

In Re: VITO RUSSO

PROPOSED FINDINGS OF FACTS AND CONCLUSIONS OF LAW

NOW COMES, petitioner, by and through counsel, Chris Montgomery, Esq., and hereby files his Proposed Findings of Facts and Conclusions of Law and for cause would show as follows:

STATEMENT OF FACTS

1. Petitioner, Mr. Vito Russo (hereinafter referred to as "Petitioner") was charged with first-degree aggravated assault for discharging a firearm at complaining witness, John McKay with the intent of causing him serious bodily injury. The information was supported by the affidavit of Officer Mark Carignan, Brattleboro Police Department, who states that on our about 5:10 p.m. on November 17, 2002, John McKay entered the parking lot of the Brattleboro Police Station to report that Petitioner had confronted him at his place of business, while he was plowing his parking lot, displayed a handgun, and, when Mr. McKay left, pursued him firing several times at his vehicle. In the course of his investigation, Officer Carignan brought Mr. McKay into the police station, conducted a thorough interview, had Mr. McKay fill out certain paperwork, contacted other officers to be on the lookout for Petitioner in a blue car, spoke with officers who were interviewing possible witnesses and verified the safety of Mr. McKay's wife and home. In the interview, Mr. McKay told the officer Carignan that he could see a large muzzle flash, which indicated to him the gun was being fired directly at him. (Petitioner's Exhibit 3: Interview of John McKay). Approximately thirty to forty minutes later, according to the police Law Incident Table, Petitioner drove into the Brattleboro Police Station then drove

Note: My charges changed from simple assault, to attempted assault, to attempted aggravated assault; to Aggravated assault and now to first degree aggravated assault! All after my conviction!!!

The order of no trespass - which had enacted the conditions of release was dismissed with prejudice adding to an illegal sentence also !!

out. Petitioner was subsequently stopped, and arrested for DUI, violation of a no trespass order, violation of conditions of release and aggravated assault. On Monday, November 18, 2002 a warrant was applied for, and received, to search Petitioner's vehicle. Items seized included a .22 caliber rifle and four spent shell casings. A property inventory of the items seized from Petitioner's vehicle was prepared by Detective Michael Gorman and dated November 17, 2002.

2. Police interviewed and received written statements from three witnesses. Caroline Houle and Donald Houle, Sr., who, according to the testimony of private investigator David Yendell, lived approximately one half mile west of Mr. McKay's place of business. According to the trial transcript, Ms. Houle reported hearing "two loud bangs" at around five p.m. She reported she thought the shots came from hunters. Police interviewed a third witness Dean Berthiaume. Mr. Berthiaume reported that he was inside his house working on his furnace when he heard a gun shot at 5:30 p.m. followed by a second shot.

3. Petitioner was held without bail and a weight of evidence hearing was ordered by Windham District Court. At hearing on November 21, 2002 before Judge Paul Hudson, John McKay reiterated his belief that he saw a muzzle flash from Petitioner's gun and that he could tell by the flash the direction in which the bullet was being fired and that it was being fired at him. Mr. McKay described the muzzle flash as a "great ball of fire." (Petitioner's Exhibit 4: Weight of Evidence Hearing, pps. 7,8.). Petitioner was held without bail under 13 V.S.A. 7553(a). Petitioner subsequently waived his right to trial in sixty days to provide his counsel sufficient time to adequately investigate and prepare for trial. Trial in this case was held on April 3, 2003.

4. In the four and a half months between Petitioner's arrest and trial, counsel for petitioner conducted no depositions of the state's witnesses, filed no motions, did not inspect or test the

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weapon seized from Petitioner's vehicle, provided no expert witnesses to either challenge Mr. McKay's claim of a muzzle flash and the direction of fire, or to support the Petitioner's defense of lack of capacity to form an intent to assault Mr. McKay.

5. At trial on April 3 and 4, 2002, Petitioner was convicted of the first-degree aggravated assault charge.

6. At trial on Petitioner's Post Conviction Relief Petition, David Yendell, a licensed private investigator, testified to testing weapons of the same caliber and similar to the rifle used at Petitioner's trial. (The original rifle was previously seized by the Federal State's Attorneys office for prosecution of federal firearms charges. The State's Attorney has refused to release the weapon (See Order of this Court dated March 14, 2007).

