

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellant	:	
	:	
v.	:	
	:	
JOSEPH WALTER DERHAMMER,	:	
	:	
Appellee	:	No. 935 MDA 2013

Appeal from the Order entered on May 14, 2013  
in the Court of Common Pleas of Luzerne County,  
Criminal Division, No. CP-40-CR-0003474-2012

BEFORE: GANTMAN, P.J., OTT and MUSMANNNO, JJ.

MEMORANDUM BY MUSMANNNO, J.:

**FILED APRIL 29, 2014**

The Commonwealth of Pennsylvania appeals from the Order granting the pre-trial Motion *in limine* filed by Joseph Walter Derhammer (“Derhammer” or the “Defendant”), excluding evidence of his pre-arrest silence to police officers following an alleged arson that claimed the lives of Derhammer’s girlfriend and another resident of the home (collectively “the victims”).<sup>1</sup> We affirm.

In its Opinion, the trial court thoroughly addressed the relevant procedural history, facts, and matters pertinent to the Motion *in limine*. **See**

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<sup>1</sup> In filing this interlocutory appeal, the Commonwealth complied with Pennsylvania Rule of Appellate Procedure 311(d), which provides that “[i]n a criminal case, under the circumstances provided by law, the Commonwealth may take an appeal as of right from an order that does not end the entire case where the Commonwealth certifies in the notice of appeal that the order will terminate or substantially handicap the prosecution.” Pa.R.A.P. 311(d).

Trial Court Opinion, 8/13/13, at 1-6. We adopt the trial court's detailed discussion herein by reference. **See id.**

On appeal, the Commonwealth presents the following issue for our review: "Did the trial court err by granting [Derhammer's M]otion *in limine*, thus precluding the Commonwealth from presenting evidence that [Derhammer], after learning of a fire at his girlfriend's home, did not ask anyone what had happened to her?" Brief for the Commonwealth at 4.

Preliminarily, we observe that

[w]hen reviewing a ruling on a motion *in limine*, we apply an evidentiary abuse of discretion standard of review. The admission of evidence is committed to the sound discretion of the trial court and our review is for an abuse of discretion. A trial court's ruling regarding the admissibility of evidence will not be disturbed unless that ruling reflects manifest unreasonableness, or partiality, prejudice, bias, or ill-will, or such lack of support as to be clearly erroneous.

**Commonwealth v. Ori**, 2014 Pa. Super. LEXIS 116, \*\*95-96 (Pa. Super. 2014) (citation, quotation marks, brackets, and paragraph break omitted).

The Commonwealth argues that the trial court abused its discretion by granting Derhammer's Motion *in limine*, thereby precluding the Commonwealth from presenting evidence of Derhammer's pre-arrest silence, and failure to inquire about the victims' fate after learning of the fire at their residence.<sup>2</sup> Brief for the Commonwealth at 8. In support of this claim, the Commonwealth principally relies upon the United States Supreme Court's

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<sup>2</sup> The Commonwealth avers that Derhammer's failure to ask the police if the victims were safe constitutes "[a] failure to make a normal and expected inquiry." Brief for the Commonwealth at 8.

recent decision in ***Salinas v. Texas***, 133 S. Ct. 2174 (2013) (plurality). The Commonwealth points out the ***Salinas*** Court's statement that, although no ritualistic formula is necessary in order to invoke one's Fifth Amendment privilege against self-incrimination, a witness or suspect does not do so by simply standing mute. Brief for the Commonwealth at 8; ***see also Salinas***, 133 S. Ct. at 2178. The Commonwealth points out that Derhammer did not invoke his right to remain silent when he voluntarily spoke to the police officers at the scene of the house fire. Brief for the Commonwealth at 9. Moreover, according to the Commonwealth, "[Derhammer's] failure to inquire what happened to his girlfriend is admissible because he voluntarily waived that right. [Derhammer] signed a waiver of his ***Miranda***<sup>[3]</sup> rights, and spoke to the police officers." ***Id.*** at 9 (footnote added). For these reasons, the Commonwealth contends the trial court's evidentiary ruling constitutes reversible error. ***Id.*** at 10. We disagree.

