Topical Issues of an Expert Report in the Process of Proving in a Criminal Examination

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Abstract:-This study presents material on an expert report as an independent source of evidence indicative that the examination of evidence is a separate stage in the process of proving. The paper includes examples from investigative and judicial practice and analysis of breaches that occur during the commissioning and performance of forensic examinations. We consider the problem of assessing the reliability of the expert's conclusions and the methods involved in the examination. Criteria are identified on the basis of which the investigator or the court can assess the reliability of an expert report.

Keywords: evidence examination, forensic examination, forensic expert report, expert methods, reliability of conclusions, psychological examination.

I. INTRODUCTION

Evidence examination is of particular importance in the process of proving in a criminal case. According to the current Code of Criminal Procedure of the Russian Federation (hereinafter referred to as "CCP"), the process of proving includes several stages such as evidence collection, verification and evaluation, however, no concept such as "evidence examination" has been set out by the legislator. However, while studying materials of criminal cases, texts of indictments, sentences, appeals, representations, we see the phrase "as a result of evidence examination" on numerous occasions.

The notion of evidence examination has a deep philosophical content, traced back to the theory of cognition [3, p. 108]. In this regard, we can confidently assume that evidence examination is a form of mental activity of the law enforcer. In particular, before appointing a forensic examination in an investigation of a criminal case, the inquiry officer, investigator or judge learn the available information on the criminal case and, on the basis of the Code of Criminal Procedure of the Russian Federation, commission the examination, which aims at examining evidence by applying specific skills and expertise.

Performance of an examination is an investigative action; therefore, the preparation and commissioning of an examination have certain procedural peculiarities affecting the result of any forensic examination.

In practice, the following elements are traditionally included in the process of preparing for the examination: selection of the expert institution and the expert, collection of materials and items for expert examination, issuance of an order and the formulation of questions to an expert, as well as interaction between the investigator and the expert in the process of performance of the examination [5, C. 78]. There must be some factual grounds for the commissioning of an examination.

We consider an example from judicial practice, when in a criminal investigation, upon inspecting the crime scene and interrogating the suspect, under the weight of the examined evidence, conclusions were drawn about the need to charge the suspect K. with crimes in violation of Clause "б" of Part 4 of Article 132, Clauses "а", "в", "к" of Part 2 of Article 105 of the Criminal Code of the Russian Federation. However, in order to substantiate the fullness of the charges, the investigator made a decision on the commissioning of a number of expert examinations.

This criminal case is a horrifying real-life story. Let us briefly present a picture of what happened. On April 16, 2013, two minor children visited their old acquaintance K., "who had gained their trust, was delighted to communicate with the children, regularly invited them home for a cup of tea". On one of these days, this acquaintance raped the children (5 and 7 years old), following which, in order to conceal the vestiges of the crime, murdered the children by asphyxiation. After committing the murder of minor children, K., "with the view to concealing the vestiges of the crime committed, armed himself with a knife, cut out parts of the rectum next to the anus from the bodies of his minor victims, and then carried the corpses into the field in the vicinity of the crime scene".

In the process of studying the materials of the initial interrogation of the suspect K., it had been obvious to us that the evidence was sufficiently clear, adequate and there was no reason to believe that the suspect might have a mental disorder. However, responding to the demand of the suspect K.'s defense lawyer, the investigator conducted an additional interrogation, the records of which show that K. "is tormented by voices commanding him to commit violent acts, that he systematically ascends to the energy astral plane, is fond of wearing women's lingerie the purportedly fills him with female energies," etc. As a result, the investigator had the impression that the interrogated person is mentally disturbed and commissioned an inpatient sexual, psychological and psychiatric examination. The experts concluded and reported that the suspect has a chronic mental disorder in the form of paranoid schizophrenia. This report

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provided the basis for the application of compulsory medical treatment against the accused K.

The investigator came to a decision to commission an examination. In this case, we see the desirability and necessity of setting up a comprehensive sexual, psychological and psychiatric examination.

Before deciding on the involvement of K. in the commission of the act of crime, the following examinations were commissioned by the investigator: eight genetic examinations, including additional, trace evidence examinations, medical and forensic, dactyloscopic [17], the conclusions of which have been based on the expertise of qualified experts. The commissioning of each of these examinations resulted from the knowledge gained and evidence examined in the investigation of this criminal case. Without due premises and proper grounds for their commissioning, examinations of this kind provide little benefit.

By analyzing the materials of this criminal case and the sequence of actions and decisions of the investigative group, as well as the judge considering the criminal case, we can assume that evidence examination is purposeful cognition, the results of which form a system of conclusions.

