

Note: These were filed
and come out a little
messed up...

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April 4, 2007

Chris Montgomery, Esq.
One Justice Square
Rutland, VT 05701

Re: Vito Russo

Dear Mr. Montgomery:

You have asked me to review the matter of *State of Vermont v. Vito Russo* and offer my opinion with respect to the representation provided by Eileen P. Hongisto, Esq. on behalf of Mr. Russo. Specifically, you have requested my opinion as to whether Attorney Hongisto's representation was negligent and fell below the standard of care one would expect a reasonable and careful defense attorney to have provided Mr. Russo in this matter. You have also asked my opinion as to whether Ms. Hongisto's failures, if any, would have made a difference in the outcome. I believe that Attorney Hongisto's representation of Mr. Russo was inadequate, ill-conceived, and negligent. I believe that her defense fell below the standard of care and that the outcome probably would have been different if she had handled the case properly. My thoughts and comments in this case relate only to the charge of aggravated assault.

I. Overview

The relevant charge was the attempt to cause bodily injury with a deadly weapon. This is a specific-intent crime. Essentially, the State had to prove that Russo followed McKay for several miles, during which time he was shooting at the back of McKay's truck with the intention of hitting McKay as he was driving. The jury really had to believe that Russo was trying to kill McKay because there would be no other explanation if Russo really was shooting at McKay and trying to hit him. The State's evidence was thin.

McKay testified that Russo came on his property, pointed a 9mm pistol at him through the window of his vehicle, and told him he wanted to talk to him. There was no evidence of threats at that time. McKay left and the State argued that Russo, now really angry, chased him down the highway, trying to shoot him. Hongisto's representation at trial was inadequate and

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often counterproductive. She had no unified theory of the defense and failed to provide an adequate investigation which, in my opinion, would have made all the difference.

1. Diminished Capacity

Hongisto raised the defense of diminished capacity. Apparently, she believed that if she could establish that Russo was very drunk, she would receive an instruction of diminished capacity and could argue that he was so drunk as not to be able to form the specific intent to commit bodily injury. This was wrong-headed. First, the defense was counterintuitive and inconsistent with the events of the evening. Surely, Russo was very drunk. His BAC reflected that. Nonetheless, there was no dispute that he was able to form the intent to drive to McKay's property with the intent to demand that McKay speak to him, the intent to follow McKay into Brattleboro, and of course the intent to operate his motor vehicle. How then could he not form the intent to shoot at McKay if he was angry when McKay would not talk to him?

Apparently, she failed to file a notice of diminished capacity. Also, she failed to have any experts testify with respect either to Russo's state of intoxication or to the effect of the alcohol on his ability to form intent. It is my experience that in the absence of a highly qualified psychologist to explain to the jury how and why intoxication precludes the formation of intent, it is impossible to be successful in this defense. Also, in light of the lack of spontaneity of the events of the evening, it is doubtful that anybody could have convinced the jury that the diminished capacity would negate specific intent. Her cross-examination of the State's chemist was useless. She was unable even to establish that someone with a BAC in excess of .20 was seriously impaired.

Then, she called her only witness for the defense, Amy Stevens, whose testimony was very circumscribed by the court on account of the lack of a notice of defense, but who nonetheless testified, on cross examination by Mr. Davis, that Russo was very drunk and harbored significant ill will toward McKay. The State's case had really failed to establish any motive for the alleged attack. Ms. Hongisto's only witness filled that gap nicely. The more logical conclusion to be drawn from Ms. Hongisto's defense was that Mr. Russo was desperate, frustrated, broke, angry, and blamed McKay for his situation. He went to confront McKay, seeking some assistance, and when McKay blew him off, he became enraged, in part because of the alcohol, and tried to kill him. How much better would it have been to plead guilty to the DWI and downplay the level of intoxication? Or perhaps leave the DWI in the case so the jury could convict Russo of DWI and unlawful trespass and DLS and give him a break on the assault.

II. The Aggravated Assault Factual Defense

As stated above, Attorney Hongisto needed to keep angry intoxication and motive out of the

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case. She had several factual defenses to the charge, some of which she raised. For instance, she pointed out that McKay drove right by the State Police Barracks and failed to stop and that McKay misidentified the weapon as a 9mm pistol. But the guts of the case was McKay's testimony. The State had to prove that Russo was shooting at him. It was dark, or close to it. They traveled over five miles. Russo was on the phone, but Hongisto never checked his phone records.

