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TRIAL EXPERIMENT IN CRIMINAL PROCEEDINGS

Summary

In the procedural law, the legislator lists the possibility of conducting an evidentiary act in the form of an experiment and the ways of documenting it. A trial experiment is an activity in which a trial authority performs an experiment or reconstructs the course of events or fragments thereof that are the subject of the investigation in order to verify circumstances that are relevant to the case. Many times a trial experiment is a complicated and complex activity in terms of process and forensic science. Accordingly, the article presents in detail the problems of the correct performance of this activity, the author leaned, among other things, on the issue of the definition of the experiment, the forms of this activity and the purpose and conditions of its performance. He discussed the legal prerequisites for implementing the experiment, as well as its characteristics.

Keywords: Code of Criminal Procedure, trial experiment, legal basis of experiment, persons participating in the experiment, documentation of the experiment

Introduction

The institution of a procedural experiment, in the doctrine of procedural criminal law also known as an investigative experiment, forensic experiment, process-criminal experiment, criminal-criminal experiment, tactical experiment, evidentiary experiment¹, is a procedural activity of the body conducting criminal proceedings that can be carried out in pre-trial or court proceedings, as long as it is expedient to verify the circumstances that are significant for the resolution of the case. As the Supreme Court aptly noted: „Conducting a procedural experiment under Article 211 of the Code

¹ W. Daszkiewicz, *Proces karny: część ogólna*, Oficyna Wydawnicza „Ławica”, Warsaw-Poznań 1994, pp. 291-292; Z. Czczot, T. Tomaszewski, *Kryminalistyka ogólna*, Comer, Torun 1996, p. 198.

of Criminal Procedure² is a procedural activity that can be carried out in either judicial or pre-trial proceedings, as long as it is expedient for verifying circumstances that are relevant to the case.”³ When the experiment is conducted at the stage of jurisdictional proceedings, it may be a repetition of an activity performed during the pre-trial proceedings or it may constitute an entirely new evidentiary activity⁴.

The trial experiment is a source of evidence in its own right, and the information obtained through it - a means of evidence to learn the truth about a specific event⁵.

In the doctrine, in the procedural sense, the experiment is treated as a procedural activity, a source of evidence, evidence in the criminal process⁶. It has a sensory, accessory nature, verifying previously obtained procedural information and its usefulness for making factual determinations. On the other hand, it does not itself allow for such determinations⁷. It can also serve the investigators' hypotheses and conjectures based on accumulated evidence and experience⁸.

An experiment is conducted when it is expedient to verify the circumstances arising from other evidence gathered during the criminal proceedings. It can make a significant contribution to the discovery of objective truth. The experiment is an evidentiary activity that welds together procedural elements - as an evidentiary activity carried out by a procedural body - and forensic elements, from the side of the way and methods of its implementation⁹. Conducting an experiment is legitimate, and often indispensable, when the evidence available to the authority conducting criminal proceedings does not allow the removal of emerging doubts about learning the actual course of the event that is the subject of a particular investigation¹⁰.

² Law of June 6, 1997. - Code of Criminal Procedure, unified text. Journal of Laws 2024, item 37, hereinafter: the Code of Criminal Procedure.

³ Order of the Supreme Court of August 20, 2003, III KP 69/02, LEX No. 80306.

⁴ W. Grzeszczyk, *Kodeks postępowania karnego: komentarz*, LexisNexis Polska, Warsaw 2010, p. 227.

⁵ K. Jagodzińska, *Eksperyment procesowo-kryminalistyczny*, „Acta Universitatis Wratislaviensis” 2009, no. 81, p. 85.

⁶ S. Rybarczyk, *Eksperyment jako dowód w procesie karnym*, Wydawnictwo Prawnicze, Warsaw 1973, p. 21.

⁷ Judgment of the SA in Krakow of August 28, 2014, II AKa 129/14, „Krakowskie Zeszyty Sądowe” 2014, no. 10, item 50.

⁸ Z. Młynarczyk, *Ogłędziny i eksperyment procesowy*, „Prokuratura i Prawo” 1996, no. 1, p. 124.

⁹ T. Grzegorzczak, J. Tylman, *Polskie postępowanie karne*, Wydawnictwo Prawnicze LexisNexis, Warsaw 2007, p. 519.

¹⁰ R. Ponikowski, W. Posnow, J. Skorupka, Z. Świda, *Postępowanie karne: część ogólna*, Wolters Kluwer, Warsaw 2012, p. 354.

According to the regulation contained in Article 211 of the Code of Criminal Procedure. in order to verify the circumstances that are significant for the determination of the case, it is possible to carry out, by means of a procedural experiment, an experiment or reconstruction of the course of events that are the subject of the investigation, or fragments thereof. In addition to Article 211 of the Code of Criminal Procedure. trial experiment as an evidentiary activity is regulated indirectly in other provisions of the procedural law, e.g., Article 143, paragraph 1, item 5, Article 167, Article 170, Article 171, Article 174, Article 175, Article 177, Article 182, Article 183, Article 190, Article 191, Article 205, Article 212 of the Code of Criminal Procedure.

