Professional Reintegration of a Police Officer Convicted to a Suspended Custodial Sentence

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Abstract: Present paper aims at considering the professional reintegration of a police officer discharged from the law enforcement forces due to a conviction with conditional suspension of the custodial punishment. The debated issues follow the criminal and criminal procedure law reform in Romania, during 2013-2016, reform which resulted in a legislative void and a non-unitary and uncorrelated interpretation of the old legislation. The academic and practical significance of this endeavor consists in analyzing a transitional situation due to the failure of the legislator that remained unregulated and is likely to lead to a non-unitary interpretation and consequently to the flagrant damaging of the fundamental rights of police officers. Without wishing to be an exhaustive initiative, the present paper represents a review that highlights the doctrinal and jurisprudential implications of a conviction with conditional suspension of the custodial sentence, upon labor relations of the police officers.

Keywords: police officer; conditional suspension; reinstatement in office; professional reintegration; contestation upon enforcement

1. Factual Background

In 2009 the defendant X, police officer within the County Police Inspectorate Z has been prosecuted for the offense of abuse of office against public interests.

By the criminal decision of 2016, the Court of Appeal found that the criminal law most favorable for the defendant X, according to art. 5 para. 1 of the Criminal Code in force is the Criminal Code in 1969 and decided his conviction to a term of eight months imprisonment for the continuing offense of abuse of office against public interests.

Pursuant to art. 71 para. 1 of the Criminal Code of 1969, the court ruled to the punishment of disqualification from exercise of the rights provided by art. 64 para.

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1 second thesis of letter a) and letter b) of the Criminal Code of 1969, in addition of the custodial sentence of eight months.

However, according to art. 81 of the Criminal Code 1969 the Court of Appeal decided to suspend under parole the custodial sentence of eight months imprisonment and to set a probation period of two years and eight months.

Given the manner of individualization of the punishment, the court made the application of article 71 para. 5 of the Criminal Code in 1969 and ordered the correlative suspension of the accessory punishment while on suspension of the custodial sentence.

At the same date, County Police Inspectorate Z decided the termination of employment relationships of police officer X reasoned that the defendant was convicted to a custodial sentence.

2. Legal Framework

Romanian legislation has gone through many substantial changes in 2013-2016 periods both in terms of criminal and criminal procedure legal framework. By default, the incidental secondary legislation has changed correlatively. Without criticizing the solutions proposed by the Romanian legislator, we will confine ourselves hereinafter to a purely legislative interpretation and an analysis of the findings.

The presented case is governed by the provisions the 1969 Criminal Code, the Code of Criminal Procedure and Law no. 360/2002 on the Statute of the policeman.

Related to the subject of the present analysis, we aim to emphasize the manner in which the extra penal secondary legislation was affected by the legislative reform in the field of criminal law, focusing on inconsistencies observed from the perspective of a police officer, staff with special status, sentenced to a suspended custodial sentence.

Regarding the factual situation it is relevant that the police officer had previously been made available during the trial and at the end of it County Police Inspectorate Z decided the unlawful termination of employment relationships of police officer X pursuant to article. 69 para. 1 letter i) of Law no. 360/2002[1].

[1] Art. 69 para. (1) i) of Law no. 360/2002, as in force, states that: "*the termination of employment relationships of a police officer is disposed by the persons according to Article. 15, who have the power to grant professional ranks and occurs when he is convicted by final court decision, except when the custodial sentence is suspended under supervision or is convicted to pay a penal fine for offenses*

The normative text indicated as incident we consider it is inapplicable in the present case for two reasons: on the one hand because criminal decision is not enforceable, containing provisions nonsusceptible of enforcement, and on the other hand because the legislator sought to allow the police officers, sentenced to imprisonment with conditional suspension of punishment, to continue their employment relations.

