06, LEX nr 324597.

DOI: 10.5604/01.3001.0015.8796