The application of this evidentiary step in a specific criminal proceeding is influenced by both procedural considerations and principles developed in forensic science. Hence, it is reasonable to say that there are statutory and non-statutory prerequisites for the application of this process-criminal activity¹¹. When interpreting the former, the general goals of criminal proceedings as defined in Article 2 of the Code of Criminal Procedure must also be taken into account. (in particular, in Article 2.1.1 and Article 2.1.4 of the Code of Criminal Procedure), and in terms of pre-trial proceedings, the objectives that apply to this phase of the proceedings, as set forth in Article 297.1 of the Code of Criminal Procedure. (in particular, those indicated in Article 297 § 1 points 1, 2, 4 and 5 of the Code of Criminal Procedure). In doing so, it is impossible to ignore the general principles of criminal trial, including in particular the principle of material truth (Article 2 § 2 of the Code of Criminal Procedure) and the principle of adversarialism.

Forms of trial experimentation

As mentioned above, two forms of trial experimentation can be distinguished: conducting an experiment and reconstructing the course of the entire event or particular parts or fragments of it. Thus, one can speak of a laboratory experiment (conducting an experiment) and a natural experiment (recreating an event or parts or a fragment of it under conditions that are closest to the actual circumstances of its occurrence).

An experiment, in the form of an experiment, involves testing the possibility of facts or phenomena or testing the possibility of perceiving them under well-defined, deliberately chosen and repeated conditions¹².

¹¹ S. Rybarczyk, *Eksperyment...*, op. cit, p. 133.

¹² H. Zgółkowska (ed.), *Praktyczny słownik współczesnej polszczyzny*, vol. 9, Kurpisz, Poznań 1996, pp. 192-193.

An experiment of this kind may precede the reconstruction¹³. It is not easy to indicate what issues may be subjected to experimental verification, for this depends on the realities of a particular case, the quantity and quality of information possessed by the trial authority, and often the zeal to obtain it.

On the other hand, an experiment in the form of restoration (a.k.a. reconstruction) is to see whether a particular event or a particular part or fragment of it could have had a certain course. This type of experiment should be conducted at the place where the specific event occurred, and under conditions as close as possible to those that existed at the time of its occurrence (weather conditions, time of year, day, etc.)¹⁴. It should be noted that the restoration must be carried out in conditions that are almost perfectly similar to those in which the event that is the subject of the specific proceedings took place¹⁵, not in an artificial environment, either manufactured or imitating the places of the event. If it is not possible to provide such conditions for this evidentiary activity, when there has been a significant change in circumstances, such as a change in lighting, reconstruction of the road where the traffic accident under investigation took place, or the cutting of roadside trees, the execution of the trial experiment should be abandoned. Therefore, it is necessary to negate the possibility, allowed by some courts, of reconstruction under the conditions of the so-called imitation proposed and approved by the accused¹⁶.

The purpose of the trial experiment

The use of a trial experiment is determined by the specific needs of the criminal proceedings and the possibility of conducting the experiment. This activity can be used as a means to check the evidence already collected, in particular, to verify the content of the explanations of the accused (suspect) or the testimony of witnesses, especially when there are significant discrepancies between them, as a means to check (confirm or exclude) the investigative version or partial investigative hypothesis, or as a means to learn about the relationships that exist between things or phenomena that

¹³ M. Zolna, *Eksperymentować czy odtwarzać, czyli rozważania na kanwie art. 211 k.p.k.*, „Przegląd Policyjny” 2008, no. 4, pp. 224-225.

¹⁴ A. Gaberle, *Dowody w sądowym procesie karnym: teoria i praktyka*, Wolters Kluwer Polska, Warsaw 2010, p. 257.

¹⁵ E. Gruza, *Inne czynności procesowo-kryminalistyczne*, in: M. Goc, E. Gruza, J. Moszczyński, *Kryminalistyka czyli rzecz o metodach śledczych*, Oficyna Wydawnicza „Łośgrań”, Warsaw 2011, pp. 185-186.

¹⁶ Judgment of the SA in Katowice of April 8, 2009, II AKa 69/09, „Krakowskie Zeszyty Sądowe” 2009, no. 9, item 81.

are relevant to the resolution of the case¹⁷. Among the characteristic circumstances that are subject to verification by means of a trial experiment is the testing of a person's sensory perception under certain conditions. Its most common tests include the audibility of sounds or speech under given conditions, e.g., signals of a privileged vehicle, warning signals¹⁸, visibility or visibility, e.g., the extent of visibility of the road in front of the vehicle and obstacles on the roadway¹⁹, or the question of whether a person who was supposed to be in another specified place can be seen from a given location, the ability to perceive stimuli under various conditions, e.g. the driver's claim that he was blinded by the very strong light of a car coming from the opposite direction, as well as the possibility of performing a certain action under certain temporal, spatial, material and subject conditions, such as the effectiveness of the brakes, the determination of the time needed to perform certain actions²⁰, the possibility of the occurrence of an event under certain conditions, the course of a certain sequence of events and their interrelationships, the possibility and manner of the formation of certain traces, etc.²¹.

