STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS
PROVIDENCE, Sc. **DISTRICT COURT**
SIXTH DIVISION

Michael Petrarca	:	
	:	
v.	:	**A.A. No. 11 - 033**
	:	
State of Rhode Island	:	
(RITT Appellate Panel)	:	

O R D E R

This matter is before the Court pursuant to § 8-8-8.1 of the General Laws for review of the Findings & Recommendations of the Magistrate.

After a de novo review of the record and the memoranda of counsel, the Court finds that the Findings & Recommendations of the Magistrate are supported by the record, and are an appropriate disposition of the facts and the law applicable thereto.

It is, therefore, ORDERED, ADJUDGED AND DECREED,

that the Findings & Recommendations of the Magistrate are adopted by reference as the Decision of the Court and the decision of the appellate panel of the Traffic Tribunal is AFFIRMED.

Entered as an Order of this Court at Providence on this 21st day of March, 2012.

By Order:

/s/
Clerk

Enter:

/s/
Jeanne E. LaFazia
Chief Judge

STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS
PROVIDENCE, Sc. DISTRICT COURT
SIXTH DIVISION

Michael Petrarca	:	
	:	
v.	:	**A.A. No. 6AA-2011-00033**
	:	**(T10-0033)**
State of Rhode Island	:	**(07-204-8488)**
(RITT Appellate Panel)	:	

F I N D I N G S & R E C O M M E N D A T IO N S

Ippolito, M. In this case Mr. Michael Petrarca urges that an appeals panel of the Rhode Island Traffic Tribunal (RITT) erred in affirming a trial magistrate's verdict finding him guilty of refusal to submit to a chemical test, a civil violation under Gen. Laws 1956 § 31-27-2.1. Jurisdiction for the instant appeal is vested in the District Court by Gen. Laws 1956 § 31-41.1-9; the applicable standard of review may be found in Gen. Laws 1956 § 31-41.1-9(d). This matter has been referred to me for the making of findings and recommendations pursuant to Gen. Laws 1956 § 8-8-8.1.

In his appeal, Mr. Petrarca presents four reasons why this Court should reverse: first, the panel erred by approving the burden-of-proof-shifting framework

employed by the presiding magistrate when deliberating on the issue of whether the injuries Mr. Petrarca had sustained in his accident precluded a finding that he knowingly and voluntarily refused a chemical test; second, the panel erred in finding that the State had established by clear and convincing evidence that Mr. Petrarca had knowingly and voluntarily refused a chemical test; third, the panel erred by finding the defense's expert witness had not established Mr. Petrarca lacked the ability to make knowing and voluntary decisions at the time of his alleged refusal; and fourth, the panel erred by finding the police had reasonable grounds to believe Mr. Petrarca was operating under the influence. (Brief of Appellant, at 3). After a review of the entire record I have concluded that, although the burden-shifting procedure utilized by the trial magistrate is not sanctioned under Rhode Island law, the Panel's decision to sustain Mr. Petrarca's refusal charge is nevertheless supported by reliable, probative and substantial evidence of record and was not clearly erroneous. I therefore recommend, for the reasons stated below, that the decision of the panel be affirmed.

I. FACTS & TRAVEL OF THE CASE

The facts underlying Mr. Petrarca's refusal charge are fully and fairly stated (with appropriate citations to the trial transcript) in the decision of the panel. See Decision of RITT Panel, March 22, 2011, at 1-7; they may be summarized here as follows.

On December 18, 2009 at approximately 1:30 a.m., Officers Mario Cerullo and Matthew Schaffran, each with just shy of three years experience as members of the West Warwick Police Department, responded to a report of a single car accident on Main Street in West Warwick. (Trial Transcript I, at 3; Trial Transcript II, at 6).[2] When the officers arrived at the scene, they determined that a vehicle had struck a telephone pole and that someone was still in the vehicle. (Trial Transcript I, at 3; Trial Transcript II, at 6). According to both officers, Mr. Petrarca — the appellant — was seated in the driver's seat of the vehicle bleeding from a cut on his forehead. (Transcript I, at 3; Trial Transcript II, at 6.) Officer Schaffran testified that it appeared Mr. Petrarca's head had partially gone through the windshield, causing the laceration. (Trial Transcript II, at 7). He added that Mr. Petrarca stated he was not wearing a seatbelt at the time of the accident. (Id.)

When Officer Schaffran approached Mr. Petrarca in the damaged vehicle, he observed a strong odor of alcohol coming from his breath and noticed that Mr. Petrarca's eyes were bloodshot and watery. (Trial Transcript II, at 8). Mr. Petrarca's speech was also slurred. Mr. Petrarca attempted to exit the vehicle several times before emergency medical personnel arrived, and the officers instructed him to remain in the vehicle for his own safety. (Trial Transcript I, at 5; Trial Transcript II, at

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[2] Five trial transcripts were included in the file for this case: the transcript designated "Partial Trial Tr." from 4/15/2010 will be "Transcript I"; that designated "Trial Tr." from 4/15/2010 will be "Transcript II"; that designated "Trial Tr." from 4/27/2010 will be "Transcript III"; the "Trial Tr." from 5/4/2010 will be "Transcript IV"; and the "Trial Tr.", from 5/12/2010 will be "Transcript V."

28). Mr. Petrarca was uncooperative with Officer Schaffran, stating that he did not want assistance from the police or emergency medical personnel. (Trial Transcript I, at 8-9).

