Available online at www.sciencedirect.com
ScienceDirect
Forensic Science International 162 (2006) 191–195
Forensic Science International
www.elsevier.com/locate/forsciint

Scent identification evidence in jurisdiction (drawing on the example of judicial practice in Poland)

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Available online 1 August 2006

Abstract

One of the most significant challenges for contemporary forensic science seems to be research of new sources of physical evidence. Particularly after successfull implementation of revolutionary DNA identification law enforcement agencies look for other new and perhaps more efficient techniques.

Keywords: Dog; Scent; Human identification; Jurisprudence

A research on osmology (as it is called in Poland) or scent identification evidence has been conducting for some years. Its goal is determination, whether dogs can compare and recognize 'scent traces': the one left by perpetrator on a crime scene, the another taken from the defendant. The results are not unanimous, however. On one hand they confirm that a dog has more sensitive nose than a human being, on the other hand they do not render any scientific data useful to establish how precise, reliable or valid might be the kind of identification of the suspect, if it is at all.

We do not want to argue with adherents nor opponents of the method. Our paper is based on a comparative analyse of jurisprudence from USA, Holland, Germany and Poland. The sentences establish some rules as to the method, concerning a.o. conducting of identification, its validity or criteria of establishing. Basing on the national jurisprudence we would like to submit following matters for consideration:

1. Is the dog scent comparison a common kind of suspect identification?
2. Can courts believe in that kind of identification and why?
3. Does the dog scent identification meet the scientific evidence criteria?
4. What is the future of the method?

Particular skills of police dogs are commonly known, and these are police patrol or tracking dogs, who become frequent heroes of media coverage from scenes of crime – both volume crime (such as burglaries) or the latest terrorist attacks. For several years these outstanding skills have been attempted to be utilised also in scent identification – the phenomenon which, on the other hand, aroses a series of questions not only in relation to actual dog capabilities, but also in terms of diagnostic value of such examinations and possibilities of evidential use of their findings.

Court jurisdiction, which particularly visible in Polish practice, perceives the problem in two aspects. The first one, being historically older, is admissibility of the use of tracking dogs (unquestionable in Polish legislation), and its younger offshoot—the acceptance of scent identification by a dog as incriminating or exonerating evidence.

In the US the fact of a dog leading to a suspect basing upon scent traces (*tracking* or *bloodhound evidence*) has been rather widely acknowledged since as early as the beginning of the 20th century [1], although in some States relevant decisions were not taken until the second half of 1980s [2], whereas in others—such an option remained by no means unaccepted [3]. Therefore, it becomes obvious that in these systems the admissibility of scent trace identification simply cannot take place. Jurisdiction of remaining States basically admits such a possibility, however conditioning the probative value of evidence on a due demonstration of a dog's aptitude and not attributing scientific character to these examinations [4].

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0379-0738/$ – see front matter
doi:10.1016/j.forsciint.2006.06.017

In the Netherlands, scent identification by dogs has been recognised since the beginning of the 20th century [5], however it was initially constrained to the use of tracking dogs. The study of several court decisions of the last years implies a remarkable revaluation and presently, bloodhound evidence is as a rule, undisputably accepted by the Dutch Supreme Court [6], although practice of conducting these examinations in Holland significantly differ from the Polish one.

In turn, a relatively high caution in relation to scent comparative examinations is expressed by German courts, which admit such examinations – for the time being at the land level. While the results of such examinations can be treated very carefully – maximally as a circumstantial evidence, the issues of scent traces are being slowly introduced to German publications in the area of forensic science [7].

In Polish doctrine, scent identification has lived to appear in a prolific literature which studies this problem both from forensic and lawsuit perspectives [8]. The hereby paper presents the summary of several year experiences of Polish courts whilst taking into account major doubts, which have arisen on this occasion.

One of the first problems faced by Polish courts in the past was to determine in what procedural form the scent identification should be carried out, as there was quite a freedom in this respect at the onset of practical application of scent identification in Poland [9], which translated into the determination of evidential usability of such method. As a consequence, the results of scent identification were initially recognised only as a circumstantial and not quite powerful, evidence [10].

In turn, Polish scent identification, also referred to as osmology, was progressing quite vividly, which forced the courts to assume a certain position towards the wide-spreading method. This process took place in three major directions:

1. to identify a uniform procedural form of research activities, which would be;
2. accepted by both theoreticians and practitioners;
3. to determine conditions to be met in order to ensure a method's reliability;
4. to answer the question on probative value of scent traces.

Doubts in relation to procedural form of such examinations had not been solved until the ruling of the Supreme Court in Poland of November 11, 1999, whereby it was clearly concluded that ''Scent trace examination should be carried out in form of expert casework'' and ''be completed with an expert report . . .''[11] In other rulings, the Supreme Court quite rigidly determined also the responsibilities of expert witness to perform examinations [12].

Courts faced (and actually are still facing) many more difficulties in determining the conditions to be met to ensure reliability of examination (expert casework). The lack of reference to other identification techniques made the courts determine reliability criteria on their own, which later were often critically assessed in scientific terms. A thorough discussion of all implications pointed out by courts is impossible, however courts put a pressure on correctness of detection and recovery of evidential material and collection and selection of comparative (reference) material (for elimination purposes) on one hand, and on the other—they focus on methodology of carrying out the examinations (among others: number of attested dogs utilised, type of main and control trials used). As the outcome of several year experiences, Polish judicial practice elaborated the following criteria of carrying out scent examinations:

(a) prerequisite of duplication of examinations (i.e. two-fold performance) [13];
(b) obligation of having a dog attested [14];
(c) elimination of suggestion by, among others: selection of a suitable group of comparative traces, absence of dog handler.

An interesting trend can be also noted in jurisdiction on probative value of scent identification. Initially, positive results of scent examinations were attributed a circumstantial value only [15], however since the recognition of these examinations as expert evidence, their probative value has substantially, although sometimes disproportionately grown, which was demonstrated for instance in conviction that scent examination evidence can be the only incriminating evidence sufficient for proving a defendant guilty [16].

On the other hand, after several spectacular cases, whereby the manner of carrying out a specific identification had been questioned in addition to a high diagnostic value of scent examination, the conviction as to a great influence of results of such examinations on judicial decisions has declined. Polish courts lay a particular stress on the treatment of scent examination findings as a circumstantial evidence; among others, they point that a positive identification can only attest a contact between an individual and a specific object, however does not provide for a direct proof of defendant's guilt; they further underline that scent casework should be evaluated – similarly to other evidence – in relation to complete evidential material in a case'' [17]. The court directly claimed in one of its sentences that ''So far, a scent evidence has not provided such a certainty which can be derived, for instance, from fingerprint or DNA examinations, and hence the need of preserving a high dose of precaution in judicial decisions while basing sentences exclusively on scent evidence. Whilst avoiding dispraisal, this type of evidence should *in concreto* be subject to a penetrating and comprehensive analysis with due respect to other evidential material'' [18]. Recently, some judicial decisions have been encountered, which attest the increased reservation of courts in relation to scent identification [19].

The evaluation of this trend cannot be unambiguous. Forensic science doctrine does not appear to strive at elimination of scent identification from an array of research methods, but only postulates drawing of proper inferences performed identifications.

A basic argument which makes the assessment of reliability and actual probative value of scent examinations more difficult is the fact that matching reference and casework scent samples