STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, S.C. RHODE ISLAND TRAFFIC TRIBUNAL

CITY OF WARWICK	:	
	:	
v.	:	C.A. No. T10-0033
	:	
MICHAEL PETRARCA	:	

DECISION

PER CURIAM: Before this Panel on August 25, 2010 and January 20, 2011—Judge Almeida (Chair, presiding), Magistrate Cruise, and Magistrate Noonan, sitting—is Michael Petrarca's (Appellant) appeal from a decision of Magistrate Goulart, sustaining the charged violation of G.L. 1956 § 31-27-2.1, "Refusal to submit to chemical test."[1] Appellant was represented by counsel before this Panel. Jurisdiction is pursuant to § 31-41.1-8.

Facts and Travel

On December 18, 2009, Officers Mario Cerullo (Officer Cerullo) and Matthew Schaffran (Officer Schaffran) responded to the scene of an accident on Main Street in West Warwick, Rhode Island. When they arrived on the scene, they found Appellee in the driver's seat of a vehicle that had struck a telephone pole. Officer Schaffran observed the Appellant to display the signs of intoxication, such as slurred speech and blood shot

[1] The matter was first before this Panel on August 25, 2010. We read Appellant's brief and listened to his oral argument on that day in spite of the fact that a portion of the trial transcript was missing from the record. Once the transcript was made whole, we granted Appellant a second opportunity to come before this Panel and present any new arguments that may have derived from testimony contained in the once missing portion of the transcript. That second oral argument took place on January 20, 2011.

watery eyes, and his breath to be emanating a strong odor of alcohol. Appellant was subsequently charged with the aforementioned motor vehicle offense. Appellant contested the charge, and the matter continued to trial.

The trial began with the testimony of Officer Cerullo. He testified that at about 1:30 a.m. on December 18, 2009, he responded to Main Street in West Warwick to find a vehicle that had struck a telephone pole. (Apr. 13 Tr. at 3.) When he approached the vehicle, he noticed that the windshield had been smashed and that Appellant, sitting in the driver's seat of the vehicle, had blood on his forehead and face. Id. Officer Cerullo also testified that the Appellant attempted to exit the vehicle a few times, but due to the severity of his injuries, he and the other officer, Officer Schaffran, urged Appellant to remain in the vehicle until medical personnel arrived on the scene. (Apr. 15 Tr. at 5.) Thereafter, according to Officer Cerullo, emergency personnel arrived on the scene, stabilized the Appellant, and prepared him for transport to the hospital. (Apr. 15 Tr. at 6.) While the Appellant was on the stretcher, Officer Cerullo was instructed by Officer Schaffran to read Appellant the "Rights for Use at Scene." Id.

On cross-examination, Officer Cerullo testified that despite his injuries, and some disorientation, he perceived Appellant to be alert and responsive. (Apr 15 Tr. at 8.) Cerullo stated that when asked if Appellant understood his rights read to him prior to him being arrested, he responded in the affirmative. (Apr. 15 Tr. at 9.) Officer Cerullo also testified that he rode along with the Appellant in the ambulance and upon arrival at the hospital went into the treatment room. (Apr. 15 Tr. at 13-14.) He noted that other than observing Appellant to be alert and responsive, and reading the "Rights for Use at Scene" form, he himself did not make any particular observations about Appellant's demeanor or

level of intoxication, as Officer Schaffran was essentially proceeding with the investigation at the scene. (Apr 15 Tr. at 17.)

Next, the State called Officer Schaffran to testify. He began his testimony by describing his background and training, specifically in the area of traffic stops, alcohol related driving offenses, and his familiarity with intoxicated persons in general. (Apr. 15 Tr. at 1-4.) Then turning to the event of December 18, 2009, the officer testified that he received a call on his police radio indicating that there was a single vehicle accident on Main Street in West Warwick. (Apr. 15 Tr. at 6.) When he responded, he found Appellant, bleeding in the passenger seat of the vehicle which had crashed into a utility pole. (Apr. 15 Tr. at 7.) He also claimed to have observed another individual, Appellant's friend, standing outside the vehicle. Id. Officer Schaffran testified that Appellant appeared a little "confused due to the head injury, [Appellant's] head had made impact with the windshield upon accident." (Apr. 15 Tr. at 7.) In addition to the trauma related disorientation, the officer noticed the tell tale signs of intoxication: bloodshot watery eyes and alcohol on Appellant's breath. Furthermore, the friend standing near the vehicle informed the officer that the Appellant had been traveling from the Sandy Lane Bar in Coventry, Rhode Island.[2] (Apr. 15 Tr. at 8.)