A friend of Mr. Petrarca, Dustin Silvia, was following appellant in another vehicle at the time of the accident, and was present at the scene when Officers Schaffran and Cerullo arrived. (Trial Transcript II, at 9, 22). Mr. Silvia informed Officer Schaffran that he and Mr. Petrarca had come from the Sandy Bottom Bar in Coventry where they had both consumed alcohol. (Trial Transcript II, at 9, 62). The record indicates Mr. Petrarca nodded his head in acknowledgement of his friend's statement to Officer Schaffran. (Trial Transcript II, at 9, 61).

Although Mr. Petrarca was conscious when Officers Cerullo and Schaffran arrived, his ability to answer their questions was limited. When the officers inquired as to what happened and where Mr. Petrarca was coming from and going to, he could not remember and answered that he did not know. (Trial Transcript I, at 8; Trial Transcript II, at 7, 29). Officer Schaffran admitted in his testimony that Mr. Petrarca could have been confused as a result of the trauma to his head from striking his vehicle's windshield. (Trial Transcript II, at 7). Officer Cerullo testified that Mr. Petrarca's initial refusal to accept medical attention did not make sense to him because of the severity of Mr. Petrarca's injuries. (Trial Transcript I, at 9).

An ambulance arrived at the scene of the accident, and Mr. Petrarca was removed from the vehicle on a backboard before being transferred to a stretcher and

placed in the ambulance. (Trial Transcript II, at 9-10, 30-32). Due to his condition, field sobriety tests were not performed on Mr. Petrarca. (Trial Transcript II, at 12, 32-34). And, based on the circumstances before him, Officer Schaffran instructed Officer Cerullo to maintain custody of Mr. Petrarca, read him his rights for use at the scene, and inform Mr. Petrarca that he was under arrest for suspicion of driving under the influence. (Id., at 10). With the consent of the medical personnel who were treating him, Officer Cerullo read Mr. Petrarca his Rights For Use at the Scene in the ambulance that had responded. (Trial Transcript I, at 6-7, 12-13). Mr. Petrarca acknowledged that he understood his rights. (Trial Transcript I, at 12-13). Mr. Petrarca appeared "alert and conscious" while he was in the ambulance. (Id., at 7).

Mr. Petrarca was transported to Rhode Island Hospital and Officer Cerullo remained with him until he was relieved by Officer Schaffran. (Id., at 16). Officer Schaffran waited for the hospital staff to finish treating Mr. Petrarca, and he then read Mr. Petrarca his Rights For Use at the Station or Hospital. (Trial Transcript II, at 14). Although Officer Schaffran was not aware of what medications (if any) had been administered to Mr. Petrarca, he perceived Mr. Petrarca to be awake and responsive during his treatment and while his rights were being read to him. (Id., at 15, 51). Officer Schaffran asked Mr. Petrarca if he understood his rights, and he said he did. (Id., at 15). Mr. Petrarca did not exercise his right to a confidential phone call and refused to take a chemical test. (Id., at 15-16). The officer then signed a form

indicating Mr. Petrarca had refused the test and a Rhode Island Hospital nurse, Kelly Kerns, also signed the form as a witness.[3] (Id., at 16-17)

Mr. Petrarca was arraigned on February 14, 2010. His trial began on April 15, 2010 before Magistrate Alan Goulart, and concluded May 12, 2010. (Trial Transcript V, at 32-35).

On the first day of Mr. Petrarca's trial, the prosecution called Officers Cerullo and Schaffran, who provided testimony consistent with the narrative just presented, the State then rested. (Trial Transcript II, at 68). Mr. Petrarca then moved for dismissal based on two arguments: first, that the State had failed to prove by clear and convincing evidence that Mr. Petrarca had knowingly and voluntarily refused a chemical test; second, that Officers Cerullo and Schaffran did not have reasonable grounds to believe Mr. Petrarca was operating under the influence. (Trial Transcript II, at 69, 71). Magistrate Goulart reserved judgment on the question of indicia of intoxication — although he found there was sufficient evidence to show appellant was indeed driving; he denied that aspect of the motion to dismiss based on an alleged failure to prove a knowing and voluntary refusal. (Id., at 73-74, 78-80). The trial was then adjourned; it was reconvened on April 27, 2010.

When the trial reconvened, Mr. Petrarca began his defense by presenting Dr. Gary Dean Roye as an expert witness. Dr. Roye, who is employed by Rhode Island Hospital, specializes in general surgery and trauma surgery. (Trial Transcript III, at

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[3] Mr. Petrarca was unable to sign the form himself because of pain in his hand. (Trial Transcript II, at 16, 58).

29). The physician testified regarding the various types of head trauma patients can experience and the impact such injuries might have on their cognitive abilities. (Trial Transcript III, at 36 et seq.). Dr. Roye explained that there are three grades of concussions. (Id., at 37). When a patient experiences a grade one concussion, he will generally not lose consciousness and will be impaired for less than 15 minutes. (Id.) In the case of a grade two concussion, the patient will generally not lose consciousness, but will be impaired for more than 15 minutes. (Id.) With a grade three concussion, the patient will lose consciousness. (Id.)