The emphasis is on the second hypothesis, namely the legislative text inferred from the interpretation of art. 27 index 30 of Law no. 360/2002. Thus, the legislator has expressly provided that in a situation where *"it was ruled by final judgment the conviction to a suspended custodial sentence or to a criminal fine for an offense committed by negligence which is not in connection with the office, the decision to continue the employment of the policeman is analyzed by the unit to which he belongs"*.

We observe that the legislator took into consideration two hypotheses:

- "*it was ruled by final judgment the conviction to a suspended custodial sentence*" without distinction between the type of suspension, conditional or under supervision and especially without making any distinction on crimes committed or the guilt form;

- "*it was ruled by final judgment the conviction to a criminal fine for an offense committed by negligence"*.

Moreover, as we have noted, according to the criminal sentencing decision, the court ordered the suspension of the accessory punishment through which it prohibited the police officer to hold an office involving the exercise of state authority. So we see that the court has understood to further allow the police officer to continue his work relations as a result of the suspended custodial sentence.

The same argument can be also supported with *a fortiori* interpretation of the indicated normative text by the employer public authority, namely art. 69 para. 1 letter i) of Law no. 360/2002 where the legislator provided that: *"the termination of employment relationships of a police officer is disposed by the persons according to Article. 15, who have the power to grant professional ranks and occurs when he is convicted by final court decision, except when the custodial sentence is suspended under supervision"*.

The conviction to a custodial sentence suspended under supervision, unlike the conditional suspended sentence is a much more restrictive measure.

committed unintentional based on the approval of persons who have the power to award professional ranks provided listed in art. 15".

Thus, if the legislator intended to allow a police officer sentenced to a custodial sentence suspended under supervision, even more (a fortiori) has understood to allow equal treatment for the officer sentenced to a conditional suspended sentence.

Therefore, in the present case subject to analysis, namely the conviction of a police officer to a conditional suspended sentence, the employing public institution has erroneously interpreted the legal framework and ignored the real intention of the legislator.

Under such circumstances, hereinafter we want to emphasize the procedural solutions that can lead to the reinstatement of the police officer relieved with such flagrant violation of the laws and the authority of res judicata of the final criminal sentence.

3. Doctrinary Issues

Regarding the effects of the criminal sentence by which was ruled the imprisonment with suspended sentences either conditional or under supervision, specialty literature expressed a range of opinions, all of which are likely to lead to the conclusion that such resolutions cannot be effectively enforced.

A first opinion expressed in the doctrine (Grigoras, Individualizarea pedepsei, 1969, p. 293) regards the provisional effects of the final criminal judgment. Thus, it is considered that the main consequence of the suspension of the sentence is that in addition to the main penalty are also suspended the effects of the punishment and of the accessories and of any incapacity, decay or prohibitions arising from the sentence.

Another author (Pavaleanu, Drept procesual penal. Partea speciala, 2007, pp. 500-501) attempted to explain in what specifically consists the criminal enforceability of the decision. Thus, it was enunciated a set of conditions for the execution of criminal convictions, among which we mention the relevant ones to the present analysis:

- "the sentences to contain sanctions or provisions that must and can be executed";

- "to exist an injunction of enforcement, that is executive".

Regarding the executive injunction of enforcement it must be issued by definition in a written form that is enforceable and the order should originate from the authorized body to enforce criminal judgment.

We note that this is a formal condition whose implementation is absolutely indispensable for a lawful enforcement. The reason for establishing this formal rule

resides in the attempt of the legislator to remove any kind of abuse from the enforcement activities.

The conclusion, to which we subscribe, is that for a judgment to be enforced there must not exist an injunction suspending the enforcement.

In other words, *"a criminal judgment is enforceable only if it includes provisions to be enforced, either from the criminal or civil side or regarding adjacent matters"*. (Buneci, Drept procesual penal. Partea speciala, 2009, p. 385)

Another author (Theodoru, Tratat de drept procesual penal, 2013, p. 771) consecrated in the field of Criminal Procedure Law, concludes that the sentence usually comprise, in its criminal side, provisions that are liable to enforcement. It emphasize that can be enforced the punishments, whether main or complementary, educational and safety measures, judicial fines and legal costs advanced by the state. On the civil side of the criminal judgment, they are likely to compel enforcement the provisions regarding civil damages, restitution of goods, provisions about restoring the previous situation or other civil benefits and the amounts granted as judicial expenses made by the parties.

