NOWA KODYFIKACJA PRAWA KARNEGO. Tom XXXIV
AUWr No 3631 Wrocław 2014

The basics of applying a pause in imprisonment

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The institution of pause in imprisonment, next to deferral of punishment, one of the effective alternatives to absolute imprisonment[1]. Its possible application depends in each case on the legal situation of the convicted person. This means that the convicted person may submit an application for a pause in incarceration only if he/she has actually begun serving his/her sentence, otherwise, the convicted may apply for a postponement of its implementation. The discussed institution makes hence the pause in punishment already started to be served.

According to Art. 9 § 1 of the Criminal Executive Code, enforcement proceedings shall be initiated immediately when the judgment becomes enforceable[2]. It happens usually at the moment of its validation, or in another moment specified in the Act. A break in the penalty is, therefore, a breach in the criminal execution law's rule for immediate and continuous execution of a sentence of imprisonment, as usually implemented immediately after the verdict and less frequently being interrupted in case the statutory requirements appear.

[1] J. Jakubowska-Hara, J. Skupiński, *Alternatives to imprisonment in Polish penal policy*, Warsaw 2009, p. 226.

[2] Regulation from 6 June 1997 of the Executive Penal Code, Journal of Laws No 90, item 557 with amendment.

Nowa Kodyfikacja Prawa Karnego 34, 2014
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A problem of jurisdiction on the application of a pause requires an explanation. Now, unlike in the case of a deferral of imprisonment, in the case of a pause in its execution a penitentiary court is always appropriate. In accordance with Article 3 § 2 CEC. referring to the penitentiary court, the competent court is the penitentiary, in whose district the convicted resides, unless the law provides otherwise. A penitentiary court is the district court. The court may act on its own initiative or at the request of legitimized parties: the convict, defender director of the prison, probation officer or the prosecutor. In terms of a pause in the punishment, the court rules in the form of provision.

The purpose of the presented study is to analyze the basis for the use of a pause in the punishment — imprisonment in light of the current criminal codification. Their correct interpretation has stirred up numerous controversies, not only in the literature, but in the practice of courts of general jurisdiction above all.

The primary purpose of the institution of a pause in imprisonment is the realization of the needs of the convicted person, namely, the need to improve her/his health or taking care of the important things in life[3]. The current Executive Penal Code provides two bases of pauses in punishment : mandatory and optional.

According to Art. 153 § 1 of the Executive Panel Code, a penitentiary court grants the pause in punishment in cases defined in Art. 150 § 1 EPC. This provision thus refers to the norms regulating the mandatory deferral prerequisite of imprisonment. The penitentiary court grants a pause in the case of mental illness or other serious illness which prevents the execution of a sentence of imprisonment.

Used in this article, the phrase "grant a pause" demonstrates clearly the court obligation to use the discussed institution, not less. However, it must be remembered that the court should assess each case individually, in relation to the specific case and a specific person. This prerequisite has been always controversial, for the reason of the lack of a statutory defin-

[3] C. Nowak, *Variations in absolute execution of the penalty of imprisonment — the postponement of the execution of imprisonment and a pause in the execution of a sentence of imprisonment, and the problem of imprisonment*, [in:] *Alternatives to imprisonment in Polish penal policy*, ed. J. Jakubowska-Hara, J. Skupiński, Warsaw 2009, p. 227.

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ition for mental illness and other serious illness preventing the execution of a sentence of imprisonment.

The term of mental illness is quite general and vague. Mental illness is defined as a pathological condition which is characterized by qualitative, quantitative, or both types of disorders, of cognitive, emotional and motivational functions, taking into account the fact that a standard, against which these disorders are related varies, and is biologically, socially or culturally determined[4]. This condition excludes conscious participation in the process of imprisonment. At the same time it deprives the convict the possibility of understanding the nature of the punishment, and thus obstructs its proper effect. Controversy remains over the proper gradation of the term of mental illness, which is reduced to determining whether any mental illness may be a prerequisite for granting a pause in the punishment pursuant to Art. 153 § 1 EPC. The doctrine includes two different standpoints. According to the first basis of a mandatory pause in the punishment is only severe mental illness[5]. In the case of light anomalies there are no obstacles for the serving of a sentence in the therapeutic system under Art. 96 EPC. Proponents of a second standpoint, claim that any mental illness requires the court , and not the entitlement, to provide a break in a custodial sentence[6]. In my opinion, however, it is not an accurate judgment. It is true that there is no division of mental illness into severe , medium or light in the literature, but the content of the article supports that view. It takes into consideration the final moment of the pause in punishment as a "termination of the obstacle" preventing penalty execution. Therefore complete "recovery" of a convicted person is not necessary. Secondly, as I 've already mentioned, this disease should have the strength to make it impossible for the convict to correctly understand the nature of the punishment. Moreover, approval of criticized opinion would, in practice, lead to the unenforceability of a significant part of sentences of imprisonment of persons with reduced sanity.