In the result of the study of the above criminal case, characterizing the procedural examination of evidence, we can distinguish the following features of the examination: firstly, its purposeful nature, which makes it necessary to set certain objectives to achieve the required purpose; secondly, the objectives of evidence examination are clearly formulated and comprehensible, being set out, in particular, in the reasoning of the court order on the extension of the terms of the preliminary investigation; thirdly, evidence examination is always focused on finding new information related to the committed act; fourthly, evidence examination enables the investigator to build investigative versions and develop a clear plan of further investigative actions; fifthly, if the implementation of procedural and investigative actions is distinguished by a systematic approach that is possible only with complete evidence examination, the investigation is carried out in a logical sequence.

In this regard, the existence of evidence examination as a stage in the process of proving, which should be regulated by the Code of Criminal Procedure of the Russian Federation. Moreover, upon studying 500 records of court proceedings in criminal cases, the procedural action of "examination of written evidence" is obvious and included in the record as such, which makes it possible for us to reason about the independence of such a stage of the process of proving as examination of evidence.

Being considered by the investigator or judge, expert opinions gain the power of convincing arguments, making it is possible to draw conclusions about the involvement or non-involvement of the person in the act committed, their guilt or innocence.

As a rule, consideration of an expert report becomes a prerequisite for the substantiation of the reasoning part of a court indictment in a criminal case. Sometimes it is the expert opinions that become the most substantial and convincing factors that influence the judge's belief.

In this regard, we can assume that an expert opinion is one of the most popular sources of evidence in investigative and judicial practice. No criminal proceedings are carried out without an expert report, and we can refer to multiple examples found in judicial practice where an expert report becomes the key evidence. However, conflicting views can be found in scientific literature. For example, V.V. Konin argues that an expert opinion is not the most convincing evidence in assessing the entire body of evidence available in a criminal case [4].

It is difficult to disagree with this position, especially in the light of the resolution of the Plenum of the Supreme Court of the Russian Federation dated December 21, 2010 No. 28 "On forensic examination in criminal cases" emphasizes that, by virtue of the provisions of Part 2 of Article 17 of the Code of Criminal Procedure of the Russian Federation, no evidence shall have a predetermined value. Therefore, paragraph 20 of the said resolution clarifies that reports and testimonies of specialists are subject to verification and evaluation according to the general procedure and can be accepted or rejected by the court, like any other evidence [7, p. 7]. Further, the author reasons that an expert is a person possessing expertise in the field of science, technology, craft, etc., fields in which both the judge and the parties to the process are not competent. The expert acts as an "interpreter of fact". At the same time, there is another participant in criminal proceedings, also possessing expertise, other than an expert: a *specialist* whose reports have been relatively recently regulated by law as a source of evidence. Such a specialist can reasonably challenge an expert's conclusions [4].

In one respect, we can agree with this opinion. Moreover, an expert report is always indirect, intermediated evidence, which is inferior in its legal force to direct evidence. We cannot fully agree with the idea that the expert conclusion may be challenged by a conclusion or testimony of a specialist. Indeed, specialist, much like expert, is endowed with certain rights and duties established by law. However, one of the differences in their status is the fact that in practice there are doubts about the appropriateness of the participation of a specialist in the process of proving in a criminal case.

In particular, in the light of Art. 6 of the Federal Law dated May 31, 2002 No. 63-FZ "On legal practice and advocacy in the Russian Federation" [8], a lawyer has the right to engage specialists on a contractual basis to clarify issues related to the provision of legal assistance. However, what does "contractual basis" mean and how is the specialist's impartiality guaranteed? It seems that certain moments of the contractual basis, in particular, the remuneration of labor of a specialist, reveal an element of dependence, which can serve as a basis for disqualification such a specialist. Thus, Articles 70, 71 of the Code of Criminal Procedure provide grounds for disqualification of a specialist. Clause 2 of Part 2 of Article 70 of the CCP established that aspecialist cannot take part in the criminal proceedings, if they are dependent on the parties or their representatives.

The problem of the use of an expert's expertise is that the

expert report may be considered unacceptable evidence in criminal proceedings as a result of violations in the course of commissioning and performance of the forensic examination.

In this regard, we decided to consider the main procedural violations arising in the course of commissioning and performance of forensic examinations in criminal proceedings, resulting in calling for recognition of an expert report to be an inadmissible evidence.

In accordance with Part 1 of Article 80 of the CCP, an expert report is a written outline of the examination performed and conclusions on the questions raised before the expert by the person conducting the criminal case or the parties.