In its comprehensive Pa.R.A.P. 1925(a) Opinion, the trial court addressed the Commonwealth's claims, thoroughly discussed the applicable law and distinguished the cases upon which the Commonwealth relies, ultimately determining that the court properly granted Derhammer's Motion *in limine* and excluded the evidence in question. ***See*** Trial Court Opinion,

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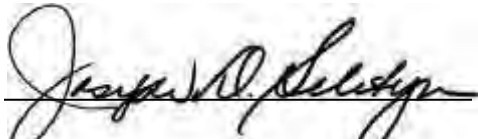
<sup>3</sup> ***Miranda v. Arizona***, 384 U.S. 436 (1966).

J-S10045-14

8/13/13, at 8-14.<sup>4</sup> After review, we determine that the trial court's cogent analysis is supported by the law, and we therefore affirm on this basis in concluding that the court did not abuse its discretion by granting Derhammer's Motion *in limine*. **See id.**

Order affirmed.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.  
Prothonotary

Date: 4/29/2014

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<sup>4</sup> On page 13 of the Trial Court Opinion, the court fails to provide the full citation to our Pennsylvania Supreme Court's decision in **Commonwealth v. Champney**, 65 A.3d 386 (Pa. 2013) (plurality).

S10045/14

COMMONWEALTH OF PENNSYLVANIA : IN THE COURT OF COMMON PLEAS  
 : OF LUZERNE COUNTY  
 vs. :  
 : CRIMINAL DIVISION  
 JOSEPH WALTER DERHAMMER, :  
 :  
 Defendant : NO. 3474 OF

CRIMINAL DIV.  
 LUZERNE COUNTY  
 2013 AUG 13 PM 1:14  
 CLERK OF COURTS

OPINION

**I. PROCEDURAL HISTORY**

On November 21, 2012, the Commonwealth issued a seven (7) count information in the above-captioned matter charging the Defendant with two (2) counts of criminal homicide and related offenses as a result of an alleged arson which occurred on April 13, 2009, at the residence of Joseph Kostelnick, 46 Chester Street in the City of Wilkes-Barre.

The matter was assigned to the author of this opinion and an initial pretrial conference was conducted on January 15, 2013, following which a scheduling order was issued on January 24, 2013.

The Defense filed an omnibus pretrial motion on March 15, 2013, and the Commonwealth submitted a brief in opposition. A hearing was scheduled for and conducted on April 19, 2013.

Thereafter, on May 3, 2013, we received "Defendant's motion *in limine* to preclude reference to Defendant's alleged silence." Paragraph five (5) of the aforesaid motion indicates the Defense anticipates the Commonwealth will call Detective Ronald J. Foy, Jr., who will testify consistently with a supplemental report issued on April 13, 2009, which, in part, provides: "During this entire process, including the interaction with Derhammer at the scene, during his transport, and while he was waiting, he never asked what happened at the house or if Nancy, CJ, or Joe were alright." A hearing on the aforesaid motion was scheduled for and conducted on May 13, 2013, the transcript of which consists of fourteen (14) pages.<sup>1</sup>

An order was issued on May 14, 2013, granting Defendant's motion *in limine*. An additional order was issued on that date denying Defendant's request, included in the omnibus pretrial motion, to suppress statements made on April 13, 2009.

<sup>1</sup> At that hearing, the parties agreed that, in deciding the motion *in limine*, the Court would rely on the factual record made at the suppression hearing held on April 19, 2013.

The Commonwealth filed a Notice of Appeal to this Court's determination regarding the motion *in limine* on May 14, 2013. An order was issued pursuant to Pa.R.A.P. 1925(b) on May 17, 2013, and the Commonwealth submitted a Concise Statement of Errors Complained of on Appeal on June 11, 2013. Defendant's response was received on June 18, 2013.