In the course of a trial experiment, it is possible to determine the determinants of a given phenomenon, determine the degree of individual dependencies in the course of an event, as well as the limits of the influence of various types of conditions on the issue under investigation²². As indicated by the provision contained in § 62 (1) of Guideline No. 3 of the KGP²³, a police officer may, pursuant to Article 211 of the Code of Criminal Procedure, conduct a trial experiment in order to:

- 1) check whether the crime could have been committed under certain conditions;
- 2) check whether a certain person could have committed a crime under the given conditions;

¹⁷ J. Kasprzak, in J. Kasprzak, B. Młodziejowski, W. Brzęk, J. Moszczyński, *Kryminalistyka*, Difin, Warsaw 2006, p. 261.

¹⁸ J. Polony, B. Stachurska-Marciniak, *Wypadki drogowe: problematyka kryminalistyczna*, Wydawnictwo Prawnicze, Warsaw 1978, p. 131.

¹⁹ Ibid.

²⁰ M. Zolna, *Eksperyment procesowo-kryminalistyczny: istota i dowodowa rola*, Difin, Warsaw 2011, pp. 37-38.

²¹ M. Glusek, *ksperyment procesowy wokół zagadnień semantycznych*, „Problemy Kryminalistyki” 2013, no. 1, p. 59.

²² J. Gurgul, *Wybrane aspekty eksperymentu kryminalistycznego*, „Problemy Kryminalistyki” 1976, no. 121-122, p. 29.

²³ Guidelines No. 3 of the Chief of Police dated August 30, 2017 on the performance of certain investigative activities by police officers, Official Gazette. Urz. KGP, 2017, item 59, as amended, hereinafter: guidelines No. 3 KGP.

- 3) determine whether the crime could have been committed in a certain way;
- 4) determine the possibility of certain consequences of the crime as a result of the perpetrator's actions;
- 5) verify the veracity of testimony or explanations;
- 6) clarify contradictions in testimony or explanations;
- 7) disclosure of evidence of a crime, including traces of a crime.

Conditions for conducting a trial experiment

When deciding to conduct an experiment, the investigator of this evidentiary activity must bear in mind that it should be performed under conditions identical or as close as possible (reproducing as accurately as possible) to those in which the event that is the subject of the specific investigation took place. This includes the coincidence of time, place, atmospheric conditions, acoustic conditions, the use of original or similar objects, as well as the multiple performance of the experiment, which is extremely important to eliminate accidental elements²⁴.

Both forms of experimentation are aimed at verifying (verifying) previously collected evidence, and experience - also to obtain new evidence in the case by filling the gap in the chain of previously collected evidence that does not allow definitive establishment of the facts related to the criminal act or omission²⁵.

Rationale of the trial experiment

The conduct of a trial experiment is carried out as necessary, for in the aforementioned Article 211 of the Code of Criminal Procedure. the legislator included the statement that the experiment „may be conducted.” An experiment is a direct evidentiary activity that reveals certain facts.

When reaching for this means of evidence, the court or pre-trial investigation body should, as with any evidence, analyze the legal prerequisites for the admissibility of this procedural action regulated by Article 170 § 1 of the Code of Criminal Procedure. and related provisions that statute evidentiary prohibitions²⁶. If there are no prerequisites from the legal standard

²⁴ M.R. Tużnik, *Procesowo-kryminalistyczne aspekty przeprowadzenia eksperymentu (zagadnienia wybrane)*, „Studia Prawnicze i Administracyjne” 2014, no. 3, p. 43.

²⁵ M. Kulicki, *Eksperyment procesowo-kryminalistyczny w świetle teorii i praktyki*, „Problemy Praworządności” 1983, no. 1, p. 71.

²⁶ Z. Świda-Łągiewska, *Zasada swobodnej oceny dowodów w polskim procesie karnym*, Wydawnictwo Uniwersytetu Wrocławskiego, Wrocław 1983, p. 562.

indicated above, it is possible to consider the individual conditions of the trial experiment.

The prerequisite of „material importance to the outcome of the case” appears to be met for almost any evidence that has been favorably reviewed in light of Article 170(1) of the Code of Criminal Procedure. However, it should be accepted that any circumstance, the determination of which in a particular case may affect the content of the decision ending the proceedings²⁷, including the determination of the criminal liability of the accused and its magnitude²⁸, is relevant. Therefore, only in a specific case is it possible to articulate a claim that a circumstance is or is not relevant to its resolution.