Based on his review of the Rhode Island Hospital medical records, the doctor testified that Mr. Petrarca suffered a grade two to grade three concussion. (Id., at 42-44). Dr. Roye explained that there was conflicting evidence in the medical records, with some reports indicating that he had lost consciousness while others indicated that he had not. (Id., at 43-44). However, Dr. Roye testified that Mr. Petrarca had at least a level two concussion because the records showed that he was still dazed when he arrived at the hospital more than 15 minutes after the accident. (Id.)

Dr. Roye further explained that in the case of traumatic brain injury, patients generally would be able to answer simple questions, but that their ability to answer these questions "doesn't necessarily mean [they are able] to process and understand more complex information or the ramifications of what [someone tells them]." (Id., at 44). According to Dr. Roye, Mr. Petrarca's medical records indicated that he was "oriented times three" when admitted, which means he was alert as to who he was,

where he was, and the general time of day. (Trial Transcript III, at 48). The doctor revealed Mr. Petrarca had blood alcohol in his system. (Id., at 55, 61). The doctor testified that he believed Mr. Petrarca's ability to comprehend complex instructions was impaired while he was in the hospital. (Id., at 49-52).

The trial adjourned following Dr. Roye's testimony, reconvening on May 4, 2010 — at which time the Court heard the final arguments of counsel. (Trial Transcript IV, passim). It was then continued to May 12 for Magistrate Goulart's decision. (Trial Transcript IV, at 45-46).

At the outset of his bench decision, the magistrate noted that he was satisfied Mr. Petrarca was the operator of the vehicle involved in the accident. (Trial Transcript V, at 3). Magistrate Goulart then reviewed the evidence produced at trial and held the State had established by clear and convincing evidence that: Officers Schaffran and Cerullo had reasonable grounds to believe Mr. Petrarca was operating under the influence; that Mr. Petrarca was informed of his right to be examined by a physician of his choice; that he was read his rights for use at the scene and the rights for use at the hospital/station; and that he was aware of the penalties for refusing a chemical test. (Id., at 20-21).

When he began addressing Mr. Petrarca's contention that he did not have the capacity — because of his injuries — to knowingly and voluntarily refuse a chemical test, Magistrate Goulart invoked a burden-of-proof-shifting framework utilized by the courts of the Commonwealth of Pennsylvania. (Id., at 17-18). Under this approach, a

defendant must prove by "competent evidence that he or she is unable to make a knowing and voluntary refusal once the [State] has established [the four elements of a refusal charge]." (Id.) Magistrate Goulart then applied this framework to Mr. Petrarca's case and held that Dr. Roye's testimony lacked a sufficient foundation and that it did not meet Mr. Petrarca's burden of rebutting the State's proof that he knowingly and voluntarily refused a chemical test. (Id., at 22-24).

Magistrate Goulart found Mr. Petrarca guilty of refusal and a seatbelt violation, but dismissed a charge of laned-roadway violation. (Id., at 32, 33-35). The magistrate imposed a 24 month license suspension, multiple fines, and community service for the refusal charge. (Id., at 33-34). He also ordered Mr. Petrarca to be screened for alcohol counseling. (Id., at 34). For the seatbelt violation, a fine of $85 was imposed. (Id., at 32).

Mr. Petrarca appealed his refusal conviction to the RITT appeals panel.

The matter was heard by an appellate panel comprised of Judge Lillian Almeida (Chair, *presiding*), Magistrate R. David Cruise, and Magistrate William T. Noonan on August 25, 2010 and January 20, 2011. Mr. Petrarca raised two issues on appeal to the panel: first, he argued that the trial magistrate erred by finding the State had established the requisite elements of the refusal charge; second, Mr. Petrarca argued that he was unfairly prejudiced by Magistrate Goulart's decision to shift the burden of proof on the element of knowing and voluntary refusal from the State to

the defendant. Decision of Panel, at 8. In its March 22, 2011 decision, the panel rejected Mr. Petrarca's assertions of error.

The panel found that Officers Schaffran and Cerullo had reasonable grounds to believe Mr. Petrarca was operating his vehicle under the influence of alcohol. (Decision of Panel, at 10). The panel reiterated that when the two officers arrived at the scene of the accident they found Mr. Petrarca in the driver's seat, bloodied, and in dire need of medical attention. (Id., at 9-10). The members of the panel noted that Mr. Petrarca's friend who was traveling in a separate car informed the officers that he was at a bar with Mr. Petrarca before the accident occurred. (Id., at 10). And they recalled that Officer Schaffran had testified that he noticed an odor of alcohol coming from Mr. Petrarca's breath and his eyes were bloodshot and watery. (Id.) The panel held that,

> 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].'

Id. On the element of the voluntariness of his refusal vel non, the panel found Magistrate Goulart's decision turned primarily on a credibility determination in weighing the testimony of Dr. Roye and the two police officers. (Id.) The panel noted that Magistrate Goulart found Officer Schaffran's testimony that Mr. Petrarca was "awake, alert, and responsive enough to a point where he could make a decision in response" to the officer's instructions credible, while he was unconvinced by Dr.

Roye's testimony. (Decision of Panel, at 10-11). The panel then approved the burden-shifting framework employed by Magistrate Goulart. (Id., at 14).

The panel cited case law from several jurisdictions and concluded that the burden-shifting framework imposed by the trial magistrate in this case was not a novel concept. (Id., at 12-13). McCormick on Evidence, 6th Edition, Vol. 2 § 337 (2006) was also cited for the general proposition 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." (Id., at 13). The panel found that the State had met its burden of proving a knowing and voluntary refusal and that Mr. Petrarca bore the burden of rebutting this element. (Id., at 14). The panel held that he did not meet this burden and sustained Magistrate Goulart's decision. (Id.)