Mr. Yendell and Mr. David Hough, a licensed instructor of firearms, testified that testing of the weapons produced no discernable muzzle flash. Mr. Hough further testified that based upon his experience, a rifle of such a small caliber as .22 could not produce a muzzle flash significant enough to indicate any direction of aim or bullet travel. Mr. Yendell testified to attempting to recreate the alleged event of Petitioner driving the subject road at the speed described by Mr. McKay while firing a bolt-action rifle; the type allegedly used in the commission of the assault. Mr. Yendell testified that it would have been extremely difficult if not impossible to operate the vehicle at such speeds while shooting a bolt-action rifle.

7. Mr. Richard Rubin, Esq., an expert witness called by Petitioner, testified that failure to conduct depositions in this matter constituted negligence, which fell below the standard of care as set out in Strickland v. Washington, 466 U.S. 668, 694 (1983). Mr. Rubin testified that, but for such negligence, the jury would have reached a different outcome than a finding of guilt. Mr. Rubin testified that it was negligence and fell below the Strickland standard, not to inspect and test the weapon, not to call an expert to rebut the claim that the weapon could

The firearm is missing!

indicate its direction of fire by a muzzle flash, and not to call an expert witness to support the claim that Petitioner was too intoxicated to form an intent to assault Mr. McKay by shooting at him. *Mr. Rubin testified that any one of these acts alone would reasonably have led to a different verdict.

8. The State called Eileen Hongisto, Petitioner's counsel at trial, who testified that Petitioner objected to raising intoxication as a defense, but that she did so as a challenge to the State's burden of intent. To support this argument, Ms. Hongisto called Amy Stevens, Petitioner's fiancée who stated that Petitioner did own the subject weapon, used it often for target practice, was drinking the day of the incident, was acting strangely that day, and was very angry with Mr. McKay for evicting him and his family in an earlier foreclosure proceeding.

9. The State also called Stephen Fine, Esq. as an expert witness. Mr. Fine testified that failure to take depositions was not negligent and that Ms. Hongisto's defense was to challenge each of the State's elements of the case, and that intoxication was part of that challenge. Mr. Fine admitted that he relied solely on the trial transcript, the reports of the private investigator, David Yendell, and the deposition and report of Richard Rubin, Esq. *Mr. Fine did not examine any of the original affidavits of the police, Mr. McKay or state's other witnesses filed prior to trial, nor the interview of Mr. McKay or the transcript of the Weight of Evidence Hearing. Mr. Fine also testified that in his years as a criminal defense attorney he conducts depositions in a majority of his cases. *(This state expert read none of the facts)*

CONCLUSIONS OF LAW

1. Ineffective Assistance of Counsel Prior to and During Trial

The constitutional basis of the first ground, failure to subject the prosecution's case to a meaningful adversarial testing is rooted in the Sixth Amendment's guarantee that, "In a criminal prosecution, the accused shall enjoy the right . . . to have effective assistance of counsel for his

defense." U.S. Const. Amend. VI. Chapter I., Article 10 of the Vermont Constitution provides in pertinent part, "That in all prosecutions for criminal offenses, a person hath a right to be heard by oneself and by counsel". This provision of the Vermont Constitution has been held to essentially parallel the Sixth Amendment's guarantee of effective assistance of counsel. In Re Trombley, 160 Vt. 215 (1993).

The familiar, well-settled rule of law for ineffective assistance of counsel claim states that a petitioner must first show that his counsel's performance was deficient in that he made errors so serious as to preclude defense counsel from having fulfilled its function as the "counsel" guaranteed under the Sixth Amendment to the United States Constitution. In order to demonstrate ineffective assistance of counsel in Vermont, petitioner must show that counsel's performance fell below an objective standard of reasonableness informed by prevailing professional norms. State v. Bristol 159 Vt. 327, 337 (1992). Once a petitioner demonstrates that his counsel was ineffective, he must then show that the deficient performance prejudiced the defense; that is, "but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, 466 U.S. 668, 694 (1983).⁴ However, where a counsel's performance was so lacking as to have "entirely failed to subject the prosecution's case to a meaningful adversarial testing", then the denial of the defendant's Sixth Amendment right to counsel, "makes the adversarial process presumptively unreliable". United States v. Cronin, 466 U.S. 648, 659 (1984).

2. Defense counsel was negligent for failing to conduct depositions of the prosecution's witnesses.

Had Ms. Hongisto deposed Mr. McKay she could have discovered more about Mr. McKay's state of mind at the time of the incident, which could have rebutted his ability to clearly and objectively judge Mr. Russo's actions and intent. A deposition would also have afforded Ms.