## II. LAW AND DISCUSSION

The Commonwealth's concise statement sets forth the following:

The Court abused its discretion in granting the Defendant's motion to exclude evidence indicating that the Defendant did not ask police officers about what had happened and about whether his family was all right. The evidence at issue would not be an improper reference to the Defendant's silence. The evidence would properly be admissible, as the Defendant did not invoke his right to silence, and instead gave statements to the police. In such a circumstance, the Commonwealth may present evidence as to tacit admissions within the Defendant's statements. *See, Commonwealth v. Jermyn*, 533 A.2d 74 (Pa. 1987); *Commonwealth v. Champney*, 2013 WL 1759247 (Pa., April 24, 2013); *Commonwealth v. Adams*, 39 A.3d 310 (Pa. Super. 2012).

In order to address the Commonwealth's allegation of error, it is necessary to review and discuss the statements attributed to the Defendant in the context of the April 19, 2013 pretrial hearing. Mr. Derhammer made three (3) separate statements to various members of law enforcement on April 13, 2009.

Deputy Chief Donald Crane of the Wilkes-Barre Police Department was assisting at the scene of the fire on April 13, 2009. (April 19, 2013 N.T. 18, 19). Deputy Chief Crane was in uniform and at approximately 9:00 a.m., was approached by an individual subsequently identified as Mr. Derhammer. This witness indicated:

...[Defendant] came over to me and asked me what happened, and I said, Well there's been a fire. Who are you? And he told me his name, that he was Mr. Derhammer. He said, My girlfriend lived there. He had been out of town for a while, he came to check on her. So realizing the connection, he said it was his girlfriend, I sought out one of the detectives that was at the scene thinking they may want to talk to him. I didn't have the need to talk to him.

...At first he asked me what happened. And it was obvious. I told him there had been a fire here. And he said something to the effect that this is my girlfriend's house, I've been out of town, I came to check on her or something to that effect.

(Id. N.T. 21, 22).

Detective Ronald J. Foy of the Wilkes-Barre Police Department was the second witness called by the Commonwealth during the April 19, 2013 hearing.

Detective Foy indicated he was involved in the investigation of the fatal fire which occurred at 46 Chester Street on April 13, 2009. (Id. N.T. 28). Detective Foy was wearing a fireman's outfit and fire helmet at the scene. This witness stated he was informed by Deputy Chief Crane that Mr. Derhammer was standing in the street in front of one of the neighboring homes. (Id. N.T. 29). Detective Foy further indicated he was aware "Mr. Derhammer had resided at the house, that the relationship between the deceased, so I started walking over to him to talk to him." (Id. N.T. 30). Detective Foy approached Mr. Derhammer accompanied by Detective Captain Robert Zavada. According to Detective Foy:

When [Detective Captain Zavada] walked up to him after saying You're Joseph Derhammer, he said, Yes.[Detective Caption Zavada] said, we have a real bad situation here. This isn't the place to talk about it. We'll give you a ride to the police station where we can talk about what happened.

(Id. N.T. 30).

Detective Foy described the Defendant's response: "[Defendant's] immediate reaction was he raised his hands, palms out, stepped back and said, Police (sic) station, I didn't do anything wrong." (Id. N.T. 32). Mr. Derhammer was advised he was not under arrest and "[W]e told him we're just going to talk to you about what happened." (Id. N.T. 32). Detective Foy further explained that other family members were arriving at the scene and were transported to the police station for their safety as well as for the safety of others given the traumatic nature of what occurred. Also, present at the scene were police and fire personnel. Detective Foy indicated the Defendant agreed to go to the police station and was transported by Chief County Detective Michael Dessoie. (Id. N.T. 33).

Approximately one half hour to forty-five minutes after the Defendant was transported to the station, Detective Foy was requested to leave the scene and speak with the Defendant. Detective Foy initially observed the Defendant seated alone at a table in the interview room. The door to the interview room was open and the Defendant was not restrained in any way. (Id. N.T. 34). Mr. Derhammer's demeanor was described as "calm". Detective Foy was accompanied by

Detective Lieutenant Daniel Yursha of the Luzerne County District Attorney's Office. When asked to describe the demeanor of the law enforcement officers, Detective Foy stated "Walked in just to talk to him. Normal conversation. A bit apprehensive because of the situation involving the deaths of two people." (Id. N.T. 35).

Detective Foy further indicated Mr. Derhammer was not coerced in any way, stating that no force or threats were made during the course of the interview. (Id. N.T. 35).