How was the State going to prove that Russo was shooting at McKay? The only real evidence was the muzzle flash, which McKay said he saw from the barrel of the weapon fired by Russo. McKay also said that he definitely saw one muzzle flash pointing toward him. This testimony was critical testimony. Hongisto did nothing to determine whether it was in fact possible to see a muzzle flash from this weapon. When she cross examined Officer Carrigan, Carrigan said that it would be possible to tell the direction the gun was pointing at from the flash even if not the exact point of aim. His testimony essentially corroborated McKay's. She had no answer. She had no defense.

It was absolutely essential that Attorney Hongisto hire an expert to determine what one could expect to hear or see from the gun which was supposedly fired on the night of the assault. Without expert testimony to rebut the testimony of McKay and then Carrigan, Hongisto was essentially providing very little defense. I have been provided with the affidavit/report of David Yendell. This is exactly the kind of expert report that Hongisto should have acquired pre-trial. Her failure to do so was very prejudicial and below the standard of care.

It is also negligent of her not to determine whether in fact the shell casings came from the weapon alleged to be the gun fired by Russo, or that the gun actually worked.

McKay clearly had a motive to overstate what had happened, both because of his prior history with Russo and because Russo had pointed a gun in his direction, but in the absence of the so-called flash testimony, it is difficult to believe that this case should have gone to the jury. It is my opinion that with Mr. Yendell's expert testimony, it is highly probable that the jury would have concluded there was not enough evidence to establish that Russo was actually firing at McKay's truck, if he was firing at all.

I have some other thoughts. There was no determination if the gun in question had been recently fired. There was no anticipation of the supposed threat in 2002, which the prosecution elicited and was ultimately struck. This should have been dealt with by a motion in limine. Also, Hongisto should have asked for a mistrial when the evidence of the prior death threat as the background cause for the TRO was elicited. In her opening, Hongisto never says that Russo did not shoot at McKay. Finally, Hongisto failed to obtain and present witnesses with regard to the

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difficulty of determining the direction of the alleged rifle shots heard by the two witnesses. Mr. Yendell points out that it would have been almost impossible to hear the rifle shots, and the ability to determine the direction from which they came would also be essentially impossible. Her cross examination and argument were also very unclear and imprecise with respect to the time that these witnesses supposedly heard the shots as compared to the testimony of McKay as to the time and location when he said the shots occurred. His testimony appears to describe four shots spaced out along the route, but the route was five miles. Her cross examination and argument failed to elicit that a noise that the witnesses heard were more likely than not unrelated to the shots that McKay supposedly heard.

I have not been advised with respect to whether or not depositions were taken in this case. It is absolutely essential in a case of this magnitude to depose the State's significant witnesses. In this case, the failure to depose McKay and the lay witnesses was negligent and below the standard of care, if they were not deposed. Depositions would have pinned down the witnesses, making it more likely that they would contradict each other, and giving the expert more to work with. I would suggest you request depositions from the State's Attorney's office, to the extent that they exist.

*Note: No depositions
were ever done.
Also there was only
one alleged witness, not two!
The one that was a mile away.
And did he hear shots while
in his house working on his furnace?*

RIR:kar

Sincerely,



Richard I. Rubin, Esq.
RUBIN, KIDNEY, MYER & DeWOLFE

*Also my car was a standard shift
and had no muffler.*

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April 4, 2007

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Windham County State's Attorney's Office
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Brattleboro, Vermont 05302-0785

Re: In Re: Vito Russo
Docket No.: 295-7-05 Wmcv

Dear Dan:

Pursuant to the Court's Order, enclosed please find copies of the following:

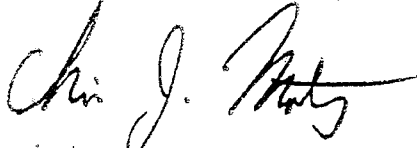
1. Investigative Report of David Hough, dated March 28, 2007.
2. Affidavit of David Yendell, dated April 2, 2007.

Please note that there are two videos to go along with these reports. However, we will be sending these to you under separate cover as soon as copies have been made.

If you should have any questions, please do not hesitate to give me a call.

Very truly yours,

ABATIELL ASSOCIATES, P.C.



Christopher J. Montgomery
CJM/bla
Enclosures



INVESTIGATIVE REPORT

CASE NAME- Subcontract/Yendell, Dave CASE # DATE 03/28/2007

My name is David K. Hough, I'm the owner and head investigator for Eye on Vermont Investigations & Recovery Services, LLC. I have been a licensed Private Investigator since 1995, I also have an education background with a degree in Law Enforcement. I'm also a Vermont Licensed Firearms Instructor and have been since 2004, my firearms training/certification was conducted through the Smith & Wesson Academy in Springfield Mass., I'm certified to instruct Revolver, Auto Pistol and Combat Shotgun courses. I have over 25 years total experience handling firearms.