Magistrate Noonan filed a concurring opinion to the panel's decision. He agreed with the majority's conclusion that the trial magistrate's decision should be sustained. (Decision of Panel, at 15; Noonan, M., concurring). However, he disagreed with the trial magistrate's utilization of the burden-shifting framework. (Id.) Magistrate Noonan cited Rule 17 of the Traffic Tribunal Rules of Procedure in support of his position, noting that the rule clearly requires the prosecution to bear the burden of proof to a standard of clear and convincing evidence. (Id.) Magistrate Noonan's primary concern with imposing the burden-shifting framework in Rhode Island was that it would result in too much uncertainty in the trial of refusal cases. (Id., at 16). He contended that such a framework would make it difficult for

defendants to know when the burden has shifted to them. (Id.) Furthermore, he noted that there is no statute or rule mandating or permitting such a burden shift in Rhode Island. (Id.)

On July 22, 2011, Mr. Petrarca filed an appeal to the Sixth Division District Court. Memoranda have been received from Appellant Petrarca and the Appellee State of Rhode Island.

II. STANDARD OF REVIEW

The standard of review which this Court must employ is enumerated in Gen. Laws 1956 § 31-41.1-9(d), which provides as follows:

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

This standard is akin to the standard of review found in Gen. Laws 1956 § 42-35-15(g), the State Administrative Procedures Act ("APA"). Accordingly, I shall rely on cases interpreting the APA as guideposts in the review process.

Under the APA standard, the District Court "* * * may not substitute its judgment for that of the agency and must affirm the decision of the agency unless its findings are 'clearly erroneous.'"[4] The Court will not substitute its judgment for that of the agency (here, the panel) as to the weight of the evidence on questions of fact.[5] Stated differently, the findings of the panel will be upheld even though a reasonable mind might have reached a contrary result.[6]

III. APPLICABLE LAW

A. THE REFUSAL STATUTE.

This case involves a charge of refusal to submit to a chemical test under Gen. Laws 1956 § 31-27-2.1. The civil offense of refusal is predicated on the implied consent law, which is stated in subsection 31-27-2.1(a):

> (a) Any person who operates a motor vehicle within this state shall be deemed to have given his or her consent to chemical tests of his or her breath, blood, and/or urine for the purpose of determining the chemical content of his or her body fluids or breath. No more than two (2) complete tests, one for the presence of intoxicating liquor and one for the presence of toluene or any controlled substance, as defined in § 21-28-1.02(7), shall be administered at the direction of a law enforcement officer having reasonable grounds to believe the person to have been driving a motor vehicle within this state while under the influence of intoxicating liquor, toluene, or any controlled substance, as defined in chapter 28 of title 21, or any combination of these. * * *

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4 Guarino v. Department of Social Welfare, 122 R.I. 583, 584, 410 A.2d 425 (1980)(citing R.I. GEN. LAWS § 42-35-15[g][5]).

5 Cahoone v. Board of Review of the Dept. of Employment Security, 104 R.I. 503, 246 A.2d 213 (1968).

6 Cahoone v. Board of Review of the Dept. of Employment Security, 104 R.I. 503, 246 A.2d 213 (1968).

Gen. Laws 1956 § 31-27-2.1(a). The four elements of a charge of refusal which must be proven at trial before the Traffic Tribunal are stated later in the statute:

> * * * If the traffic tribunal judge finds after the hearing that: (1) the law enforcement officer making the sworn report had reasonable grounds to believe that the arrested person had been driving a motor vehicle within this state while under the influence of intoxicating liquor, toluene, or any controlled substance, as defined in chapter 28 of title 21, or any combination of these; (2) the person while under arrest refused to submit to the tests upon the request of a law enforcement officer; (3) the person had been informed of his or her rights in accordance with § 31-27-3; and (4) the person had been informed of the penalties incurred as a result of noncompliance with this section; the traffic tribunal judge shall sustain the violation. The traffic tribunal judge shall then impose the penalties set forth in subsection (b) of this section * * *. Gen. Laws 1956 § 31-27-2.1(c).

The Rhode Island Supreme Court has interpreted the phrase "reasonable grounds" in the statute as equivalent standard to "reasonable suspicion." The Court stated simply, " * * * [I]t is clear that reasonable suspicion is the proper standard for evaluating the lawfulness of the stop." State v. Jenkins, 673 A.2d 1094, 1097 (R.I. 1996). On most occasions an alcohol-related traffic offense (*i.e.*, driving under the influence or refusal) results after a motorist has been stopped for violation of a lesser (non-alcoholic related) traffic offense.[7] Such stops have been found to comport with the mandate of the Fourth Amendment that searches and seizures be reasonable. See Whren v. United States, 517 U.S. 808, 810 (1996) (cited in State v. Bjerke, 697 A.2d 1069, 1072 [1997]).

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[7] See Gen. Laws 1956 § 31-27-12 (requiring officer who observes traffic violation to issue summons). In Rhode Island, most minor traffic offenses are civil violations. See Gen. Laws 1956 § 31-27-13(a).