Both police officers testified that in their opinion it was best to keep the Appellant in his vehicle until emergency personnel arrived. (Apr. 15 Tr. at 9.) When emergency personnel arrived, they removed Appellant from his vehicle and placed him onto a stretcher (Apr. 15 Tr. at 10.) Officer Schaffran testified, that based on the "totality of the circumstances, [he] told Officer Cerullo to remain with [Appellant] and read him the

[2] The friend, later identified as Dustin Sylvia or Dustin Silva, was not in the vehicle with the Appellant. According to Appellant's memorandum, the two were traveling in tow from the Sandy Lane Bar through the streets of West Warwick.

rights for use at scene, [and to inform him] that he was in custody for suspicion of DUI." (Apr. 15 Tr. at 10.)

While Officer Cerullo rode along in the ambulance, Officer Schaffran drove his police cruiser to Rhode Island Hospital to continue with the DUI investigation. (Apr. 15 Tr. at 12.) After waiting for the treatment to be completed, he read to Appellant a form known to the West Warwick Police Department as the "Rights for Use at Station/ Hospital" form, and asked Appellant if he understood his rights. (Apr. 15 Tr. at 14.) According to Officer Schaffran, Appellant was fully alert and awake during this time, and indicated that he was, in fact, aware of his rights. (Apr. 15 Tr. at 15.) Appellant did not exercise his right to make a confidential phone call, and when asked if he would submit to a blood test, he informed the officer that he was not willing to take any tests. (Apr. 15 Tr. at 16.) Officer Schaffran thereafter signed the Rights form indicating that Appellant refused the test after being fully aware of his rights. Id. He also had a Rhode Island Hospital nurse, identified as Kelly Kerns, sign the form as a witness. Id. However, Officer Schaffran informed the Court that due to pain in his hand, Appellant was not able to sign the Rights form. Id.

On cross examination, Officer Schaffran reiterated that he perceived Appellant to be awake and responsive to both him and the hospital staff during the time he was being treated for his injuries. (Apr. 15 Tr. at 51.) The officer was not aware of what drugs, if any were administered to him by hospital personnel. (Apr. 15 Tr. at 52.)

After the testimony of Officer Schaffran was completed, the State rested its case. (4/15 Tr. at 68.) Counsel for the Appellant motioned for a dismissal on the grounds that the State failed to prove by clear and convincing evidence that Appellant knowingly and

voluntarily refused a chemical test. (Apr. 15 Tr. at 69.) Counsel also cited a lack of probable cause evidence in the State's case for the officers to suspect that Appellant was under the influence of alcohol. (Apr. 15 Tr. at 71.) While the trial judge withheld his ruling as to the probable cause argument, he denied the motion as it pertained to the knowing and voluntary refusal. (Apr. 15 Tr. at 74, 80.)

The trial reconvened on April 27, 2010 with the Appellant's case in chief. Appellant's first and only witness called was Dr. Gary Dean Roye, a trauma surgeon, employed at Rhode Island Hospital, who also works as a professor of surgery at Brown University Medical School. (Apr. 27 Tr. at 28-29.) Dr. Roye testified that he had been a trauma surgeon for 10 years and had been teaching the elements of surgery for the same amount of time. (Apr. 27 Tr. at 32.) He also testified that he had significant experience in the testing and evaluation of trauma patients resulting from stabbings, shootings, and automobile accidents. (Apr. 27 Tr. at 36.) Specifically to incidents of head trauma, Dr. Roye explained how a person's cognitive ability, particularly to follow commands, is lessened by severe trauma to his head. (Apr. 27 Tr. at 39.)