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[4] L. Przybylczak, J.T. Marcinkowski, *Break in imprisonment*, Problems of the Rule of Law 1985, No. 8–9, p. 91.

[5] K. Postulski, op. cit, p. 327.

[6] T. Szymanowski, [in:] T. Szymanowski, Z. Świda, *Executive Penal Code, The Comment*, Warsaw 1998, p. 345.

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Courts of general jurisdiction also take the view that "not every mental illness justifies postponement (interruption of) the execution of a sentence of imprisonment on the basis of Art. 153 § 1 of the Executive Penal Code, but only a severe illness, which makes the placement of prisoners in the prison dangerous to his life or health"[7].

Serious illness as an obligatory pause of punishment, is less of a problem for interpretation. The helpful regulation of Art. 150 § 2 of the Code of Execution, referring to a pause in punishment , states that serious illness shall be considered as a state of the convict, in which placement in a prison may endanger life or may cause serious danger to her/his health. Apparently, it seems that the regulation includes the definition of "severe disease", in practice however, it defines a situation when illness prevents only the punishment being implemented. l. As rightly noted in the literature, the term "serious illness" is not a medical term. Therefore, attempts to define it are undertaken on the basis of the science of law, especially criminal law. The most accurate position seems to be taken by K. Postulski according to whom: "Severe diseases differ from others (light, medium) not in their duration but in their severity of pathological processes, because the very nature of the disease indicates that it is a process and therefore its duration cannot be short. At this time, there may appear decisive phases declared as hard. The conclusion follows that the threshold that marks the beginning of a serious illness is not sharp"[8].

Jurisprudence also contains the definition of severe disease. In one of its decisions, the Supreme Court stated that: "life-threatening illness usually should be understood as a state in which a serious disturbance to the basic function of organ systems appears e.g. the central nervous system, respiratory or circulatory system, due to which you can always expect inhibition and cessation of their activities, and therefore death"[9]. This means that the court grants a pause in a custodial sentence in regards of a serious illness of the convict if the nature of the disease, the size of body injuries are so severe that the convict staying in prison,

[7] Order of the Court of Appeal in Krakow from 15th March 2005, II AKz 151/05.

[8] K. Postulski, [in:] Z. Hołda, K. Postulski, *Executive Penal Code, The Comment*, Gdansk 1998, p. 324.

[9] Order of SC from 15 September 1983, II KR 191/83, OSPiKA 1984, issue 9, item. 192.

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including a penitentiary hospital unit, poses a real danger to his life or health[10]. Mental illness or another serious illness of a convicted person preventing the execution of a sentence of imprisonment may require the consultation of forensic experts. Freedom of the court in the judgment under Art. 153 § 1 EPC, therefore, is being significantly reduced. Taking into account the content of Art. 202 § 1 EPC in connection with Art. 1 § 2 of the Code of Execution, states the opinion about the state of mental health of the convict requiring the appointment of at least two expert psychiatrists.

It does not mean, however, that the possession of special knowledge may be the only evidence in the case. In the jurisprudence of courts of general jurisdiction there is a view according to which the court is not obliged to commission research in each case when sentenced to a term of imprisonment raises doubts as to his state of health, applying at the same time for a break in punishment[11].

Just like the opinion of experts, a medical certificate may be the basis for a decision on granting the convict a pause in punishment. The medical certificate of the state of health of the person deprived of liberty shall be prepared by the prison doctor. It is done on the basis of a medical examination, including the data contained in medical records[12]. This means that various types of medical documentation concerning the health of the convict, medical history, laboratory test results, information cards may be treated as material evidence[13]. It is essential, however, that such documents may constitute an independent means of evidence only if a court approves their credibility.