The reasoning presented here makes it clear that the described rationale for resorting to procedural experimentation is eminently evaluative and may raise serious doubts in practice. Undoubtedly, therefore, it must be supplemented in each case with the objectives of the experiment, and above all the understanding of this activity as aimed at removing doubts, which are, for example, the possibility of performing a certain action, making observations or the occurrence of a certain event as the effect of the alleged cause²⁹.

Circumstances that preclude conducting a trial experiment

Experiments that endanger the life or health of those participating in them or bystanders, or property to an extent that is disproportionate to the significance of the experiment (ignoring minor losses), as well as those that offend the personal dignity of those participating in them, are considered unauthorized. Also excluded should be experiments that would involve the violation of good morals, accepted social principles and values, the promulgation of facts of an intimate nature, the violation of bodily integrity, as well as those whose performance may threaten the disclosure of legally protected secrets, involve the adoption of a corpse for the activity or the participation of the victim referred to in Article 185a of the Code of Criminal Procedure³⁰, and persons indicated in Article 192 § 3 of the Code of Crim-

²⁷ M. Zolna, *Eksperyment...*, op. cit, p. 34.

²⁸ A. Gaberle, op. cit. p. 258.

²⁹ A. Biderman-Zaręba, *Kryminalistyczne czynności procesowe*, in D. Wilk (ed.), *Kryminalistyka: przewodnik, Towarzystwo Naukowe Organizacji i Kierownictwa „Dom Organizatora”*, Toruń 2013, p. 134.

³⁰ The experiment requiring the examination of a witness, referred to in Article 185a of the Code of Criminal Procedure, should be resorted to in exceptional cases, when evidentiary discrepancies cannot be resolved by other available evidence. If, at the pre-trial stage, the prosecutor decides to conduct such evidence, then the protective rules of the child witness will begin to apply, and it will be necessary to entrust the performance of these pre-trial activities to judicial authorities (J. Pawlik-Czyniewska, *Rola i zadania prokuratora w przesłuchaniu małoletnich świadków*

inal Procedure, unless such persons consent. In light of the circumstances presented here, the regulation contained in § 62(2) of Guideline No. 3 of the KGP, which indicates that: “The trial experiment shall not be carried out if its conduct may:

- 1) endanger the life or health of participants;
- 2) combine with the participation of the victim referred to in article 185a, article 185b or art. 185c k.p.k.;
- 3) combine with the participation of persons referred to in article 192 § 3 of the Code of Criminal Procedure, unless they give their consent;
- 4) threaten the disclosure of legally protected secrets;
- 5) derogate the personal dignity of participants;
- 6) endanger property to an extent that is disproportionate to the importance of the experiment;
- 7) combine with the adoption of a corpse.”

It is also impossible to carry out an experiment when there is no information that enables it to be carried out properly, and when it is impossible to reproduce the conditions under which a specific event occurred³¹. The limits of the experiment must be conditioned by the average capabilities of a law enforcement or judicial employee, related to the knowledge required of him and his education and professional experience, which will constitute a sufficient guarantee for the conduct of the experiment and the proper evaluation of its results³².

Features of the trial experiment

It is worth noting at this point the characteristics of the experiment that distinguish it from other procedural activities undertaken by courts or pre-trial authorities, such as visual inspection, examination or site visit:

- 1) during the experiment, both the incident itself and its result are perceived;
- 2) during the experiment, it is possible to establish circumstances and phenomena that do not leave material traces, such as observing the occurrence of a phenomenon;

na podstawie art. 185a i art. 185b k.p.k., „Nowa Kodyfikacja Prawa Karnego” 2013, No. 30, pp. 133-153).

³¹ M. Zolna, *Eksperyment...* op. cit, pp. 134-135.

³² S. Rybarczyk, *O istocie eksperymentu w procesie karnym*, „Wojskowy Przegląd Prawniczy” 1969, no. 1, p. 53.

- 3) the object or phenomenon is studied in a reconstructed form, and its state is never identical to the state existing at the time of the event³³;
- 4) the conditions or circumstances of the occurrence of an event can be reconstructed not all at the same time, but sequentially in stages, which facilitates their observation and analysis;
- 5) the protocol drawn up from the experiment should include a detailed description of the experiments carried out and the results obtained as a result³⁴.