Returning to the conditions of enforcement of final penal judgment, as we have shown, the execution thereof is conditioned by the existence of provisions on the criminal and the civil side that can be executed.

It follows that, in the event in which is ruled the suspension, either conditional or under supervision, the sentence in the penal side has nothing that can be enforced.

The procedural solution given by the specialized literature (Tatu & Tulbure, Tratat de drept procesual penal, 2001, p. 531) as regards the enforceability of the final criminal judgment is lodging a contestation based on the provisions of art. 598 par. 1 letter c) Criminal Procedure Code, considering that there is a hindrance in the enforcement.

Therefore, it is stated that *"hindrance in the enforcement exists when the decision was suspended and however, the authorities proceed to enforcement. Being a circumstance of hindrance in the execution, the error can be corrected on appeal in the enforcement path, canceling the forms of execution"*.

We consider that this opinion can be also supported by a *per a contrario* interpretation of the provisions of Law no. 253/2013 on the execution of punishments, educational measures and other non-custodial measures ordered by the court during the trial.

According to art. 27 para. 1 of Law no. 253/2013 *"the enforcement of imprisonment sentence accompanying accessories is done by the appointed judge by submitting a copy of the judgment, to the persons and institutions mentioned in art. 29 para. (1) a[1], b[2] and d) -n) corresponding to the content of the accessory punishment"*.

We can assert therefore that if the judge delegated with the enforcement of the sentence has not ordered the communication of a copy to the empowered institutions, the state office cannot, on its own initiative, order the enforcement of criminal sentences.

The reason also taken into account by the legislator was to guarantee the procedural rights of convicted person by eliminating the arbitrary that might exist within a public institution.

Thereby, as the state has the obligation to subject to judiciary control the entire criminal proceeding, inclusively its execution phase, any enforcement of a final penal judgment without the express order from the appointed judge, is illegal.

Moreover, we believe that, by establishing a system of accessory punishments the legislator of the Criminal Code gave the judge of the case the attribute of decision-making. Therefore, the judge who tried the merits of the criminal case, based on the defendant personality and the conditions under which the crime was committed, is the only one who can decide whether the convicted person may or may not hold a position involving the exercise of state authority.

In this context, we believe that the intervention of County Police Inspectorate Z in the execution phase of the criminal proceedings and the discharge of the police officer represents in fact a flagrant violation of a court decision and an erroneous interpretation of the law. This unlawful interference is likely to cause serious material and moral damage to the officer concerned, damages that can only be removed by annulling the administrative act by which he was discharged.

In conclusion, although we subscribe to the opinion expressed in the literature in terms of hindering of the enforcement of the sentence, in order to avoid creating an imbalance in the rule of law, besides the intervention of the criminal court by

[1] Art. 29 para. (1) a) of Law no. 253/2013 provides that *"for the deprivation of the right to be elected to public authorities or any other public functions, the communication is made to the City Hall from the city of residence of the convicted and, where appropriate, the City Hall of the dwelling of the convicted person and also to the Directorate for Personal Records and Database administration"*.

[2] Art. 29 para. (1) b) of Law no. 253/2013 provides that *"for the deprivation of the right to hold a function involving the exercise of state authority, the communication will be made to the National Agency of Civil Servants and, if necessary, to the institution in which the convicted person exercises such a function"*.

contestation to execution, we believe it would also be appropriate an intervention of the administrative court.

The reason to lodge an administrative lawsuit resides in the procedure used by the employer respectively issuing a decision in this regard, decision which is of an administrative nature, and can be voided only in accordance with Law no. 554/2004 on administrative procedure.