After a stop, the procedures necessary to sustain a refusal charge (usually beginning with the administration of field sobriety tests) may be commenced when an officer has reasonable suspicion to believe that a person has been driving under the influence. State v. Bjerke, 697 A.2d 1069 (1997); State v. Perry, 731 A.2d 720 (1999). At the same time, the officer's acquisition of reasonable suspicion that a motorist was operating under the influence becomes the first element of a refusal charge. See Gen. Laws 1956 § 31-27-2.1(c). Thus, the Court has pronounced that in alcohol cases, reasonable suspicion is the standard, which if present, empowers the arresting/charging officer to take two crucial actions in alcohol cases: (1) the initial stop and (2) the request of the motorist to take a chemical test. The Court confirmed that the reasonable suspicion test carries this dual role in State v. Perry, 731 A.2d 720, 723 (1999).

IV. ISSUE

The issue before the Court is whether the decision of the appeals panel was supported by reliable probative and substantial evidence in the record or whether or not it was clearly erroneous or affected by error of law. More precisely, was it an error of law for the panel to shift the burden of proof on an essential element to the defendant? And, did the panel err in finding the State had established the elements of reasonable grounds and a knowing and voluntary refusal by clear and convincing evidence?

V. ANALYSIS

In most cases, I would address the question of whether the State established the requisite elements of a refusal charge first. However, this case is atypical because the Appellant has raised an important procedural issue, namely the burden-shifting framework utilized by the trial magistrate. Therefore, I will address this procedural question before I consider whether the elements of the refusal charge were established by clear and convincing evidence.

A. DID THE PANEL COMMIT ERROR IN SHIFTING THE BURDEN OF PROOF ON AN ESSENTIAL ELEMENT OF A REFUSAL CHARGE FROM THE STATE TO THE DEFENDANT?

At the outset, it should be noted that the issue of the evidence a motorist must produce in order to rebut the State's proof that he knowingly and voluntarily refused a chemical test has not been addressed in Rhode Island. In the absence of local precedent, the trial magistrate and the appellate panel looked to the law in other jurisdictions and concluded that the burden-shifting framework already discussed was the appropriate approach. To determine if their conclusion is correct we must answer two questions: (1) whether Rhode Island law permits shifting the burden of persuasion from the State to a defendant in a quasi-criminal civil proceeding like a refusal case; and (2) if the first question is answered in the negative, whether the burden-shifting framework approved by a majority of the appeals panel improperly shifts the burden of proof (specifically, the burden of persuasion) to a defendant in a refusal case.

1. Rhode Island Law Does Not Permit Shifting the Burden of Persuasion To a Defendant.

The resolution of this question requires a careful distinction between two key evidentiary concepts, namely the burden of persuasion and the burden of production or "of going forward with the evidence." Both concepts are encompassed by the broader concept of the general burden of proof, but each is allocated between litigants differently. DeBlois v. Clark, 764 A.2d 727, 731 (R.I. 2001) (citing Murphy v. O'Neill, 454 A.2d 248 (R.I. 1983)). The burden of persuasion "refers to [a] litigant's burden of establishing the truth of a given proposition by such quantum of evidence as the law may require;" this burden never shifts. (Id.) The burden of production, however, can shift from one party to another as a case progresses. Id. and see In re Jarvis, 766 A.2d 395, 399 (R.I. 2001) (noting the burden of persuasion remains with the State in a termination of parental rights case, while the burden of production can shift).

In the context of a refusal charge, the relevant burden of proof is found in Traffic Tribunal Rule of Procedure 17 and Gen. Laws 1956 § 31-41.1-6(a). Rule 17(a) provides that "[t]he burden of proof shall be on the prosecution to a standard of clear and convincing evidence." (Emphasis added). Accord, Gen. Laws 1956 § 31-41.1-6(a). This language clearly places the burden of persuasion in a civil traffic case, including refusal charges, on the prosecution. Therefore, the prosecution is required to persuade the court that the four elements set forth in § 31-27-2.1 have been satisfied in each case. I find that this language clearly and unambiguously provides

that Rhode Island law does not allow shifting the burden of persuasion to a defendant in a refusal case. See DeBlois, 764 A.2d at 731. This does not mean the defendant-motorist may not bear a burden of production regarding a potential defense in a refusal case, but I believe Rhode Island law simply does not allow the burden of persuasion to shift to the defendant. See Jarvis, 66 A.2d at 399.

The Supreme Court of Rhode Island has applied a similar approach to shifting burdens of proof in other contexts. In Jarvis, the Court noted that in a case seeking to terminate the parental rights of a parent, the State will always bear the burden of persuasion, but the burden of producing rebuttal evidence will fall on the parent once a prima facie case has been made. Jarvis, 766 A.2d at 399 (citing State v. Neary, 122 R.I. 506, 511-12, 409 A.2d 551, 555 [1979]). Similarly, in Infantolino v. State,[8] the Court held that defendants in homicide cases bear the burden of producing evidence of self defense if they choose to use that defense, while the State will bear the burden of persuading the Court that the defense is inapplicable. This rule was also upheld in a purely civil context in DeBlois. 764 A.2d at 731.

Furthermore, a review of additional extra-jurisdictional cases demonstrates that this view of Rhode Island law is consistent with the general rule which applies in refusal cases.[9] Although some states do shift the burden of persuasion to drivers in

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[8] 414 A.2d 793, 796 (R.I. 1980).