The following fundamental differences between the trial experiment and visual inspection, i.e. sensory familiarization by the trial body with a place, thing or body of a person in order to learn about their features and characteristics, singled out for their relevance to the resolution of the case or the discovery of a new source or means of evidence, can be mentioned:

- 1) the purpose of the activities listed here - the visual inspection is aimed at revealing traces and securing them, and is therefore detective in nature, while the experiment is to reconstruct the course of the event, to verify the version of the investigators or the evidence collected up to the time of its conduct³⁵;
- 2) the time of their implementation - visual inspection is most often the first evidentiary activity in the case, which is often performed as part of the proceedings to the extent necessary, while the experiment, due to the need for its prior preparation and objectives, can generally not be carried out as part of such activities³⁶;
- 3) the nature of the activity - visual inspection is of a primary nature, involving the search for forensic traces on the carrier, while the experiment is of a restorative nature, the arrangement of the carriers in this case is deliberately changed by the investigating authority and is the result of a planned arrangement³⁷. As the Supreme Court has aptly ruled: “*Inspection* is static in nature - it serves as a means for the trial authority to familiarize itself with the scene, person or thing (article 207 § 1 code of Criminal Procedure), while the procedural experiment referred to in article 211 k.p.k., is intended to verify exper-

³³ K. Marszał (ed.), S. Stachowiak, K. Zgryzek, *Proces karny*, Wydawnictwo Volumen, Katowice 2005, p. 303.

³⁴ R.S. Belkin, *Charakter, cel i rodzaje eksperymentów śledczych*, „Problemy Kryminalistyki” 1958, No. 12, pp. 247-248, 253.

³⁵ S. Rybarczyk, *Eksperyment...*, op. cit, p. 40.

³⁶ K. Witkowska, *Oględziny: aspekty procesowe i kryminalistyczne*, Wolters Kluwer Polska, Warsaw 2013, p. 316.

³⁷ M. Zolna, *Eksperyment...*, op. cit, p. 141.

imentally whether the investigated event or the reported course of the event was possible at all. Both the experience and the reconstruction, in order to fulfill the procedural sense, should be carried out under conditions as close as possible to those when the event occurred.”³⁸. Also, the SO in Poznan pointed out that: “The inspection is static in nature - it serves to familiarize the trial authority with the place of the event, person or thing (Article 207 § 1 of the Code of Criminal Procedure), while the trial experiment referred to in Article 211 of the Code of Criminal Procedure. is intended to verify experimentally whether the investigated event or the reported course of the event was possible at all.”³⁹;

- 4) the object of examination - in the case of visual inspection it is forensic traces on a specific medium, and in the case of an experiment it is also all elements of the course of the event, both those originally fixed and not materially fixed, which appear in the course of this activity; this object in the case of visual inspection must be authentic, while during the experiment it is not, because it can be a similar or substitute (dummy) object, as long as it meets certain conditions⁴⁰.

The trial experiment is distinguished from a site visit by the following criteria:

- 1) the purpose of the activity - the purpose of the experiment is to experimentally check the possibility of the occurrence of a specific event, while the local inspection is devoid of experiential aspects, it serves to visually show the elements, to orient oneself in the local, spatial conditions, to get to know the place of the event or the things located there⁴¹ (hence, it is understood as a repeated control inspection of the place of the event or as a special type of inspection of the place of the event or an intermediate activity between inspection and trial experiment⁴²), rather than verification of facts⁴³, so it is reasonably assumed in the literature that when there is a need to verify the possibility of the occurrence of certain events or their course, it

³⁸ Supreme Court ruling of July 16, 2009, V KK 20/09, LEX No. 519629.

³⁹ Judgment of the District Court in Poznań of December 17, 2015, IV Ka 1095/15, LEX No. 1966610.

⁴⁰ M. Zolna, *Eksperyment...* op. cit, p. 141.

⁴¹ J. Nelken, *Problematyka procesowa eksperymentu śledczego*, „Nowe Prawo” 1958, No. 11, pp. 59-60.

⁴² S. Rybarczyk, *Eksperyment...*, op. cit, p. 42.

⁴³ T. Hanausek, *Kryminalistyka: zarys wykładu*, Zakamycze, Kraków 2005, p. 130.

is necessary to conduct an experiment, even if such verification (its necessity) would have revealed itself during an eyewitness⁴⁴;

- 2) the nature of the activity - the experiment on the dynamic nature, while the local inspection is similar to visual inspection, does not involve learning about a specific event through its dynamic reconstruction, but plasticizes it in a certain way⁴⁵.

The key differences in the evidentiary activities of the trial experiment and the presentation, also known as recognizance⁴⁶, and which is in fact a special form of interrogation⁴⁷, are:

- 1) the basis for carrying out the activity (in the forensic aspect) - with regard to the experiment, doubts about the possibility of a specific course of a specific event, and with regard to the presentation - about the possibility of recognizing the item shown⁴⁸;
- 2) the subject making the recognition of the possibility of a particular event - with regard to the experiment, it is the procedural authority that observes itself, and with regard to the demonstration - the witness or the accused (suspect) who reports his observations to the authority carrying out this evidentiary activity⁴⁹.