Prior to the interview, Mr. Derhammer executed a "Miranda rights waiver form", introduced as Commonwealth's Exhibit No. 1. (Id. N.T. 35, 36). This document was executed at 10:06 a.m. on April 13, 2009. Mr. Derhammer indicated he was willing to speak with the detectives and provided a statement regarding the nature of his relationship with the alleged victims and his whereabouts prior to and during April 13, 2009. (Id. N.T. 38-48). Detective Foy testified to the following concerning Derhammer's statement at the station:

ADA: And, Detective Foy, at this point, had you or Detective Yursha told the defendant that Nancy and CJ had perished in the fire?

DET. FOY: No, we had not.

ADA: Had he asked what occurred to any of the occupants inside the home?

DET. FOY: He didn't ask anything about any of the persons in the home.

(Id. N.T. 40).

Detective Foy testified that during the course of the interview several breaks were taken, the last of which was approximately 25 minutes (Id. N.T. 47). During the breaks, the door to the interview room remained open and the Defendant was unrestrained. At the resumption of the interview, after one of the breaks, Mr. Derhammer was asked whether he knew "[W]hat happened at that house?" Detective Foy testified as follows:

ADA: And what did the defendant indicate to you?

DET. FOY: That he didn't know what was the current status of any of the occupants.

ADA: What did you tell him?

DET. FOY: Told him that Nancy and CJ both died in the fire and that Joe had gotten out and was slightly injured.



ADA: Do you recall what his reaction was?

DET. FOY: He said okay.

(Id. N.T. 47, 48).

On cross examination Detective Foy reiterated Mr. Derhammer was advised prior to the interview that he was not required to remain at the police station nor to discuss the matter with the detectives. Detective Foy indicated the Defendant did not appear to be in any physical distress, sleep deprived, or under the influence of alcohol or drugs. (Id. N.T. 53).

Regarding the rights waiver form executed by Mr. Derhammer, Detective Foy explained that Mr. Derhammer was being interviewed as a witness and the form and Miranda warnings were administered to demonstrate a witness is "giving the information of their own free will." (Id. N.T. 55).

This interview concluded at approximately 2:00 p.m. During Mr. Derhammer's time at the police station, he was offered food, water, soda, and a bathroom break. (Id. N.T. 60).

Detective Lieutenant Daniel Yursha of the Luzerne County District Attorney's Office was called by the Commonwealth and initially indicated he was involved in the instant investigation and present at the Wilkes-Barre City Police Department on April 13, 2009. Detective Yursha stated that after the interview previously referenced, Mr. Derhammer agreed to a subsequent interview at the Pennsylvania State Police Barracks in Wyoming. Detective Yursha transported Mr. Derhammer in an unmarked county vehicle. (Id. N.T. 67). This vehicle contains no divider or cage and a rear occupant is able to open the doors. (Id. N.T. 67). This witness further related that the short drive from Wilkes-Barre to Wyoming lasted approximately ten (10) minutes, during which the Defendant was not placed in restraints. Upon arrival at the barracks, Detective Yursha and Mr. Derhammer went to a second floor meeting room and met with Corporal Gerald Williams. Corporal Williams and Mr. Derhammer went to a different room for the purpose of conducting an interview, after which Detective Yursha escorted Mr. Derhammer into the lobby of the barracks where Mr. Derhammer was met by family members and left. (Id. N.T. 69).

On cross examination, Detective Yursha stated Mr. Derhammer was aware he was free to leave: “When I arrived at the police station, Detective Foy advised him that he was free to go at any point in time.” (Id. N.T. 70).

Corporal Michael Golay next assumed the stand and initially stated he was employed by the Pennsylvania State Police, Troop R at Honesdale, for in excess of twenty (20) years. Corporal Golay was present at the barracks in Wyoming to conduct a polygraph examination of Mr. Derhammer. During the pre-interview, Corporal Golay determined that Mr. Derhammer could read, write and understand the English language. Additionally, Corporal Golay discerned Mr. Derhammer was not under the influence of alcohol or drugs or otherwise impaired.