On March 28th 2007 myself and fellow investigator David Yendell along with witness Robert Bovat (Wolcott Town Constable) conducted a firing experiment with 22 caliber firearms to try to determine if you could judge the direction of a shot being fired from the muzzle flash.

Experiment was conducted with four (4) separate 22 cal. Firearms:

- Model 925 Marlin Bolt Action Rifle with full length barrel
- Model 10/22 Ruger Rifle, semi auto rifle with full length barrel
- Smith & Wesson 22 cal. Revolver with 5.75" barrel
- Model 908 H&R 22 cal. Revolver with 5.5" stock barrel

Each firearm was loaded with six (6) rounds, first three (3) rounds were CCI 22 cal. Hollow Points, and the next three (3) were Federal 22 Cal Long Rifle solid lead bullet.

We began the experiment by first firing a series of rounds at approx. 1905 hrs was the first set, approx. 1927 hrs was the second set, and the last set was done at approx. 1943 hrs. The experiment was set up by placing a Ford F150 pickup as the lead vehicle, I sat in a Ford Ranger Pickup (chase vehicle) with my low beam lights on, and fired from out the window as how it would have been done at the time of the incident. From my point of view I was not able to make any determinations, investigator Yendell placed himself in a position which allowed him to be able to do so. I was however able to see the muzzle flash coming from the cylinder of the revolvers, however with the rifle shots there was virtually no flash visible from the shooters point of view. A total of 144 rounds were fired. It is my professional opinion that one would not be able to determine if they were being fired upon by looking at the flash of a 22 cal. bullet.

The information, facts, conclusions and opinions are true and accurate to the best of my ability and knowledge.

Affidavit

I have been continuously licensed by the State of Vermont as a private investigator since July 2002. In that time I have worked on well over one hundred cases involving criminal and civil investigations, witness location and interviews and subpoena service. I am certified by the State of Vermont to carry a handgun in the performance of my work as a private investigator. I am very familiar with firearms and ammunition having served in the military and as a police officer.

On Wednesday March 28, 2007, at the request of attorney Christopher Montgomery, I recreated and recorded, both audio and video, a reenactment of the shooting incident alleged to have taken place on November 17, 2002. Attorney Montgomery is representing the defendant Vito Russo. The complainant was John McKay. The incident took place on Western Avenue in Brattleboro, VT. The alleged incident took place somewhere between 1700 and 1730 hours that day.

The following is an explanation of how, when and where the reenactment took place. Present were: David Hough, a licensed private investigator and a firearms instructor certified by the State of Vermont. Mr. Hough's certification as a firearms instructor enables him to train, test and certify applicants to work in the State of Vermont as armed security personnel, armed private investigators and armed armor transport officers.

David Yendell, an armed private investigator licensed by the State of Vermont.

The entire reenactment was witnessed by Robert Bovat, constable for the Town of Wolcott, VT

The reenactment took place at the shooting range of the Barre Fish and Game Club in Barre, VT.

The defendant was charged with shooting a .22 caliber rifle at Mr. McKay while allegedly pursuing Mr. McKay on Western Avenue Brattleboro, VT. Mr. McKay was driving a pickup truck with a plow on it and Mr. Russo was driving a small car. The rifle that was confiscated from Mr. Russo's car was a Marlin model 925 .22 rifle with the barrel sawed off to approximately 8.5". The serial number of the rifle was given as 15676149. The weapon is currently in the possession of the Bureau of Alcohol, Firearms and Tobacco in Burlington, VT. We were unable to inspect the weapon so we have no way of knowing if it was operational at the time of the alleged incident or not. We were not allowed, by law, to modify a similar rifle and use it in the reenactment.

To make the reenactment as accurate as possible we fired a total of four (4) weapons in an effort to show the muzzle flash or lack of from varying length weapons. The shorter the barrel the more likely a muzzle flash will be produced. The weapons we used were:

1. A Model 25 Marlin .22 bolt action rifle with a stock (full length) barrel
2. A Ruger Model 1022 .22 semi-automatic rifle with a stock (full length) barrel
3. A Smith & Wesson .22 revolver with a 5.75" stock barrel
4. A H&R .22 revolver with a 5.5" stock barrel.

We purchased and used the same brands of .22 ammunition as were entered as evidence in Mr. Russo's trial. They were:

1. CCI brand "MiniMag" .22 cartridges with hollow point bullets
2. Federal brand .22 caliber cartridges with solid nose bullets.