The manner of conducting the trial experiment

Undoubtedly, experimentation is a procedural activity that is difficult to carry out, complex in nature, possible only when the evidence available from other sources of evidence has been collected and thoroughly analyzed by the court or the pre-trial investigation body⁵⁰, and yet there are doubts, in particular, about the possibility of taking a certain action, making observations, the occurrence of a certain phenomenon or the occurrence of a certain event.

Conducting an experiment requires detailed preparation, which includes:

- 1) Clearly formulating the purpose of the experiment, i.e., determining what is to be explained in this way;

⁴⁴ S. Rybarczyk, *Eksperyment...* op. cit, p. 43.

⁴⁵ T. Hanausek, op. cit. p. 130.

⁴⁶ T. Grzegorzcyk, J. Tylman, op. cit. p. 534.

⁴⁷ T. Hanausek, op. cit. p. 248.

⁴⁸ M. Zolna, *Eksperyment...*, op. cit, p. 152.

⁴⁹ M. Kulicki, *Kryminalistyka: wybrane zagadnienia teorii i praktyki śledczo-sądowej*, Wydawnictwo Uniwersytetu Mikołaja Kopernika, Toruń 1994, pp. 337-338.

⁵⁰ M. Kulicki, V. Kwiatkowska-Wójcikiewicz, L. Stępka, *Kryminalistyka – wybrane zagadnienia teorii i praktyki śledczo-sądowej*, Wydawnictwo Uniwersytetu Mikołaja Kopernika, Toruń 2009, p. 471.

- 2) Selecting the right checking methodology;
- 3) Selecting the time and place of the experiment, as well as selecting and preparing the objects to be used in the experiment. It should be remembered that for many incidents, field conditions are crucial. The terrain, its lighting, as well as the location of objects affect the visibility of certain phenomena, audibility, or the ability to perform relevant activities. Original objects should be used in the experiment if the purpose of the experiment is to test the properties of the object, the possibility of performing certain actions with it or leaving certain traces, although for safety reasons during the experiment the use of dangerous objects should be avoided, such as the tool used in the commission of the crime, which is, for example, a knife or a so-called "tulip". In such situations, dummies, corresponding in shape and size to the actual tools of the crime, must be used for this evidentiary action;
- 4) determining the persons participating in the experiment (whether they will be only law enforcement officers or also other persons, such as experts or specialists, whose presence will be mandatory in cases where the proper organization and evaluation of the results of the experiment requires special knowledge, as well as the so-called sham and foster witnesses), which is determined by the stage of criminal proceedings in which the experiment is conducted, the category of the crime under investigation and the type of research being conducted;
- 5) Making the distribution of roles among those who are to participate in the experiment;
- 6) plan how to document and record the course of the experiment⁵¹.

A plan for this evidentiary activity can help in the proper conduct of the trial experiment. Paragraph 64 of Guideline No. 3 of the KGP addresses this issue; it indicates that prior to conducting a trial experiment, a police officer may draw up a plan, which he may agree with the prosecutor conducting or supervising the proceedings, and which should specify, in particular:

- 1) the purpose, time and place of the experiment;
- 2) the number and type of experiments intended;
- 3) a detailed scenario developed in close connection with the hypothetical course of the event established on the basis of the results of the inspection, testimony and explanations;

⁵¹ J. Widacki, in J. Konieczny, T. Widła, J. Widacki, *Kryminalistyka*, C.H. Beck Publishing House, Warsaw 2008, pp. 120-122.

- 4) persons participating in the experiment, indicating the functions to be performed and the method of notification of participation in the experiment;
- 5) technical means, means of transportation and materials necessary for the experiment;
- 6) possible questions for the participants in the experiment;
- 7) division of activities among the police officers participating in the experiment;
- 8) how to secure the conduct of the experiment, especially to ensure the safety of its participants and prevent the suspect from escaping.

Admittedly, the experimental plan is not mentioned in either the Order of the Minister of Justice of April 7, 2016. - Regulations for the Internal Office of the Common Organizational Units of the Public Prosecutor's Office⁵², nor the Order of the Minister of Justice of June 18, 2019. - Rules of Procedure of Common Courts⁵³, however, there is no obstacle to the fact that, following the example of, for example, § 64 of Guideline No. 3 of the KGP, this plan should be drawn up, for example, by the prosecutor, especially when the pre-trial proceedings are conducted in the form of own investigation. In such a case, the plan for this evidentiary action shall be attached to the handy file of the proceedings.

At this point it is also necessary to share the position of Wojciech Kotowski; according to this author, the trial experiment should be preceded by the presentation by the leader (judge, prosecutor or police officer) to its participants of a prepared plan (scenario) of activities, which can be extended by accepted requests of the defense counsel, the accused (suspect) and the attorney, the victim (at the stage of pre-trial proceedings) and the auxiliary prosecutor, if the latter appears in the jurisdictional proceedings⁵⁴. This will ensure the full adversarial nature of this trial activity and exclude the possibility of challenging the way the experiment was conducted and its results at a later stage of the trial.