In the medical certificate drawn up in the proceedings on granting a pause in the punishment due to ill health, the prison doctor is obliged to

[10] Resolution of SC from 21 February 1995, WZ 35/95, OSNKW 1995, issue 7–8, item 52.

[11] See the resolution of Court of Appeals in Krakow from 20 May 1999, II AKz 245/99, KZS 1999, issue 5, item 42.

[12] Regulation of the Minister of Justice of 31 October 2003, regarding detailed rules, scope and mode of providing health services to persons deprived of their liberty by health care facilities for persons deprived of their liberty, Journal of Laws No. 204, item. In 1984 and 1985.

[13] E. Ślęzak, *Referrals of the execution of imprisonment sentence*, Jurysta 2008, No. 9, p. 7.

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assess the health of the convicted person and qualify her/him for one of the categories below:

1. "treatment is not required";
2. "can be treated in prison";
3. "during the diagnosis";
4. "cannot be treated in prison".

A pause in punishment granted under Art. 153 § 1 EPC is continued "until the cessation of obstacles". However, the court, in its order of granting a pause should indicate a specific making use of the opinion of an expert witness if possible. However, if the expert is not able to clarify the exact date, he/she is required to define the term of retesting. This obligation follows directly Art. 242 § 3 of the Penal Code, under which the convicted enjoying a pause in imprisonment, who without certain reason does not return to prison within 3 days after the deadline, commits an offense punishable by a fine, the penalty of restriction of liberty or imprisonment for up to one year.

The condition of optional interruptions of a punishment is provided by Art. 153 § 2 of the Executive Penal Code, under which a court may grant the penitentiary break in execution of a sentence of imprisonment, if justified by important family and personal reasons.

Important personal reasons, as indicated by the legislature in Art. 153 § 2 EPC apply to all of the circumstances that relate to the wide meaning of convict's education. It should be remembered however that the circumstances mentioned above are important especially in case of short-term imprisonment.

Important family reasons justifying the granting of a pause in punishment indicate the desperate plight of closest family of the convicted and at the same time forecast an improvement in the presence and effort of the convicted. The jurisprudence also indicates that a pause in punishment due to family reasons shall be granted when the presence of the convicted person is required to provide for the family or taking care of a family member, which cannot be achieved, but by the personal participation of the convicted person[14].

[14] Resolution of SC in Krakow from 23 July 2008 r., II AKzw 549/08.

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We must agree with the view of W. Kotowski and B. Kurzępa[15], that interpreting the term "important family reasons", its linguistic meaning should be taken under consideration. Therefore fundamental circumstances necessary to the functioning of the family of a prisoner are concerned.

Thus, family reasons give the convicted an opportunity for an application to the court in this regard. On the other hand, the assessment of its relevance, e.g. due to the indication of the need to care for a disabled and dependent person, can be done only by the penitentiary court and decisions issued in this regard may be reviewed only as a result of the appeal by a higher court.

It is important to add that it is impossible to enumerate all circumstances that even theoreticallycould provide a basis for granting a pause in punishment. Therefore, an individualized basis in relation to individual cases is recommended.

The order of the Court of Appeal in Lublin on 19 May 2010[16] shows that the grant of a pause under Article 153 § 2 of the Code of Execution is only optional, and lawful refusal does not affect the right to respect for private and family life. Execution of a punishment according to the legal order constitutes the legally permissible interference by a public authority with the right to respect private and family life, necessary in a democratic society for the protection of the legal order and prevention of crime.

The institution of a pause in the execution of a punishment is an exception to the principle of continuous imprisonment, and thus the conditions for the grant must be interpreted strictly. The gravity of the negative effects of imprisonment must therefore be so significant that no other way but providing a pause in the punishment would solve them. This means that the family of the person placed in jail should take all efforts to acquire the means to get necessary help[17].

In addition, the court judgments indicate that providing an optional interruption of a custodial sentence, the court is required to assess whether

[15] W. Kotowski, B. Kurzępa, *Voice to the order of Court of Appeal*, Lublin, 19 May 2010, II AKzw 354/10, Probacja 4, 2011, pp. 149–150.