The alleged shooting incident took place some time between 1700 and 1730 hours on November 17, 2002. I accessed a website of the U.S. Naval Observatory, Astronomical Applications Department. This website lists the exact times the sun rose and set on any given day. The web address is <http://aa.usno.navy.mil/cgi-bin/aa>. I found the sun set on November 17, 2002 at 1625 hours in Brattleboro, VT.. Using the same website I was able to find that the sun would set at 1912 hours in Barre, VT. on March 28, 2007.

Using this information we attempted to recreate the spread of time as accurately as possible. It should be noted that in the police affidavits, in Mr. McKay's statement to the police and in the ensuing trial the exact time of the incident was not known but approximated by Mr. McKay.

At the Barre Fish and Game Club we recreated, as closely as possible, a street setting by parking a Ford F150 pickup truck on a dirt road along side the firing range. We parked a second, smaller pickup truck on the road directly behind the first vehicle. Using a 100' tape measure we measured a distance of 75' between the front of the front vehicle and the front of the vehicle behind it. We also measured a distance of 50' between the two vehicles. We used two distances as it is unclear just how close or far apart the two vehicles were as they traveled along Western Avenue in Brattleboro, VT. We determined these two distances to be representative of what likely happened in the pursuit.

Western Avenue is a main road/street leading from the west side of Brattleboro into the business district of Brattleboro. Where the shooting allegedly took place Western Avenue is a mix of apartments, single family dwellings, businesses and the State Police Barracks. It is lit with standard street lights as well as by lights on the buildings and parking lots along the route. We were unable to simulate that lighting. The more light there is the less chance there is to see any muzzle flash as the ambient lighting would "wash out" the intensity of any minute flash. The lighting conditions of our test made it much darker than the actual event would have been. The darker it is the easier and more likely it is to notice even a small amount of flash. Traffic along Western Avenue is generally moderate to heavy at that time of day. The traffic, both following and approaching the vehicles would have had their headlights on. We were unable to simulate the lighting from traffic. The weather on November 17, 2002 was a mixture of snow and rain at the time of the alleged

incident. The weather when we recreated to scene was somewhat overcast and dry.

I set up a Sony HandyCam video recorder on a tripod. The tripod was placed next to the driver's side outside mirror of the front vehicle. The camera was situated at eye level of a person seated in the driver's seat of that lead vehicle. The Sony recorder captures both video and audio on a DVD-R medium. The R denotes that this particular DVD is not re-record able. It is a single use DVD. Nothing already recorded can be added to or deleted from once the DVD is recorded. I set the lens on the recorder at wide angle as opposed to Tele-photo. Wide angle would let the camera record with as closely as possible the same field of vision and depth as the human eye would see it from that location.

To conduct the test we did the following:

1. Each of the four weapons was loaded with 6 rounds of ammunition. Three of the CCI brand and three of the Federal brand. In each firing sequence the CCI rounds were the first three to be fired followed by the three Federal rounds.
2. David Hough sat in the driver's seat of the "chase" vehicle which had its headlights on low beam, closed the door, extended the weapon through the open window and fired directly at and slightly above the recorder to simulate firing at the lead vehicle. Each shot was recorded in sequence.
3. 24 rounds (6 from each of the 4 weapons) were fired from the "chase" vehicle at the recorder which was set 75' in front of the "chase" vehicle.
4. The four weapons were then reloaded with the same number and sequence of the two brands of ammunition. The recorder was moved to a point 50' in front of the chase vehicle. The weapons were then fired from the same position inside the "chase" vehicle a total of 24 times (6 each) in the same sequence at and slightly above the recorder on the tripod.
5. This sequence of firing at the two distances was repeated three (3) times. Once at 1905 hours (7 minutes before sundown at 1912 hours). Again at 1927 hours (15 minutes after sundown). And lastly at 1943 hours (31 minutes after sundown). A total of 144 rounds were fired.
6. I stood on the opposite side of the front vehicle and slightly off to the side and watched the muzzle of the weapons each time they were fired.

Observations & Conclusions:

No muzzle flash was detected from any of the four weapons at the 1905 hours firing.

At the 1927 hours firing I detected and the recorder captured an occasional bit of light from only the H&R revolver.

The H&R revolver, an older much used (worn) gun did occasionally produce what would be termed a "cylinder" flash. In other words, a flash of light could be seen emanating

from the gap between the cylinder of the revolver and the rear end of the barrel. To be sure I walked back and observed David Hough fire the H&R. I stood directly off to the side and within 10 feet of the weapon so I had a clear and unobstructed view of the side of the weapon. When the H&R did flash it was from the cylinder and not the muzzle.