The quintessence of forensic examination is seen in the performance of an expert, as a person possessing expertise of an independent procedural examination that is obligatory for proving particular circumstances of a criminal case with the help of an expert opinion. Therefore, expert examination has the following distinctive features: "it is carried out by a person who is knowledgeable in a particular special area or field of knowledge; there is a need to use this knowledge to conduct a special examination of the subject; such examination is independent in its nature; special procedural form of expert examination is maintained" [15].

An examination may be commissioned at the request of parties in the proceedings or at the initiative of the investigator, inquiry officer or the court. According to the general rule, examination towards the victim or witness to a crime may be carried out only upon their consent or upon the consent of their legal representative. The exceptions are the grounds established in Clauses 2, 4, 5 of Article 196 of the CCP, if it is necessary to establish: the nature and the extent of personal injury; mental or physical condition of the victim, when there is doubt about their ability to correctly perceive the circumstances that are relevant to the criminal case and to bear testimony; the age of the suspect, the accused, the victim, when it matters in a criminal case, and the documents confirming their age are missing or doubtful.

We can distinguish the following violations that may arise in the course of commissioning and performance of forensic examinations.

First of all, it is the lack of timely informing the parties to criminal proceedings about the order on the commissioning of an examination: after the end of expert examination, or at the time the expert report is submitted.

The Constitutional Court of the Russian Federation noted that "informing the suspect, the accused about the order on the commissioning of examination after the performance of the latter should be regarded as an unacceptable violation of the right to defense, the principle of competition and equality of the parties" [9].

The resolution of the Plenum of the Supreme Court of the Russian Federation "On forensic examination in criminal cases" dated December 21, 2010 No. 28 also states that "the suspect, the accused and their defenders, as well as the victim must be informed about the decision on the commissioning of an examination prior to its performance. If a person is recognized as a suspect, accused or victim after the commissioning of a forensic examination, they must be informed with the order of commissioning at the same time as being recognizing as such, whereof a corresponding record shall be drawn up." [11].

But at the same time, as of today, law enforcement practice shows that late informing about the order of commissioning of a forensic examination is never used as a ground for recognizing the expert's record as an inadmissible evidence, including by the Supreme Court of the Russian Federation.

"The fact of the late informing of the accused about the order of commissioning of a forensic examination shall not be considered to be a procedural violation resulting in setting aside of a judgment.

Since N did not file any petitions for questions to the experts, about personal participation in the performance of the examinations, did not require disqualification of experts or any other measures provided for by Article 198 of the Code of Criminal Procedure at the time of being informed about the orders of commissioning of forensic examinations, therefore, there are no grounds for recognizing the right to defense of the accused to be violated, and there are no grounds for recognizing the expert reports to be inadmissible evidence, as the accused did not produce any complaints at the time of learning about the reports" [10].

"The fact that the accused and the defender have been informed about the orders on the commissioning of examinations and with the expert reports after the actual performance of examinations cannot serve as a basis for declaring the reports resulting from such examinations to be inadmissible evidence, since the defense party was not deprived of the capability to learn about the orders on the commissioning of examinations and the corresponding reports, or, in the course of reviewing the materials of the criminal case, to exercise their right to petition for raising additional questions, for challenging the expert, for recommissioning the examination of another expert institution, etc." [2].

It seems that such court practice cannot be considered lawful and justified, since there are substantial violations of the form of criminal procedure that entail violation of the rights of parties to criminal proceedings, as well as the very principles of criminal proceedings.

Secondly, failure to warn the expert about criminal liability for perjury.

For example, in the verdict of the Rostov Regional Court, the court of appeal concluded that "the expert report cannot serve as a basis for the court decision, since the expert had not been warned about criminal liability for giving knowingly false conclusion" [13].

The warning of criminal liability is particularly relevant in relation to a private expert. This is the common procedure in practice: If the examination is carried out in an expert institution, then part of the procedural authority is vested in the head of the expert institution, who entrusts the study to specific experts, and explains their rights and obligations to them. If the examination is carried out outside the expert institution, and it is entrusted to a "private expert" (Part 4 of Article 199), then the investigator himself shall establish the

specialty and the competence of the private expert, the lack of grounds for the disqualification of the latter, informs the expert about the rights and obligations, including a warning about criminal liability for perjury under Article 307 of the Criminal Code of the Russian Federation [16].

Thirdly, the incorrect indication of the name of the examination in the order of its commissioning.