Extremely important for the proper conduct of the experiment are also the preparatory activities undertaken at the site where the test will be carried out, including, in particular, the proper securing of the place where it will be performed, and the activities aimed at introducing the participants to the essence of this activity.

⁵² Uniform text Journal of Laws of 2023, item 1115, as amended.

⁵³ Uniform text Journal of Laws of 2022, item 2514.

⁵⁴ W. Kotowski, *Eksperyment procesowy w sprawach wypadków drogowych – zarys problemu*, „Palestra” 2008, no. 5-6, p. 266.

The result of the trial experiment

The result of the experiment is to confirm or refute the theses regarding the circumstances of the occurrence and course of the event investigated in a specific criminal proceeding, which were formulated on the basis of the evidence collected in the course of the experiment, to obtain new evidence that can shed a completely new light on the previous procedural findings, as well as to test the investigators' assumed versions and hypotheses and conjectures based on the evidence and experience. The trial experiment and its results may testify not to an actual fact, but only to the theoretical possibility of an event, the determination of which is the task of the court or pre-trial investigation body⁵⁵.

The result of the experiment can be positive or negative. There is a positive result when the possibility of an event occurring in a certain way is confirmed. A negative result, on the other hand, rules out the possibility of an event occurring or proceeding in a certain way.

From an evidentiary point of view, the so-called negative result of the experiment is more valuable. The finding, following an experiment, of the possibility of the occurrence of an event does not yet categorically prove that *tempore criminis* the event must have occurred or that it had a course consistent with the result of the experiment. This is because it is only the probability of the possibility of the event under study or its course⁵⁶.

It should be remembered that the reliability of the result of the experiment will be greater the more times it has been repeated. For only a consistently reproducible result of an experiment, using the variable elements of the experiment carried out, acquires the attributes of full reliability.

The results of the experiment become part of the evidence that is collected in a specific criminal proceeding. They must be evaluated in tangent with other evidence, in accordance with the requirements of Article 7 of the Code of Criminal Procedure. When evaluating an experiment, it should be remembered that there is no so-called absolute experiment, and therefore no reproduction that is fully consistent with what occurred in the past. Hence, the results of the experiment should be interpreted as probable, not certain.

The trial experiment is considered a unique activity⁵⁷, although in case of failure, that is, if its course or result is considered incorrect by the trial authority, whose assessment of the experiment is subject to the principle of

⁵⁵ Judgment of the SA in Cracow of April 12, 2006, II AKa 12/06, OSA 2008, no. 5, item 23.

⁵⁶ B. Holyst, *Kryminalistyka*, Wolters Kluwer, Warsaw 2018, p. 1146.

⁵⁷ A. Taracha, *Eksperyment w procesie karnym jako niepowtarzalna czynność dowodowa*, „Studia Kryminologiczne, Kryminalistyczne i Penitencjarne” 1977, no. 7, pp. 217-228.

free evaluation of evidence (Article 7 of the Code of Criminal Procedure), it is permissible to repeat it. The prerequisite for considering an experiment as a unique activity is that it takes the form of an experiment on the site of the event under investigation in a specific proceeding, if it takes the form of a reconstruction under conditions that are almost perfectly similar to those under which it occurred. The position presented by Marta Tużnik that „certain types of experiments can be classified as unique, but only at trial”⁵⁸ should be considered unconvincing, in my opinion. In practice, most experiments are carried out at the pre-trial stage and are not repeated in court.

Authorities conducting the trial experiment

Article 211 of the Code of Criminal Procedure. does not indicate which criminal procedural body is to carry out this evidentiary action. At the pre-trial stage, the trial experiment can be performed by a police officer, while in cases of significant evidentiary difficulty or serious crimes, it should be carried out by the body responsible for the final outcome of this phase of the criminal proceedings, i.e. the prosecutor.

At the jurisdictional stage, on the other hand, the experiment should be conducted by the full court. Nothing prevents this to be done also by a judge appointed or summoned by the court, as authorized by the content of the disposition of Article 396 § 1 of the Code of Criminal Procedure. A *sine qua non* condition for the implementation of activities in this mode is the demonstration that the inspection by the full court would encounter significant difficulties, as well as the consent of the parties.

Participants in the trial experiment

In the case of an evidentiary activity such as an experiment, it is impossible to lose sight of Article 315 of the Code of Criminal Procedure; according to the wording of its § 1, the suspect and his defense counsel and the victim and his attorney may file motions for an investigative (inquiry) activity, and the party who filed the motion and his defense counsel and attorney may not be denied participation in the activity if they request it (Article 315 § 2 of the Code of Criminal Procedure), as well as Article 316 § 1 of the Code of Criminal Procedure. - according to its content, the suspect, the victim and their legal representatives, as well as the defense counsel or attorney should be allowed to participate in the activity of investigation or prosecution, which cannot be repeated at the trial, if they were appointed in the case.