Hongisto a chance to determine what expertise or training Mr. McKay had or did not have, which would qualify him to judge a bullet's direction based on muzzle flash. Finally, though Ms. Hongisto argued at trial as to the impact of Mr. McKay foreclosing on Petitioner's business had on Petitioner, a deposition of Mr. McKay could have brought out potential bias by Mr. McKay against Petitioner as a result of the foreclosure proceedings.

By failing to depose Officer Carignan, Ms. Hongisto did not investigate or determine the substantial discrepancy in time between Mr. McKay arriving at the Brattleboro Police Department and Petitioner's appearance thirty to forty minutes later. Instead, Ms. Hongisto stated in her opening statement to the jury that Petitioner had "followed" Mr. McKay into the police parking lot, furthering the impression that Petitioner was chasing Mr. McKay. (Trial transcript, p. 19, line 22-25, p. 20, line 1).

Had Ms. Hongisto deposed Officer Carignan prior to trial she would have discovered his opinion regarding whether the rifle could produce a muzzle flash, which would indicate the direction of the bullet's travel. Instead, she could not have known his answer when he replied "I wouldn't say you can't tell what direction it's being fired. I mean, you certainly couldn't chose a point of aim by a flash coming out of a barrel, *but I think you, you could probably tell what direction the gun was pointed.*" (Jury Trial transcript, April 3, 2003, page 58, 59; italics added). Instead, Ms. Hongisto waited until trial to ask what is basically a discovery question, and, receiving an answer that only corroborated Mr. McKay's claim, was unprepared with any rebuttal.

* Counsel for Petitioner did not depose Detective Gorman to discover the reason for the discrepancy between the date the rifle and shell casings were seized from Petitioner's auto, and inventoried in a written report dated November 17, 2002, and the date a search warrant was applied for to seize such evidence, a full day later. Had she done so, such deposition might have revealed that Officer Gorman did in fact seize the evidence before a proper search warrant had

been executed, which would have led to a motion to suppress and the loss of much of the State's case.

Not having conducted any depositions, Ms. Hongisto continued this discovery by trial method with the state's two witnesses Caroline Houle and Dean Berthieaume. With Caroline Houle, she pointed out that she and her husband Donald were involved in a business relationship with John McKay. However, failing to earlier depose them, she could not discover the extent of that relationship or whether such relationship would influence their testimony to the point of committing perjury. Ms. Hongisto was left with pointing out that Ms. Houle was puffing her testimony with statements that she heard other shots fading away. A deposition could have not just negated such testimony through inconsistency, but strengthened any claim of bias due to business contacts.

Ms. Hongisto's cross of Dean Berthiaume was no less failing due to lack of any pre-trial deposition. In his affidavit he said he heard gunshots. At trial he said it sounded like a car backfiring. He also testified what he heard was at least half an hour after what the Houles stated they heard and after Mr. McKay had pulled into the police parking lot. Instead, and without the benefit of discovery, Ms. Hongisto allowed the State to allude that it was Mr. Berthiaume's training as a former Marine that what he heard were gunshots, not a car backfiring, despite the fact his own affidavit stated he assumed they were gunshots based on a later report that Mr. McKay was claiming Petitioner had shot at him. None of this was brought out by Ms. Hongisto, because she had failed to conduct any proper discovery.

What is most telling is that not once during her cross of either Caroline Houle or Dean Bartheaume did she point out in their affidavits that they heard shots half an hour apart. This was no small error of people not keeping track of time. An almanac view of the day, and Mr and Mrs. Houle's assumption the shots were from hunters, would show that 5:00 p.m. on November 17,

2002 was the last vestige of sunlight and the end hour of hunting season. Five thirty p.m. was pitch black, and when Mr. McKay was likely in the Brattleboro Police Station being interviewed by Officer Carignan. Dean Bartheiaume described the moment as dark as night, pouring down rain and sounding like a car backfire (Trial transcript pp. 71, 73). Caroline Houle described the gunfire occurring a time when she would assume hunters were still out shooting deer and her husband was shoveling snow off their driveway. These are the type of details normally adduced through deposition and then prepared for at trial.

3. Defense counsel failed to conduct any examination or testing of the rifle and spent shells which were key to Petitioner's conviction on the charge of first degree aggravated assault.