Corporal Golay’s interview was conducted on the second floor of the barracks in a room comparable to an office of a criminal investigator or supervisor with an attached bathroom. (Id. N.T. 76). This witness further related that Corporal Williams participated in the interview. The aforementioned room contained a desk and several chairs and Corporal Golay was dressed in a shirt and tie, as was Corporal Williams. (Id. N.T. 78, 79). Corporal Golay additionally testified Mr. Derhammer was not restrained at any time and was free to leave. (Id. N.T. 79). Mr. Derhammer was described as “receptive” and “cooperative”.

Corporal Golay identified Commonwealth’s Exhibit 2 as a form utilized by polygraph examiners. This form was read to Mr. Derhammer, who indicated he understood its contents. (Id. N.T. 80, 81). This form included “Miranda warnings” and reflects Mr. Derhammer’s initials and signature. The statement offered during this interview appears at pages 82 through 91 of the hearing transcript.

Corporal Golay testified the tone employed was neither combative nor confrontational and at no time did he or Corporal Williams raise their voice. (Id. N.T. 91). Corporal Golay indicated Mr. Derhammer was not coerced nor did the troopers “attempt to influence” what Mr. Derhammer said. (Id. N.T. 92).

No other testimony was offered during the course of the hearing regarding Mr. Derhammer’s statements.

### **III. LAW AND DISCUSSION**

Subsequent to the filing of a motion to suppress evidence, the Commonwealth bears the burden of going forward at a subsequent hearing and establishing that the challenged evidence

was not obtained in violation of a Defendant's rights. Pa.R.Crim.P. 581 (H); Commonwealth v. Dixon, 997 A.2d 368 (Pa.Super. 2010).

Recently, in Commonwealth v. Johnson, 42 A.3d 1017 (Pa. 2012), Justice Eakin, author of the opinion, observed that a person is in custody for Miranda purposes only when he is physically denied his freedom of action in any significant way or is placed in a situation in which he reasonably believes that his freedom of action or movement is restricted by the interrogation. The standard for determining whether an encounter with police is deemed "custodial" is an objective one based upon a totality of circumstances with due consideration given to the reasonable impression conveyed to the person interrogated. (Id. 42 A.3d at 1028 referencing prior Pennsylvania Supreme Court precedent).

Police detentions become custodial when, under a totality of the circumstances, the conditions and/or duration of detention become so coercive as to constitute the functional equivalent of arrest. Commonwealth v. Baker, 24 A.3d 1006, 1019 (Pa. Super. 2011). The Baker court identifies several well established factors to be considered including the basis for the detention; its length; its location; whether the suspect was transported against his will; how far, why; were restraints employed; did law enforcement show, threaten or use force; the nature of the investigatory methods employed. A plethora of appellate decisions in this Commonwealth, including Baker, have identified as a salient consideration that a suspect was advised he or she was not under arrest and/or were free to leave the interview venue. Also identified, in that context, is that the person being interviewed was not handcuffed or restrained in any fashion. Indeed, in Commonwealth v. Sherwood, 982 A.2d 483 (Pa. 2009) the court found significant that the Defendant voluntarily accompanied the police to the police station, was advised he was not in custody and was unrestrained during the course of the interview. See also, Commonwealth v. Gibson, 720 A.2d 473 (Pa. 1998); Commonwealth Rucci, 670 A.2d, 1129 (Pa. 1996).

When considered within the above referenced analytical framework, the uncontradicted evidence offered by the Commonwealth in the instant matter clearly establishes the Defendant was not in custody.<sup>2</sup> Indeed, it was Mr. Derhammer who initially approached and questioned Chief Deputy Crane. After being advised he was not under arrest, Mr. Derhammer agreed to an

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<sup>2</sup> To the extent any of the Commonwealth's evidence was contradicted we resolve the issue of credibility in favor of the Commonwealth witnesses.