⁵⁸ M.R. Tużnik, op. cit. p. 45.

Given the wording of the latter provision, it should be concluded that these people are entitled to take part in the experiment. The authority conducting this evidentiary activity is obliged to admit these persons to participate in the experiment *ex officio*, without the need for them to submit a request to this effect; it does not issue any procedural decision on the admission of these participants to the activity. In exceptional cases, the experiment may take place without the participation of these persons if there is a danger of losing or distorting evidence in the event of a delay in its conduct (Article 316, paragraph 1 of the Code of Criminal Procedure). The danger referred to in this provision must be real and objective, justified by the circumstances, and in particular by the characteristics of this evidence. The persons in question here are not only entitled to participate in the indicated procedural activity. They can also exercise the rights of a party to the proceedings, and therefore make statements and motions, as well as ask questions, such as to a witness who participates in the experiment. A decision refusing to allow these persons to participate in this evidentiary activity may be made by the prosecutor or the court, depending on the stage of the trial in which the activity is carried out. The form of the order is required here, which must contain a statement of reasons (Article 317 § 2 of the Code of Criminal Procedure and Article 98 § 1 of the Code of Criminal Procedure).

The provisions of the Code of Criminal Procedure do not require that an expert participate in the experiment, but the need for his participation in this activity may arise from the need to assess circumstances requiring special knowledge, as referred to in Article 193 § 1 of the Code of Criminal Procedure.⁵⁹ In such cases, the trial authority may summon an expert (Article 198 § 1b of the Code of Criminal Procedure) or a specialist (Article 205 § 1 of the Code of Criminal Procedure) to participate in the experiment⁶⁰. The expert's participation in the trial experiment will be limited in such a case to the function of a trial consultant, who may provide an advisory vote on how to conduct the experiment, as well as respond to its results by submitting an oral opinion to the protocol of this evidentiary action (Article 143 § 1.5 of the Code of Criminal Procedure)⁶¹. A specialist may also participate in the trial experiment (Article 205 § 1 of the Code of Criminal Procedure).

⁵⁹ Judgment of the Supreme Court of May 7, 1997, IV KKN 23/97, OSNKW 1997, No. 9-10, item 79.

⁶⁰ Judgment of the Supreme Court of October 3, 2006, IV KK 209/06, OSNKW 2006, no. 12, item 114.

⁶¹ R. Kmieciak, *Przegląd orzecznictwa Sądu Najwyższego Izby Karnej w zakresie zagadnień kryminalistyczno-dowodowych w postępowaniu karnym (w latach 1997–2001)*, „Prokuratura i Prawo” 2002, No. 7-8, pp. 31-36.

Summary

The experiment as a forensic process activity is most often performed at the pre-trial stage. It provides a means of learning the objective truth about the course of the event being investigated in a particular criminal proceeding and serves the cognitive (informational) function of the criminal process. In addition, the experiment performs a verification function in relation to the evidence collected before it, both material and personal (e.g., contradictory witness testimony), as it provides a basis for basing the factual findings in the case on certain and indisputable evidence.

The objectives of pre-trial proceedings are defined by the legislator in Article 297 § 1 of the Code of Criminal Procedure, according to which they are to determine whether a criminal act has been committed and whether it constitutes a crime, to detect and, if necessary, apprehend the perpetrator, to collect data in accordance with Articles 213 and 214 of the Code of Criminal Procedure, to clarify the circumstances of the case, including the determination of victims and the extent of damage, to collect, secure and, to the extent necessary, record evidence for the court. The indicated goals can be divided into three groups: 1) „clarify the nature of the circumstances of the incident, 2) determine the perpetrator of the incident, 3) collect factual evidence in the form of forensic traces revealed and secured”⁶². Proper conduct of the experiment allows you to get significantly closer to learning the truth about the course of the event covered by a particular criminal proceeding, and, in particular, allows you to verify the investigative version or investigators’ version adopted by law enforcement, as well as to assess the reliability of procedural accounts of the course of the event or parts of it given by witnesses or the accused (suspect).

Without a doubt, an experiment is a very complex activity. Conducting it properly requires a number of steps, as well as a detailed analysis of the collected evidence. This activity aims to detect and punish the perpetrator, who is guilty of the alleged act, by comprehensively explaining the circumstances of the case and acting on the basis of the applicable laws. The evidentiary value of the experiment depends on respecting the rules for its conduct and respecting the rights of the participants in the criminal proceedings who take part in it.

⁶² M. Goc, M. Pękała, *Inspection*, in J. Widacki (ed.), *Kryminalistyka*, C.H.Beck Publishing House, Warsaw 2002, p. 204.

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