[9] Almost all states impose a presumption of validity regarding an administrative order revoking a motorist's license for drunk driving or refusing to take a chemical test once an arresting officer's sworn report is provided. The motorist will then

drunk driving and refusal cases, others hold that the State bears the burden of establishing the elements of a refusal charge, while a defendant only bears the burden of producing rebuttal evidence. See, e.g., Schroeder v. Dir. of Revenue, 216 S.W.3d 711, 713 (Mo. Ct. App. 2007); Staggs v. Dir. of Revenue, 223 S.W.3d 866, 869 (Mo. Ct. App. 2007) (holding the State has the burden of proof on all of the prima facie elements). In the majority of the states that do shift the burden, the framework generally stems from language in the State's drunk driving and refusal statutes.[10] There is no language in § 31-27-2.1(b) requiring (or permitting) a burden-shift in a refusal case.

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generally bear the burden of producing rebuttal evidence, but the driver's burden is only one of production not one of persuasion. 7A AM. JUR. 2D Automobiles § 153 (2007). Rhode Island's refusal statute does not provide for such a presumption. See Gen. Laws 1956 § 31-27-2.1(b).

[10] For example, under Nebraska's refusal statute, Neb. Rev. Stat. § 60-498.01(7) (2010), once the arresting officer's report is received the order revoking a motorist's license is prima facie valid "and it becomes the [motorist's] burden to establish by a preponderance of the evidence grounds upon which the operator's license revocation should not take effect." See State v. Hansen, 542 N.W.2d 424, 428 (Neb. 1996); McPherrin v. Conrad, 537 N.W.2d 498, 501 (Neb. 1995).

The statutes in Missouri and Pennsylvania are silent on the issue of a burden shift in refusal cases. See 75 Pa. CONS. STAT. ANN. § 1547 (West 2011); MO. ANN. STAT. § 577.041 (West 2011). In Missouri, the courts have explicitly held that the burden of proof lies exclusively with the state, and the motorist merely bears a burden of production and not persuasion. Schroeder v. Dir. of Revenue, 216 S.W.3d 711, 713 (Mo. Ct. App. 2007). As noted by the majority of the panel, the Pennsylvania courts have taken a different tack and once the State makes a prima facie case, the defendant driver then bears the burden of proving he or she could not make a knowing and conscious refusal by competent evidence. Commonwealth v. O'Connell, 555 A.2d 873, 248-49 (Pa. 1989). I believe Rhode Island's law can be distinguished from all of these states because of Rule 17's explicit requirement that the State bear the burden of persuasion throughout the proceeding.

As discussed above, in his concurring opinion Magistrate Noonan concluded that the burden-shifting framework used by the trial magistrate should not be approved because there is no statute or rule in Rhode Island mandating (or permitting) such an approach. He stated,

> 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 [v. California, 291 U.S. 82 (1934)] case cited in the Decision of the Panel, there is no statute or rule that mandates the burden shift.
>
> Again, the record in this matter does no[t] 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.
> (Citation added).

Decision of Panel, at 16 (Noonan, M., Concurring). As my analysis will reveal, I agree with Magistrate Noonan's conclusion that Rhode Island law does not support the burden-shift applied by the trial magistrate and approved by the panel.

2. The Burden-Shifting Framework Proposed by the Panel Impermissibly Shifts the Burden of Persuasion.

As noted by the appeals panel, the trial magistrate adopted[11], verbatim, the burden-shifting framework utilized by the courts of the Commonwealth of Pennsylvania. Decision of Panel, at 12. Under this approach, once the State establishes all the elements of a refusal charge under the Pennsylvania statute, the burden then shifts to the defendant driver "to prove by competent evidence that he or she was unable to make a knowing and conscious refusal to consent to the chemical test." Commonwealth v. Holsten, 615 A.2d 113, 114-15 (Pa. Commw. Ct. 1992) (citing Commonwealth v. O'Connell, 555 A.2d 873, 248-49 (Pa. 1989)) (emphasis added). This approach clearly shifts the burden of persuasion to the driver. This is even more apparent when one reviews the application of this rule by the trial magistrate. When he rendered his decision, the trial magistrate essentially stated that the defendant had not met his burden of rebutting a presumption that he could

[11] To be precise, the trial magistrate embraced the Pennsylvania protocol, but he did not truly utilize it. As we have noted, the trial magistrate did not invoke the burden-shifting framework until the deliberation stage of the trial. To that point, the trial had proceeded without reference to it. In my view this circumstance is highly significant for two reasons. In the first place, the fact that it was not disclosed to the defense until after the State and the defense had rested carries due process concerns of notice and the opportunity to be heard — in a meaningful way. Conversely, the fact that this contested procedure did not come into play until the deliberation stage means the trial court really did not utilize an improper procedure — at worst, he applied an incorrect rule of law. As we shall see, this will allow us to avoid remand by considering whether the guilty verdict he returned was clearly erroneous in light of the proper rule of law.

knowingly and voluntarily refuse by clear and convincing evidence. (Trial Transcript V, at 23-24); see also Decision of Panel, at 12.

Therefore, given that Rhode Island law generally does not allow the burden of persuasion to shift, and that the decision of the panel shifted the burden, I feel constrained to conclude that the panel committed error in sanctioning this approach — even though it was only used in a limited way. In my view the State must bear the burden of persuasion (although not the burden of production) throughout the proceeding, and if rebuttal evidence is introduced, it is always the government's burden to persuade the Court it is unpersuasive. See Infantolino, 414 A.2d at 796.