Dr. Roye informed the Court that he had reviewed all medical records regarding Appellant's admission to Rhode Island Hospital on December 18, 2009. (Apr. 27 Tr. at 42.) Dr. Roye noted that Appellant had been diagnosed with a "grade two to grade three concussion." (Apr. 27 Tr. at 43.) He also noted that the medical records indicated that Appellant had loss consciousness due to this head trauma. (Apr. 27 Tr. at 46.) Such concussions, the doctor explained, could have severely impaired Appellant's ability to make intelligent decisions. (Apr. 27 Tr. at 44.) The doctor went to state that although a victim of such trauma may be aware of his surroundings, such as place and time, his

ability to understand the "consequences of [an] action" may be impaired. (Apr. 27 Tr. at 44.)

Dr. Roye also stated that although the medical reports indicated that Appellant did, in fact, have alcohol in his system, alcohol does not generally exacerbate the cognitive impairment stemming from concussion, nor did the medical records indicate that attending personnel were at all concerned with the alcohol's effect on the Appellant's mental status. (Apr. 27 Tr. at 55.) At the conclusion of the direct examination and at the motion of Appellant's counsel, the Court qualified Dr. Roye as an "expert in the area of emergency and trauma treatment, and he's able to provide opinions consistent with that expertise." (Apr. 27 Tr. at 58.)

On cross examination, Dr. Roye admitted that he had never seen the Appellant prior to the day of his testimony before the Court. (Apr. 27 Tr. at 59.) He also informed the court that he had no personal knowledge as to whether or not the Appellant was alert or awake, or if he had ever lost consciousness on the night in question. Id. He concluded that all of his findings and determinations were made solely based upon his analysis of the medical records, which he had reviewed about a month prior to testifying. (Apr. 27 Tr. at 67.) After the State had completed its cross of Dr. Roye, testimony in the trial concluded.

The trial resumed on May 5, 2010 for closing arguments, and the trial judge, needing more time to review testimony, continued the matter until May 12, 2010 for his decision. In his decision to sustain the charge against the Appellant, the trial judge found the testimony of both police officers to be "credible and worthy of belief." (Dec. Tr. at 2.) The judge found that the evidence of the motor vehicle accident, along with

Appellant displaying the tell tale signs of intoxication lay the proper foundation for police to have reasonable suspicion that Appellant was operating his vehicle under the influence of alcohol. (Dec. Tr. at 34-35.) The judge also, referencing case law from the State of Pennsylvania law—which calls for a shifting burden in proving certain elements of a refusal, was convinced that the State had met its burden in proving that Appellant had knowingly and intelligently refused a chemical test. (Dec. Tr. at 19.) Appellant's attempts to disprove that fact, were unsuccessful, as he found the testimony of Dr. Roye to be unconvincing as it was based largely on almost "hand picked documentation," and failed to take into account all of the pertinent evidence. (Dec. Tr. at 23.)

Aggrieved by this decision to uphold the refusal charge, Appellant filed this Appeal. Forthwith is this Panel's decision.

Standard of Review

Pursuant to G.L. 1956 § 31-41.1-8, the Appeals Panel of the Rhode Island Traffic Tribunal possesses appellate jurisdiction to review an order of a judge or magistrate of the Rhode Island Traffic Tribunal. Section 31-41.1-8(f) provides in pertinent part:

> "The appeals panel shall not substitute its judgment for that of the judge or magistrate on questions of fact. The appeals panel may affirm the decision of the judge or magistrate, may remand the case for further proceedings, or may reverse or modify the decision if the substantial rights of the appellant have been prejudiced because the judge's findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional or statutory provisions;
> (2) In excess of the statutory authority of the judge or magistrate;
> (3) Made following unlawful procedure;
> (4) Affected by another error of law;
> (5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
> (6) Arbitrary, capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion."

In reviewing a hearing judge's decision pursuant to § 31-41.1-8, this Panel "lacks the authority to assess witness credibility or to substitute its judgment for that of the hearing judge concerning the weight of the evidence on questions of fact." Link v. State, 633 A.2d 1345, 1348 (R.I. 1993) (citing Liberty Mut. Ins. Co. v. Janes, 586 A.2d 536, 537 (R.I. 1991)). "The review of the Appeals Panel is confined to a reading of the record to determine whether the judge's decision is supported by legally competent evidence or is affected by an error of law." Link, 633 A.2d at 1348 (citing Envtl. Scientific Corp. v. Durfee, 621 A.2d 200, 208 (R.I. 1993)). "In circumstances in which the Appeals Panel determines that the decision is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record or is affected by error of law, it may remand, reverse, or modify the decision." Link, 633 A.2d at 1348. Otherwise, it must affirm the hearing judge's conclusions on appeal. See Janes, 586 A.2d at 537