4. The Proposed Procedural Approach

Notwithstanding the foregoing opinions, we believe that optimal procedural solution is to challenge the enforcement based on the provisions of art. 598 par. 1 letter c) of the Criminal Procedure Code, first thesis, contestation based on the existence of doubts regarding the sentence enforced.

We observe that the criminal court ruled the application of accessory penalties consisting in the interdiction of exercising the rights provided by art. 64 para. 1 letter a) second thesis and letter b) C.pen. 1969 in addition to the custodial sentence of eight months, respectively the right to elect and be elected to public elective office and the right to hold an office involving the exercise of state authority.

However, from the final criminal sentence, it is not clear what exactly represents the interdiction of the right to hold a function involving the exercise of state authority or specifically which are the offices that cannot be occupied by the police officer, in the case that the accessory punishments are operable.

This unclear character of the sentence we consider that it can be unraveled exclusively by the court which tried and ruled in the first place in accordance with the provisions of art. 598 para. 2 of the Criminal procedure code.

Incidentally, this is also the Romanian case law[1] showing that *"from the examination of the application filed by the appellant and addressed to the first court, it is found that he lodged a contestation of execution based on the provisions of art. 461 of the Criminal Procedure Code, whereby he sought to clarify the conviction sentence, namely the Penal sentence no. 84/10.03.1998, ruled by the Tribunal of Constanta, sentence that provides as additional punishment, the interdiction of the rights stipulated by art. 64 C.P., without specifying, as regards the prohibitions, which is the office, occupation or activity which occurs in reference to the interdiction.*

[1] Constanta Court of Appeal, Criminal Section, Criminal Decision Nr. 725 / P, Public hearing of 04 December 2009.

This misunderstanding of the judgment of conviction was required to be resolved in the first instance, in a contestation to the execution founded on art. 461 lit. c) Thesis I of the Criminal Procedure Code, given that the unclear character of the sentence allows state institutions to extensively interpret said decision.

This situation is circumscribed to the reason for cassation provided by art. 385 index 9 pt. 10 criminal procedure code, and imposes to uphold the appeal, the cassation of the sentence under appeal and refer the case back to the first instance, in order to settle the contestation by clarifying the unclear nature of the sentence, meaning to specify which are in particular the occupations, functions or activities whose exercise was banned for the convicted person, and the operating interdiction period".

The ambiguity concerning the criminal decision is not purely theoretical for two reasons: on the one hand because the legislator uses the notion of office involving the exercise of state authority, without specifying in what consists the effective state authority, and on the other hand because, if the penal code legislator intended to permit the fund judge to consider whether or not to apply this accessory punishment and especially if it is necessary its enforcement. Therefore, we cannot consider that the legislature of the Law no. 360/2002 namely the legislator of an extra penal secondary law may prohibit de facto the exercise of an office.

Ergo, as we have seen, the widely accepted view in the doctrine is that the suspended custodial sentence is unenforceable. Under provided circumstances, in the case subject to review, the public authority has acted unlawfully by enforcing said sentence.

Thus, given the suspension of the custodial sentence we consider that the police officer can hold a public office involving the exercise of state authority.

This argument is also supported by national case law[1] showing that *"the doubt from the decision of the Court of Appeal regards criminal penalties and accessories and resides in the fact that in the case was issued a suspended sentence for the accessory punishments provided by art. 64 lit. a) Letter b) and lit. e) C. pen. and the question arises if the convicted person can further occupy the position of administrator of a commercial company.*

Since it has been decided the suspension of the enforcement of this secondary penalty, provided by art. 64 lit. a) Penal Code, the convicted person can further occupy this function.

[1] Decision no. 15 / 07.02.2013 pronounced by the Court of Appeal Iasi in file no. 945/45/2012.

As the Court of Appeal did not order the communication of a copy of the judgment to the Trade Registry Office, the court clearly appreciated that by suspending the secondary penalty, she can occupy the position of administrator of a commercial company".