3. The Record Contains Sufficient Evidence To Support the Trial Magistrate's Finding that Mr. Petrarca's Refusal to Submit to a Chemical Test Was Knowing and Voluntary.

Of course, having found the trial magistrate's use of the burden-shifting framework in his deliberations to be contrary to law, this Court could simply remand the instant case for further proceedings. But I shall not summarily recommend remand. Instead, following the lead of the concurring decision below, I must now address the issue of whether the State proved a knowing and voluntary refusal by clear and convincing evidence. If the State proved this element — notwithstanding any deviation from proper trial procedure — then the trial magistrate's use of the burden-shifting framework may be deemed to have been non-prejudicial and

harmless error and remand is unnecessary.[12] For the reasons that follow, I believe the record does indeed support a finding that Mr. Petrarca freely and voluntarily refused a chemical test.

In his bench decision, the trial magistrate was very clear in explaining his thought process in deciding this issue. The magistrate considered the testimony of Officers Cerullo and Schaffran and weighed their testimony against the expert opinion offered by Dr. Roye. (Trial Transcript V, at 21-24). In conducting this analysis, the trial magistrate found the testimony from the officers that Mr. Petrarca was alert and responsive when he was informed of his rights and the penalties for refusal to have more weight than the opinion of Dr. Roye, which the magistrate felt lacked foundation. (Id.)

On appeal, the panel found that the trial magistrate's determination on this issue hinged on a credibility determination. Decision of Panel, at 10. The panel noted:

> [Magistrate Goulart] 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 [test] 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.

(Id., at 10-11.) The panel noted that since they did not have an opportunity to view the live testimony of the police and Dr. Roye, it would be an error of law for them to

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12 Particularly since only the trial magistrate's deliberations were affected by this faulty procedure. See discussion, supra at 20 fn. 11.

disturb the trial magistrate's credibility determinations. Magistrate Noonan agreed with the majority's conclusion on this point stating, "[the trial magistrate's] decision was based primarily on credibility determinations, and this panel shall not substitute our judgment for his." (Id., at 15; Noonan, M., Concurring). I too must agree that the trial magistrate's decision to give greater weight to the testimony of the percipient witnesses — i.e., the officers, who actually saw Mr. Petrarca after the accident and interacted with him — and less weight to the testimony of the medical expert — whose testimony was solely based on a review of medical records — must be deemed to be well-supported by the evidence of record.

When reviewing the decision of a trial magistrate or justice, Rhode Island law clearly states that an appellate body "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) (emphasis added). The findings of the trial magistrate or justice must be upheld even if a reasonable mind may have reached a contrary result. Cahoone v. Board of Review of the Dept. of Employment Security, 104 R.I. 503, 246 A.2d 213 (1968). In this case, Magistrate Goulart's decision turned on weighing the testimony of Dr. Roye against that offered by Officers Cerullo and Schaffran. It was not the panel's role, nor is it mine, to second-guess his exercise of his sound judgment. Therefore, I find that the panel's decision to sustain the trial magistrate's finding that the State established a

knowing and voluntary refusal by clear and convincing evidence is supported by reliable, probative and substantial evidence of record and is not clearly erroneous.

B. DID THE PANEL ERR IN FINDING THE STATE HAD ESTABLISHED REASONABLE GROUNDS BY CLEAR AND CONVINCING EVIDENCE?

In addition to his procedural and substantive arguments regarding his alleged inability to knowingly and voluntarily refuse an chemical test, Mr. Petrarca presented an additional reason for setting aside the decision of the panel: this is his assertion that the panel erred in finding Officers Cerullo and Schaffran had reasonable grounds to believe Mr. Petrarca was operating under the influence. (Brief of Appellant, at 3). In order to resolve this question, we must first return to the findings of the trial magistrate and the panel.[13]

1. Findings of the Trial Magistrate and the Appeals Panel on the Element of Reasonable Grounds.

Magistrate Goulart began his oral decision by noting that reasonable suspicion to make the initial traffic stop was not an issue in this case because the police were investigating a single vehicle car accident when they arrived on the scene. (Trial Transcript V, at 12). The magistrate also noted he was satisfied that Mr. Petrarca was operating the vehicle because Officers Schaffran and Cerullo found him in the driver's seat upon their arrival. (Id., at 13). He then reviewed the evidence on the issue of whether the officers had reasonable grounds to believe Mr. Petrarca was operating under the influence, and found the evidence sufficient. The record showed

[13] These findings have already been reviewed, but in the interest of clarity and thoroughness I will reiterate the key facts in the next section.

that Mr. Petrarca made no attempt to explain the cause of his accident to the two police officers when they asked him what happened. (Id., at 14). Furthermore, the officers observed a strong odor of alcohol on Mr. Petrarca's breath and Officer Schaffran testified that he noticed Mr. Petrarca's eyes were bloodshot and watery. (Id., at 14; Trial Transcript II, at 8). Mr. Petrarca's speech was also slurred. (Trial Transcript V, at 14).

Furthermore, Mr. Petrarca's friend, Dustin Silvia, informed Officer Schaffran that he had been drinking at a bar with Mr. Petrarca before the accident. (Trial Transcript II, at 9). After reviewing all of this evidence, Magistrate Goulart noted that "[e]ach of these factors alone or facts alone may not justify a police officer having probable cause but * * * [the] facts and circumstances described above viewed cumulatively did provide probable cause to make an arrest." (Trial Transcript V, at 15).