Analysis

On appeal, Appellant argues that the trial judge's decision is characterized by abuse of discretion, affected by error of law, and clearly erroneous in light of the reliable, probative, and substantial record evidence. On appeal the Appellant has advanced two general arguments. The first is that the judge erred when he found that the State met its burden in proving all the elements of refusal under the statute. Secondly, Appellant feels he was unduly prejudiced by the trial judge's decision to shift the burden of proof concerning certain statutory elements.

Reasonable Suspicion

Appellant contends that the State failed to prove to a standard of clear and convincing evidence that Officer Walsh had sufficient evidence to furnish him with probable cause to arrest Appellant on suspicion of operating his motor vehicle while under the influence. As the initial arrest of was unlawful, Appellant asserts that the charged violation of § 31-27-2.1 must be dismissed.

While many times erratic driving is indeed an arresting officer's first clue that a motorist is operating a vehicle under the influence, such preliminary observations are not necessary to validly reach the same conclusion. Decisions from our Supreme Court provide us with numerous examples of "post vehicle operation" clues that can lead an officer to reasonably suspect a motorist of driving under the influence. Some of these include: an admission by the motorist that he or she had been drinking, State v. Bruno, 709 A.2d 1048, 1050 (R.I. 1998); detection by the officer of an odor of alcohol on the motorist's breath or person, State v. Pineda, 712 A.2d 858 (R.I. 1998), State v. Perry, 731 A.2d 720, 721 (R.I. 1999); exhibition by the motorist of bloodshot eyes, Pineda, 712 A.2d at 858, and Perry, 731 A.3d at 721; observation of physical damage to the motorist's vehicle, Pineda, 712 A.2d 858. See also United States v. Trullo, 809 F.2d 108, 111 (1st Cir. 1987.) ("[T]he circumstances before the officer are not to be dissected and viewed singly; but rather they must be viewed as a whole.")

In the facts before us, Officer Schaffran arrived on the scene to find a vehicle which had struck a utility pole. The vehicle had sustained serious damage to its fender, and its windshield had been smashed. Inside the vehicle was the Appellant, face and clothes bloodied, sitting in the driver's seat very obviously in need of medical attention.

Office Schaffran also testified that a friend, traveling in a separate car, informed him that the Appellant had been traveling from a tavern in Coventry Rhode, Island when the accident occurred. Officer Schaffran went on to testify that he a noticed a smell of alcohol emanating from Appellant's breath and that his eyes were bloodshot in appearance. Based on Officer Schaffran's personal observations of the scene and Appellant's physical appearance, coupled with his professional experience and training with respect to the investigation of DUI-related traffic stops, the "facts and circumstances known to [Officer Schaffran [were] sufficient to cause a person of reasonable caution to believe that a crime ha[d] been committed and [Appellant] ha[d] committed [it]." Perry, 731 A.2d at 723. We therefore find no error in the trial judge's conclusion that police had the requisite level of suspicion to believe Appellant had been operating his vehicle under the influence of alcohol.

Knowingly and Voluntarily

Appellant also contends that the trial judge erred when he found that the State had proven that he had knowingly and voluntarily refused the chemical test. He believes that because of his physical condition, which was detailed by an expert witness, he lacked the ability to knowingly and intelligently refuse a chemical test pursuant to statutory requirements.

This Panel notes that trial magistrate's finding as to the voluntariness of the refusal turned on a credibility determination. He found Officer Schaffran's testimony that Appellant was awake, alert, and responsive enough to a point where he could make a decision in response to the proffered chemical to be credible. On the contrary, in the trial magistrate's opinion, the expert testimony of Dr. Roye failed to convince him that

Appellant's injuries affected his cognitive ability to the point where he was incapable of understanding that which was read to him and could not have knowingly refused the blood test)). As the members of this Panel did not have an opportunity to view the live trial testimony of Officer Schaffran or Dr, Roye, it would be impermissible to second-guess the trial judge's "impressions as he . . . observe[d] [Officer Schaffran and Dr. Roye] [,] listened to [their] testimony [and] . . .determine[ed] . . .what to accept and what to disregard[,] . . . what . . . [to] believe[] and disbelieve[]." Environmental Scientific Corp., 621 A.2d at 206. Other than continuing to rely on the expert testimony of Dr, Royer, Appellant has presented no new argument in support of his contention that that the trial magistrate erred in determining that his refusal of the blood test was not made knowingly or voluntarily. Therefore, we find no error of law, and the ruling of the trial magistrate is upheld.