We see therefore that a suspended custodial sentence cannot be enforced until after its communication by the court of enforcement to the empowered public authority.

Relevant in support of the view expressed above is the unanimous doctrine (Grigoras, 1969, p. 293) appreciating that *"the first consequence of the application of a suspended custodial sentence is that besides the main penalty, are also suspended the effects of the accessory and the complementary penalties and of any incapacity, decay or interdiction arising from the conviction".*

Another argument in support of our opinion is emerged from relatively recent jurisprudence of the Constitutional Court of Romania. By Decision no. 1511/2011, the Constitutional Court held that *"criticism aims the accessory punishment of interdiction of the rights provided by art. 64 para. 1 letter a) second thesis and paragraph. 2 of the Criminal Code concerning the right to be elected to public authorities or public elective office and the right to hold an office involving the exercise of state authority.*

However, according to art. 71 para. 5 of the Criminal Code, for the entire period of suspension the accessory penalty is also suspended.

Therefore, the complaint targets a punishment that is not effective, being suspended, and only to the extent that the defendant during probation will commit a crime again and the suspended conditional sentence will be revoked the provisions regarding the accessory punishment becomes incidental.

Hence, a suspended custodial sentence, through its effects, extends also on accessory punishments that become unenforceable. In the situation provided by art. 81 of the Criminal Code, the conditional suspension of the execution regard both the main punishment and the accessory punishment and at the expiration of the probation period, if it has not occurred any of the grounds for revocation, the convict is rehabilitated by law, which means that all decay, interdictions and incapacities caused by the existence of the sentence, ceases.

In other words, although the author of the exception was subject of an accessory punishment, said sanction is not effective, being suspended and, in conclusion, the Court finds that he has no interest in invoking the exception, not being harmed in any way, as during the probation period he can be elected in public authorities or in

public elective offices or can occupy an office involving the exercise of state authority".

As a consequence, we can summarize the opinion expressed earlier: although the officer was convicted, the enforcement of the sentence was suspended; although it was prohibited to occupy a function involving the exercise of state authority, this prohibition is suspended as a result of the suspension of the custodial sentence. Overall, although the officer concerned has been convicted for committing a crime, the most important effect of parole resides in the fact that the convicted officer is not subject to any incapacity, decay or interdiction arising from the penal sentence.

Conclusion

The legislation in force at the moment does not provide explicitly the consequences applicable to a police officer sentenced to imprisonment with conditional suspension of punishment.

This omission of the legislator is motivated by the entry into force of the new Criminal Code which eliminated the institution of conditional suspension of sentence, being maintained only the suspension under supervision. Correspondingly, all extra penal laws that contain provisions dependent upon the Criminal Code were amended. However, the legislator did not anticipate any transitional situations that may arise.

From this perspective, because there is a legislative gap, the managing bodies of police inspectorates interpreted extensively the legal provisions and ordered the discharge of the officers. We believe that this interpretation is an abusive one, in contradiction with the very spirit of the law and in violation of the will of the legislator.

Moreover, as we have shown, the panel of judges who pronounced the suspended custodial sentence considered that the defendant is found worthy to hold an office involving the exercise of state authority, implicitly being police officer. Any contrary interpretation is likely to seriously violate res judicata of the penal decision and irreparably harm the rights of police officers.

As a consequence, we consider that the only authority empowered to clarify all aspects of the consequences of the conviction sentence, regarding the employment relations of the police officer, is the court that issued the penal sentence, through a contestation to enforcement in accordance with the provisions of the Code of Penal Procedure.

Subsequently to the clarifications received from the criminal court, there is the possibility of lodging a lawsuit at the administrative court through which will be requested the professional reintegration of the police officer and retroactive compensation of wages, from the time of discharge until effective reintegration.

In conclusion, as lex ferenda proposal we suggest the amending of Law no. 360/2002 on the status of police, so that it is expressly provided that, in the case in which a police officer is convicted by a suspended custodial sentence, whether conditional or under supervision, the officer can continue his work relations.

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