The appeals panel reiterated the same facts, stating,

> [i]n 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[r] 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 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].' We therefore find no error in the trial judge's conclusion that [the] police had the requisite level of suspicion to believe Appellant had been operating his vehicle under the influence of alcohol.

Decision of Panel, at 10 (internal citations omitted). Based on the panel's declination to address the issue of operation and probable cause to make the initial stop, it appears the panel agreed with Magistrate Goulart's conclusion on these issues.

2. Did the State Establish the Element of "Reasonable Grounds" by Clear and Convincing Evidence?

After reviewing the evidence in this case, I am more than satisfied that the State proved the element of reasonable grounds by clear and convincing evidence.

From among the several cases from the Rhode Island Supreme Court discussing the evidence required to establish reasonable grounds in drunk driving cases, I have selected State v. Perry, supra, for first discussion because I believe it is the most analogous case to the present situation. In Perry, the motorist left the scene of an accident and a police officer acting on information from the other driver involved in the collision went to the motorist's home. Perry, 731 A.2d at 722. Once at the motorist's home, the officer observed front end damage to the driver's vehicle and, upon making contact with the driver, observed a strong odor of alcohol on his breath and that his eyes were bloodshot. (Id.) The motorist was stumbling and had so much trouble standing that the officer did not conduct any field sobriety tests. (Id.) On these facts, the Court held that the evidence was sufficient to show the officer

had reasonable grounds to believe the driver operated a car under the influence. (Id., at 723).

In State v. Bjerke, supra, the police initially stopped the motorist's vehicle based on information from their dispatcher that his vehicle's registration had been suspended and he was operating the car in violation of Rhode Island law. Bjerke, 697 A.2d at 1070. When the investigating officer approached the driver in his vehicle, the officer noticed that the driver's speech was slurred and that he was emitting a strong odor of alcohol. (Id.) In finding the evidence sufficient to support a refusal charge, the Court said,

> the defendant's commission of a criminal misdemeanor alone gave the officer probable cause to stop and detain him, and then from that point on, any evidence obtained pursuant to that lawful stop, such as the odor of alcohol, the slurred speech, and bloodshot eyes, would in effect be in plain view of the arresting officer and would support an arrest for suspicion of driving while under the influence.

697 A.2d at 1072 (emphasis added). Bjerke establishes that a motorist emitting the odor of alcohol and having bloodshot eyes is acceptable evidence of reasonable grounds.

In State v. Bruno, 709 A.2d 1048, 1049-50 (R.I. 1998), the Court held that a police officer had reasonable grounds to believe a motorist was driving under the influence when the officer observed the motorist vomit on the side of the road and then drive erratically – swerving lane to lane and accelerating to over eighty miles per hour on Route 4. Furthermore, after stopping the driver, the officer in Bruno observed vomit on the interior of the vehicle and detected a strong odor of alcohol.

(Id., at 1049.) The motorist's speech was slurred and the driver admitted that he had consumed alcohol. (Id.) Thus, we can discern from Bruno that erratic driving, an odor of alcohol, slurred speech, and admitting that one has consumed alcohol are all relevant to establishing reasonable grounds.

All in all, the State presented five indicia that Mr. Petrarca was operating his vehicle under the influence at the time of his accident: (1) Mr. Petrarca was involved in a single car accident and he did not offer any explanation for the crash when questioned by police; (2) Mr. Petrarca's speech was slurred while he was being questioned by the police; (3) Mr. Petrarca's eyes were bloodshot and watery; (4) both responding officers testified that they noticed a strong odor of alcohol emanating from Mr. Petrarca's breath; and (5) Officer Schaffran testified that Mr. Petrarca's friend who was standing nearby informed him that he was drinking at a bar with Mr. Petrarca prior to the accident and that Mr. Petrarca nodded in acknowledgement.

Applying the limited standard of review applicable to District Court review of decisions of the Traffic Tribunal appellate panel, I have concluded these facts were sufficient — when measured against the standards established in the Supreme Court decisions discussed above — to allow this Court to find that the trial magistrate and the appellate panel were not clearly erroneous in finding that Officers Cerullo and Schaffran had reasonable grounds to believe Mr. Petrarca was driving under the influence and that this conclusion is supported by substantial evidence. See Gen.

Laws 1956 § 31-41.1-9(d), supra at 12-13 and Link v. State, 633 A.2d 1345, 1348 (R.I. 1993).

VI. CONCLUSION

Upon careful review of the evidence, I recommend that this Court find that the decision of the appellate panel to sustain the refusal charge against Appellant was made upon lawful procedure and was not affected by error of law. Gen. Laws 1956 § 31-41.1-9. Furthermore, said decision is not clearly erroneous in view of the reliable, probative and substantial evidence on the whole record. Gen. Laws 1956 § 31-41.1-9.

Accordingly, although I must withhold approval from that portion of the panel's opinion sustaining the trial magistrate's use of the burden-shifting framework, I nevertheless recommend that the decision of the appellate panel sustaining appellant's conviction on the charge of refusal to submit to a chemical test be AFFIRMED.

/s/
Joseph P. Ippolito
MAGISTRATE

March 21, 2012