Burden of Proof

Lastly, Appellant argues that the trial judge committed error of law when he held that once the State met its burden in proving the refusal was knowing and voluntary, the burden of proof shifted to the Appellant to prove otherwise. In issuing his decision, the trial judge stated the following:

> "[Appellant] argues that due to the head injury suffered in the crash, the defendant was impaired to a degree which rendered him incapable of knowingly and voluntarily refusing. . . a research [sic] of any Rhode Island law has tuned up no cases which directly address this issue. So I'm going to follow the guidance that has been utilized by the Commonwealth of Pennsylvania in numerous cases and adapt that as my own analysis." (Dec. Tr. at 18.)

Specifically, he cited Department. of Transportation, Bureau of Driver Licensing v. Holsten, 615 A.2d 113 (Pa. Cmwlth. 1992). There, a Pennsylvania Appellate Court overturned a trial court's ruling that a refusal was not knowing and voluntary. Id. at 116. More importantly for the purposes of this Appeal, the trial magistrate in the case before us adopted the procedure used by Pennsylvania courts when a defendant alleges that due to a medical issue, he or she was incapable of knowingly and voluntarily refusing a chemical test when offered. As the Court in Holsten stated: "Once the Department establishes [the elements of refusal], the burden of proof then shifts to the driver to prove, by competent evidence, that he or she was unable to make a knowing a conscious refusal to consent to the chemical test." Id. at 115 (citing Department. of Transportation, Bureau of Driver Licensing v. O'Connell, 555 A.2d 873 (Pa. Cmwlth. 1989). After laying out the Pennsylvania rubric, the trial judge continued in his decision: "[Once the State had rested its case] I [was] satisfied that the defendant refused to submit . . . he exhibited an understanding of what was happening." (Dec Tr. at 22.) He continued, [Appellant's] expert testimony fell short of rebutting the State's evidence that the refusal was voluntary. . .[a]accordingly, the [Appellant] has not met its [sic] burden, essentially, of [sic] regarding the medical presumption but [sic] a finding of clear and convincing evidence." (Dec. Tr. at 24.)

While the trial judge was correct in asserting Rhode Island law is silent on this issue, we note that the Commonwealth of Pennsylvania is not alone in employing burden shifts in these types of cases. For instance, in the State of Nebraska, it has been held that if the Department of Motor Vehicles presents evidence against a defendant motorist which meets the elements necessary to prove a statutory chemical test refusal, the burden

of proof shifts to the arrestee to disprove any or all elements thereof. Malhendorf v. Nebraska Dept. of Motor Vehicles, 538 N.W. 2d 773, 777 (Neb. App. 1995.) Similarly, in the State of Washington, if a defendant, motorist alleges such as the Appellant has in the case before us, that, for whatever reason, he did not knowingly or voluntarily refuse a chemical test, the burden of proof is on him to prove such. Strand v. State Dept. of Motor Vehicles, 509 P.2d 999, 1003 (Wash. App. 1973); see also Matter of Smith, 770 P.2d 817 (Idaho App. 1989) (referencing Idaho laws which place the burden of proof on the arrestee when attempting to refute certain aspects of the refusal charges rendered against him or her).

This burden shift is a not a novel or even a completely modern concept. "A doctrine often repeated by the courts is that where the facts with regard to an issue lie peculiarly in the knowledge of a party, that party has the burden of proving the issue." McCormick on Evidence 6th Edition Vol. 2 § 337 2006. While Professor McCormick was referencing matters more purely civil, this concept is not limited to a civil context.