However, there are following examples from investigative practice. By the verdict of the Supreme Court of the Republic of Sakha-Yakutia it was established that "there are no grounds for doubting the expert's testimony, because before the examination his rights had been explained to him, he was warned about criminal liability for perjury. Taking into account that the investigator had actually provided the expert with a number of questions included in the list of questions that are resolved while performing a forensic computer examination, the fact that the examination had been specified in the order on the commissioning of a "software and technical forensic examination" does not render the expert opinion inadmissible.The court came to the conclusion that the investigator lacks expertise in the field, and the erroneous name of the commissioned examination did not affect the actual conclusions of the expert" [12].

– judgments on matters that are outside the competence of the expert;

The verdict of the Sterlitamak District Court found that "the expert's conclusion does not meet the requirements for this kind of examination. In particular, when answering question No. the expert gives a legal assessment of the actions of L. for compliance with the requirements of the Traffic Rules of the Russian Federation. However, the competence of the forensic vehicle technical examinationshall extend only to the resolution of special technical issues related to the traffic accident, and the resolution of legal issues is exclusively within the competence of the court. Hence the expert opinion cannot be used as evidence of the defendant's guilt". [14].

– violations regarding methods and methodology.

The methodology is central to the expert's report, it must be described in detail in the conclusion, proven in practice, relevant to the subject of expertise, associated with the examined items and meet many other requirements. The use of complementary methods of expert examination and the extent of coverage of all expert material by the examination determine the completeness and reliability of the expert report. Violations regarding examination methods result on the competence of the expert and indicate that the expert examination was conducted with material violations of the requirements of law.

RESULTS & DISCUSSIONS

As N.E. Muzhenskaya reasonably notes, "to require the inquiry officer, the investigator and the court to assess the scientific validity of the expert report, and for all practical purposes, to attribute to them the obligation of possessing expertise, means to vest them with powers that the investigator and the court do not possess, both due to their professional (legal) education and position, and due to their procedural status" [6, p. 103]. In other words, the investigator or the court does not need to assess the applied methods and conclusions of the expert from the point of view of the provisions of individual sciences, since they do not possess the required expertise. To clarify these issues, an expert can be engaged or, in the presence of the necessary grounds, an additional examination commissioned. At the same time, the investigator or the court can assess the reliability of the expert report by the following criteria:

– competence of the expert who provides the report (it is checked whether the expert has the relevant education and work experience in the field);

– completeness of the examination (did the expert answer all the questions raised, how fully did they answer the questions, did all the materials submitted for the study have been taken into account or only a part of them);

– substantiation of the expert's conclusions (the report must indicate the methods on the basis of which the examination has been carried out, the special literature to which the expert refers while carrying out the examination, substantiation of the provisions on which the conclusions were drawn, have any illustrative materials attached);

– the nature of the expert's conclusions (probabilistic or definitive, or inability to answer the questions raised);

– logical consistency of the description of the content of the examination (compliance with the proper stages of an expert examination, absence of contradictions between the expert's conclusions);

– consistency of the conclusions indicated in the report with other evidence in the case.

Primorsky Territorial Court, while evaluating expert reports, came to the following conclusions: "examinations have been commissioned and carried out in accordance with the requirements of the Code of Criminal Procedure of the Russian Federation by competent designated persons possessing expertise in this field. The examinations are sufficiently substantiated and motivated, do not contain contradictions and alternative conclusions, are given on the basis of approved methods... The experts have examined all the materials submitted to their consideration, the conclusions are consistent with other evidence in this case, therefore, appellate court does not have any grounds for declaring them unreliable, as well as for additional or repeated examinations" [1].

Special consideration should be given to assessment of the reliability of psychological examinations, the commissioning of which has recently become particularly relevant. Here it is necessary to take into account the methods used and the possibility of resistance of the person being examined.

Regarding the methodology, the expert should use adapted and validated methods, methodological complexes, the reliability of which cannot cause any doubts. Also, if necessary, the report can describe in detail not only the course of the examination itself, but also the processing of its results. We should not forget that, in accordance with Part 3 of Article 204 Code of Criminal Procedure, materials illustrating the expert opinion (diagrams, tables, drawings, etc.) are attached to the report

and become part of it.

Regarding any resistance of the person being examined, it should be noted that the subject themselves decides how to answer the questions posed in the test, can specifically give false answers in a conversation with a psychologist, etc. In this case, one would assume that the reliability of the results is doubtful, but this is not so because:

– the duties of the psychologist in carrying out the examination first of all includes making contact with the subject, and it is possible to decide on the attitude of the person being examined already at this stage. If the expert is faced with a situation of resistance of the person being examined, the former can adjust the examination techniques, use special techniques aimed at changing the attitude of the subject;

CONCLUSION

– some test methods contain “deception scales”. Even if the test does not contain “deception scales”, results of a single test are insufficient to draw conclusions, and other methods should be used for this purpose to reinforce and clarify the results obtained;

– If the expert founds that the conclusion obtained in the test contradict each other, various projection techniques can be applied. The peculiarity of projective techniques lies precisely in the fact that they are aimed at the unconscious and the subject cannot specifically adapt to their conscious attitude of resisting to the expert.