The Smith and Wesson revolver was observed in a similar fashion and produced neither muzzle nor cylinder flash.

At the 1927 hours firing it was getting quite dark.

At the 1943 firing we were in considerable darkness. Neither rifle produced any muzzle flash, however, there was a minute amount of light that could be seen on several of the shots fired from both the Smith & Wesson and H&R revolvers. None of these flashes resembled the one "big ball of fire" (page 7 lines 10&11 of the interview transcript of November 18, 2002) Mr. McKay told the police he allegedly saw in the mirror of his truck as he sped down Western Avenue. In his words he "took off flying down Western Avenue. (page 4 lines 17&18 of 11/18/02 interview transcript). Mr. McKay told the police he "started going as fast as I could with a plow on." (page 6 lines 18&19). On page 7 of the same transcript in lines 7,8,9&10 Mr. McKay said as he drove "I was looking in the mirror trying to get on the floor and everything else and I looked back and saw the second shot." In my opinion it would be difficult to be doing everything he describes, keep the truck under control at high speed in the snow and still look in the mirror let alone see and distinguish a flash of light from a gun from all the other lights and reflected lights he would have been surrounded by.

The cylinder flash I observed from the H&R pistol has to be ignored in this reenactment since the shots allegedly fired at Mr. McKay all supposedly originated from the bolt action rifle found in Russo's car. Unlike a revolver which has a small gap between the cylinder and rear end of the barrel a bolt action rifle creates a tightly closed breach. The round is pushed by the bolt into a slight recess in the rear of the barrel of the rifle. The bolt contains the firing pin. The end of the bolt containing the firing pin completely closes the breach of the rifle. The entire round is actually in the barrel of the rifle. Any escaping gases would have to be directed down the barrel not back through the closed breach. In the case of a revolver the gap between the cylinder and barrel allows the cylinder of a revolver to rotate so successive shots can be fired. In a worn revolver this gap is wider and could allow a flash that could be seen.

The longer the barrel of the weapon the less likely it is to see any flash from the muzzle in any lighting conditions. The powder charge is .22 caliber round is quite small and does not produce a great deal of gas when fired. The weapons that produced any visible flash in the reenactment both had barrels considerably shorter than the barrel on the rifle found in Russo's vehicle. According to the police reports the barrel of Russo's rifle was 8.5 inches long. The shortest barrels of the test weapons we used were 5.5" and 5.75". This

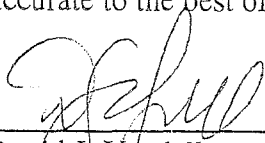
additional 2.75" to 3.0" of barrel length would likely make a good deal of difference in what was or was not visible at the muzzle end when the weapon was fired. The additional length would, by necessity, diminish any flash as the longer the barrel the more time the pressure and the resulting gases have to dissipate reducing and/or eliminating any muzzle flash.

During the reenactment I listened to the report each time the weapons were fired. While the reports were distinctive it was difficult to pin-point where they originated from.

Additionally, being in the closed cab of a quite possibly loud pickup truck operating at a high rate of speed as Mr. McKay reported, it would be much more difficult to hear the report of a .22 weapon being fired let alone be absolutely sure of where it was coming from. Mr. McKay would have to have been able, in my opinion, to eliminate all ambient noise from his vehicle, other vehicles approaching him, road noise from his truck tires (snow treads?) and the echo effect the buildings and other vehicles as well as the dampening effect falling snow and rain would have had on the report from .22 caliber rifle. All this would have taken place under the fear and stress Mr. McKay said he was experiencing at the time.

Based on my observation, the recorded results and the conditions under which the actual event was alleged to have taken place, it is my opinion that Mr. McKay did not see a muzzle flash from Russo's vehicle let alone "big ball of fire". It is also my opinion, based on my observation at the reenactment, my experience around and with firearms and the conditions both physical and emotional that Mr. McKay described, that it is unlikely that Mr. McKay could say with any degree of certainty where the sounds he allegedly heard came from.


The information, facts, conclusions and opinions contained in this report are true and accurate to the best of my ability and knowledge



David J. Yendell

April 2, 2007

Date



Witness

4/2/07

Date

note: originally this proves the witness lied that was a mile away from the shots and said he heard them while in his house etc. but my lawyer won't challenge the credibility of the witness like he won't challenge prosecution misdirection!