For instance, the U.S. Supreme Court upheld the implementation of California law, which placed the burden of proving one's citizenship on a defendant subject to a criminal prosecution even when the determination of one's citizenship was an essential element of the crime charged. Morrison v. California, 291 U.S. 82 (1934). Defendants in Morrison were convicted of conspiring to transfer land into the hands of a person who was, at the time, ineligible due to his racial composition. Id. at 83. The Court held that the California law, which required them to prove that they were of a certain race, was not a violation of the Constitution, and was, in the Court's opinion, "within the limits of reason and fairness." Id. at 88. Further, the Court opined, "the limits are in substance

these, that the state shall have proved enough to make it just for the defendant to be required to repel what has been proved with excuse or explanation. . . ." Id. at 89.

The State, in presenting Officer Schaffran's informed and experienced observations of Appellant's demeanor, alertness and responsiveness, met its burden. If there was something medically defective with Appellant regarding his motor skills, or cognitive ability to understand what was read to him from the Rights form, it most certainly lay "peculiarly with him." Therefore the burden of proving as much did as well.

We do not feel that by employing this analysis to Appellant's case, the trial judge committed an error of law. The State proved all of the necessary elements, while Appellant's attempts to refute the State's assertions were unsuccessful. Appellant has suffered no prejudice.

Conclusion

This Panel has reviewed the entire record before it. Having done so, this Panel is satisfied that the trial judge's decision sustaining the charged violation of § 31-27-2.1 was not affected by error of law, clearly erroneous based on the reliable, probative, and substantial record evidence, characterized by abuse of discretion, or in violation of constitutional provisions. Finding that substantial rights of Appellant have not been prejudiced, we hereby deny his appeal and sustain the violation charged against him.

Noonan, M. Concurring. I concur with the majority opinion that the decision of the trial magistrate should remain undisturbed. As the majority has pointed out, his decision was based primarily on credibility determinations, and this Panel shall not substitute our judgment for his. However, I write separately to express my disapproval of the language which suggests that a defendant has the burden of proof in these quasi-criminal proceedings. I am of the opinion that courts walk a dangerous line when they place a burden of proof with regard to statutory elements on a motorist who is the target of a State endorsed prosecution.

Rule 17 of Traffic Tribunal Rules of Procedure makes it clear: "[t]he burden of proof shall be on the prosecution to a standard of clear and convincing evidence." (Emphasis added.) In a refusal trial, the prosecution must prove all the elements required by § 31-27-2.1 and the other pertinent statutes to that degree of certainty. One of these

elements is that a refusal was knowing and voluntary. I find that by combining our rules of procedure with this so-called Pennsylvania shifting burden test, too much uncertainty exists for those who come before this tribunal. With the burden purportedly shifting only after the State's having met its initial statutory burden that the refusal was knowing and voluntary, the question remains; how can a defendant be expected to decipher if or when this has occurred?[3] Surely the trial judge, at the moment he or she becomes convinced that all the elements have been met, will not signal to a defendant that the burden has shifted.

I am well aware that the natural volley intrinsic to our adversarial system will, at times, result in the burden of going forward with evidence to shift from party to party. However, that is separate and apart from the burden of proof. Professor Wigmore once wrote, "the burden of proof never shifts since no fixed rule of law can be said to shift." 9 Wigmore Evidence, § 2489 (Chadbourn rev 1981). Our "unshiftable," fixed rule of law can be found in the aforementioned Traffic Tribunal Rule of Procedure, and unlike the situation involved in the Morrison case cited in the Decision of the Panel, there is no statute or rule that mandates a burden shift.

Again, the record in this matter does nor present an instance of when the trial magistrate's ruling should be overturned. However, until the General Assembly presents some "fixed rule of law" which mandates that the burden of proof shifts on any of the refusal elements, I deem adopting such an approach improper.

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[3] Although I am in no way advocating a burden shift, in reading the extra jurisdictional case law provided by the Panel's opinion, the test employed by the State of Nebraska seems to eliminate this uncertainty. In Nebraska, it is codified that once police present a sworn report which confirms all of the necessary elements under Nebraska's refusal statute, then the burden falls upon a defendant motorist to disprove the facts sworn to in said report. See Malhendorf supra; see also NEB. REV. STAT. § 60-498.01.(7) (2010). Further, in the case of Morrison v. California, there were statutory provisions mandating the burden shift.