[16] Resolution of SC in Lublin from 19 May 2010, II AKzw 354/10.

[17] Resolution of SC in Lublin from 8 February 2006, II AKzw 72/06.

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the convicted will use the pause in accordance with the purpose for which it is granted[18]. Recognizing the request for a pause in the execution of the punishment, the penitentiary court should therefore examine whether the convicted may properly use the pause in serving the sentence and in case of justified doubts about it, as well as doubts as to whether staying at liberty will comply with the legal order, refuse to apply that optional institution.

The prognosis of a convict's behavior at liberty cannot be the sole subject of deliberations of the court. The court penitentiary should, first and foremost, examine the existence of certain facts regarding the family situation and personal position of the convict, justifying the grant of a pause[19]. Examining the case, the court must also pay attention to the nature, circumstances and consequences of an illicit act which in a particular situation can speak against the convicted.

Finally, the result of amendments to the criminal law of the Executive carried out by the Law of 16 September 2011 amending the Act — Executive Penal Code and some other laws were removed from the list of premises for optional circumstances defined as "important health reasons"[20]. This change has been introduced to eliminate the possibility of manipulation in order to get a pause in incarceration. This does not mean, however, that currently placed applications with a request for a pause in the punishment cannot rely on the health of the convicted person. This possibility follows Article 150 § 1 of the Executive Penal Code, which should be used properly for the pause in punishment. Therefore the possibility to rely on health has been significantly limited to cases of severe illness of the convict, preventing him from execution of the sentence. Not every illness then will be treated as a basis for granting the pause institution.

The existence of circumstances justifying the occurrence of a request for a pause in punishment pursuant to Art. 153 § 2 EPC court deter-

[18] See Resolution of CA Krakow from 25 January 2008, IIAKz 12/08, Resolution of CA in Lublin from 27 May 2009, II AKzw 446/09.

[19] Resolution of Court of Appeals in Lublin from 5 August 2009, II AKzw 672/09.

[20] Resolution from 16 September 2011, Reg amendments of Executive Penal Code and other acts, Journal of Laws No 240, item 1431.

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mines using specific evidence. These can be various kinds of documents, witness statements and clarifications of the convicted. To make a full and meaningful research, however, it is necessary to tap into the result of an interview carried out by a professional probation officer, whose knowledge on the situation of the convict and his family shall help to estimate all circumstances which could be a basis for the postponement of imprisonment. Nevertheless, the positive opinion of the professional probation officer does not oblige the court to grant the convicted the postponement of imprisonment, but only creates its possibility.

It is worth noting that providing a pause in a custodial sentence penitentiary court may require the convicted person to seek gainful employment, to report to a designated police unit at specified periods of time or to undergo appropriate treatment or rehabilitation, therapeutic interaction or participation in correctional educational programs.

To summarize, in the case when the sentence is not possible to be executed for the reason of mental illness or any other severe illness of the convicted or any other important family or personal reasons come into being, the convicted may apply for granting a pause in imprisonment.

The pause in punishment is one of the most extreme forms of suspension of imprisonment . Quite often, it is the only effective way to leave the penitentiary institution, while required by the state of health of the convict or important personal or family reasons. We must remember however that the principle is the execution of a custodial sentence on a continuous basis. The institution of a pause in the punishment is therefore an exception to this rule, admitting that the fundamental principle of uninterrupted execution of the sentence in a size of judgment given by the court must give way to the principle of humanity and respect for human dignity of the convicted.

Summary

A pause in punishment is one of most effective alternatives to the absolute punishment of imprisonment. It can be applied only if the convicted has already started serving the sentence of imprisonment. The execution penal code takes into consideration a two — basis pause in punishment: obligatory, connected with health and optional, related to family and the personal situation of the convicted. The competent court is the peniten-

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tiary, in whose district the convicted resides. The pause in punishment is an exception to the fundamental rule of uninterrupted execution of the sentence, so due to its unique character it should be granted with regard to a narrow understanding of statutory requirement.

Keywords: imprisonment, pause in the punishment, mental disease, penitentiary court, important family reasons, important personal reasons.

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