In response to Petitioner's motion for directed verdict at trial, and after closing of the State's case, Dan Davis, Esq., stated the following: "[Mr. McKay] is followed by Mr. Russo. Mr. Russo is shooting a gun at him and Mr. McKay indicated that the muzzle flashes were in his direction. [T] hat is what Mr. McKay said at the time, muzzle flashes were in his direction. And that is, we think, sufficient evidence that a reasonable jury could conclude that Mr. Russo intended to injure Mr. McKay by discharging a weapon at him." (Trial transcript April 4, 2002, page 55, line 5-14). The State's claim cannot be overemphasized. From Mr. McKay's initial statement to the police, his interview, his affidavit, to his testimony at trial, it has been this muzzle flash claim that puts Mr. Russo at pointing a gun and shooting it at Mr. McKay. All other evidence and testimony is evidence Mr. Russo possessed a weapon, Mr. Russo confronted Mr. McKay, and Mr. Russo fired the weapon. The only evidence that Mr. Russo fired the weapon at Mr. McKay was Mr. McKay's testimony of seeing the muzzle flash.

* Ms. Hongisto should have inspected the rifle to determine if it could fire, if the shell casings found in the vehicle matched the rifle, and most importantly, if the rifle produced a muzzle flash

which would indicate direction of travel. As demonstrated by David Yendell and David Hough, such an examination and test firing would have provided the jury clear proof Mr. McKay could not have seen a muzzle flash nor determined the bullet's trajectory. Failure to challenge the critical piece of the State's case fell well below the Strickland standard. Further, Mr. Yendell's reenactment of the alleged actions of Mr. Russo, driving down Western Avenue at a high rate of speed while firing a bolt action rifle, would have shown the jury the extreme difficulty, if not impossibility, of the State's claim. The importance of such a demonstration is supported by a question submitted by the jury; "How does one fire a bolt action rifle while driving?" (Trial transcript, April 3, 2002, pg. 76, lines 24-25, pg. 77, lines 3-4. *The court denied the question based on the witness, Dean Berthiaume's lack of qualification*).

4 Defense counsel failed to present expert testimony either to challenge elements of the State's case and/or to support Defense claims of diminished capacity.

Mr. Richard Rubin testified that Ms. Hongisto's failure to present expert testimony to support her claim that Mr. Russo lacked the mental capacity to intend to shoot Mr. McKay was fatal to her defense. Ms. Hongisto did not rebut the fact that, despite intoxication, Mr. Russo intended to confront Mr. McKay, intended to follow Mr. McKay, or even intended to shoot the rifle. Without an expert to explain the distinction between his capacity to intend those actions and the capacity to actually want to shoot Mr. McKay, the jury had no evidence to support Mr. Hongisto's defense.

The failure to call an expert witness to testify as to the weapon's ability to create muzzle flashes and whether such muzzle flashes would indicate direction of travel was no less fatal. As stated above, the critical element, intending to cause bodily injury, rested on Mr. McKay's claim of the presence and direction of a single muzzle flash. Had Ms. Hongisto offered any testimony in the way of rebuttal, the jury likely would have found the State failed to prove this element.

CONCLUSION

Putting a State's case to the test of reasonable doubt, especially in a matter involving such a serious charge as first degree aggravated assault, requires adequately and reasonably questioning the State's witnesses, inspecting and testing the state's physical evidence, filing motions, if evidence so demonstrates, to suppress introduction of any particular testimony or piece of evidence, and calling any witnesses, expert or lay, who may rebut any element of the State's case. In the months Ms. Hongisto was given to defend Mr. Russo she did none of these things. She conducted no depositions, filed no motions, did not inspect or test the weapon or shell casings, and failed to call any expert witnesses who would rebut the state's case or support her defenses. By pursuing a defense which puts the State's case "to the test" without investigating and testing the State's case, Ms. Hongisto had, in effect, no defense. But for Ms. Hongisto's failure on any or all of the above-listed claims of ineffective assistance of counsel, it is more than likely by a preponderance of evidence the jury would have reached a different verdict. For these reasons and those set forth above, Petitioner requests this Court grant Mr. Russo's Petition for Post Conviction Relief.

Dated: October 29, 2007

ABATIELL ASSOCIATES, P.C.

By:


Chris Montgomery, Esq.
for Vito Russo

*I could not afford counsel at trial, nor for this PCR; otherwise I would be released. --
* This atty who represented this was a state contractor (Public Defender) appointed to me.
We left out several facts which would of made a difference from Police & Prosecutorial misconduct; to several witness' relevant to the case; to the sentencing and outrageous 15-21 year sentence...
* However it was discovered and on record my entire file the state had is missing and so is the evidence... ~~Vito Russo~~*