Therefore, overcoming the resistance of the person being examined should not pose a significant difficulty for an experienced psychologist, and since the research results of one technique are confirmed and supported by the results of another, in this case the court should have no doubts about the reliability of the expert’s conclusions.

REFERNCES

1. Апелляционное постановление Приморского краевого суда по делу № 22-1353/2018 от 02.04.2018 г. [Электронный ресурс] // Доступ из СПС «СудАкт» (дата обращения: 11.11.2018 г.).
2. Апелляционное постановление Суда Ханты-Мансийского автономного округа по делу № 22-588/2018 от 18.04. 2018 г. [Электронный ресурс] // Доступ из СПС «СудАкт» (дата обращения: 11.11.2018 г.).
3. Брянская Е.В. Аргументирующая сила доказательств при рассмотрении уголовных дел в суде первой инстанции. – Иркутск : ИГУ, 2015. – С. 108.
4. Конин В.В. Опровержение выводов эксперта при осуществлении профессиональной защиты по уголовным делам с использованием специальных познаний [Электронный ресурс] // Использование специальных познаний в судопроизводстве: сборник научных трудов / Под ред. Т.С. Волчецкой. – Калининград: изд-во КГУ, 2005 (дата обращения: 1 апреля 2019 г).
5. Криминалистика : учебник / Т. В. Аверьянова [и др.]; под ред. Р. С. Белкина. – М. : НОРМА-ИНФРА-М, 2000. С. 78.
6. Муженская Н.Е. О необходимости и возможности оценки следователем и судом научной обоснованности заключения эксперта / Н.Е. Муженская // Уголовное право. – 2011. – № 3. – С. 99-103.
7. О судебной экспертизе по уголовным делам : постановление Пленума Верховного Суда РФ от 21 декабря 2010 г. № 28 // Рос. газ. – 2010. – 30 дек. – С. 7.
8. Об адвокатской деятельности и адвокатуре в Российской Федерации: федеральный закон от 31.05.2002 № 63-ФЗ (ред. от 29.07.2017 г.) // Собр. зак. РФ. – 2002. – № 23. – Ст. 2102.
9. Определение Конституционного Суда Российской Федерации №206-О «По жалобе гражданина Корковидова Артура Константиновича на нарушение его конституционных прав статьями 195, 198 и 203 Уголовно-процессуального кодекса Российской Федерации» от 18.06.2004 г. [Электронный ресурс] // Доступ из СПС «КонсультантПлюс» (дата обращения: 11.11.2018 г.).
10. Определение Верховного Суда Российской Федерации по делу № 1-321/2008 от 28.01.2014г. [Электронный ресурс] // Доступ из СПС «СудАкт» (дата обращения: 11.11.2018 г.).
11. Постановление Пленума Верховного Суда Российской Федерации от 21 дек. 2010 г. N28 «О судебной экспертизе по уголовным делам» // Рос. газ. – 2010. – 30 дек. – № 296.
12. Приговор Верховного суда Республики Саха-Якутия по делу № 22-1/2016 от 29.03.2016 г. [Электронный ресурс] // Доступ из СПС «СудАкт» (дата обращения: 11.11.2018 г.).
13. Приговор Ростовского областного суда по делу № 22-21/2018 от 13.02.2018г. [Электронный ресурс]. –Доступ из СПС «СудАкт» (дата обращения 11.11.2018 г.).
14. Приговор Стерлитамакского районного суда по делу № 1-3/2015 от 24.02.2015г. [Электронный ресурс] // Доступ из СПС «СудАкт» (дата обращения: 11.11.2018 г.).
15. Смирнов А.В., Калиновский К.Б. Следственные действия в российском уголовном процессе: уч. пос. для студентов, обучающихся по специальности 021100 – Юриспруденция [Электронный ресурс] // Санкт-Петербург: СПбГИЭУ, 2004 (дата обращения: 10 апреля 2019 г.).
16. Смирнов А.В., Калиновский К.Б. Уголовный процесс [Электронный ресурс] // СПб.: Питер, 2005. (дата обращения: 13 апреля 2019 г.).
17. Уголовное дело № 2-108/2014 // Архив Иркутского областного суда.