interview at the Wilkes-Barre Police Department. At no time during his transportation or the interview process were handcuffs or restraints employed by law enforcement. Additionally, there was nothing about the tenor or circumstances surrounding Mr. Derhammer's interview with Detective Foy at the Wilkes-Barre Police Department or with Corporals Golay and Williams at the State Police Barracks in Wyoming which would create a reasonable impression to the person being questioned that he was in custody. The tone employed by law enforcement was conversational and the record is devoid of any threats or force used to gain information or provoke a response from Mr. Derhammer. As observed by the Pennsylvania Supreme Court in Commonwealth v. Philistin, 53 A.3d 1 (Pa. 2012), a determination of whether a statement or confession is involuntary, focuses not upon whether a suspect or Defendant would have given a statement or confessed without the interrogation, but whether the questioning or interrogation was so manipulative or coercive that it deprived the Defendant of his ability to make a free and unconstrained decision to provide a statement or confess. There is literally no evidence in the instant record which would allow or permit this conclusion. Indeed, at the conclusion of the apparent polygraph examination administered by Corporal Golay, Mr. Derhammer was escorted to the lobby and left the building with family.

That Mr. Derhammer received Miranda warnings both prior to his interview with Detective Foy as well as prior to the interview with Corporals Golay and Williams does not convert an investigative interview into custodial interrogation. Commonwealth v. Morgan, 610 A.2d 1013, 1015, n.2 (Pa. Super. 1992). Since Mr. Derhammer was not in custody, the reading of Miranda warnings was simply gratuitous. Commonwealth v. Page, 965 A.2d 1212, 1218 (Pa. Super. 2009).

Having determined the Defendant was not in custody at the time the aforementioned statements were made, as well as that the statements were neither coerced nor involuntary, we next address the issue which is the immediate subject of the Commonwealth's appeal in the matter *sub judice*.

As previously indicated, a hearing was scheduled for May 13, 2013, as a result of a motion *in limine* filed by the Defendant to preclude reference to "Defendant's alleged silence." The Commonwealth seeks to introduce in its case in chief (and thereafter presumably comment on) Mr. Derhammer's failure to ask about "what happened at the house or if Nancy, CJ or Joe

were all right” at the fire scene during the two (2) separate interviews or in his brief transport from the scene to the Wilkes-Barre Police Department and thereafter from the Wilkes-Barre Police Department to the State Police Barracks in Wyoming. (May 13, 2013 N.T. 2).

Prior to considering the respective arguments advanced by Counsel, we observe for the sake of accuracy that the Defendant’s statement to Detective Foy contains the previously quoted exchange regarding whether Detective Foy asked the Defendant if he was aware of what happened at 46 Chester Street and Derhammer’s response “that he didn’t know what was the current status of any of the occupants.” Detective Foy then advised him that “Nancy and CJ” both died in the fire and that “Joe” was slightly injured. Additionally, Corporal Golay specifically asked Mr. Derhammer whether “he had any knowledge of participation in setting – starting the house fire” to which he responded “No.” (Id. N.T. 91). The Defendant, therefore, was asked by two (2) separate members of law enforcement in different interviews whether he had any knowledge of or started the fire which was the subject of this investigation.

During the May 13, 2013 hearing, the Commonwealth initially argued the Defense reliance on Commonwealth v. Molina, 33 A.3d 51 (Pa. Super. 2011), Alloc. Gr. 51 A.3d 181 (2012), was misplaced since it is factually distinct from the instant matter. The Commonwealth further noted that “Justice Stevens had actually written a dissent in Molina. But then in a subsequent case, in Adams, he actually wrote the majority opinion.” (Id. N.T. 5) For the sake of accuracy and completeness, we simply note that Commonwealth v. Molina is an en banc opinion authored by President Judge Emeritus Ford Elliott in which President Judge Stevens issued a dissenting opinion joined by Judges Bender, Gantman, and Allen. Commonwealth v. Adams, 39 A.3d 310 (Pa. Super. 2012) is a panel decision authored by Judge Allen. President Judge Stevens and Judge Shogun were additional members of the panel deciding Adams.

The Commonwealth essentially argued that neither Molina nor Adams required granting the motion *in limine* since Mr. Derhammer elected to speak with investigators and did not exhibit silence (Id. N.T. 5, 6). Rather, the Commonwealth suggests this is simply a suppression issue to be decided in the context of the omnibus motion.

Defense counsel countered that the referenced case law precludes the Commonwealth from attempting to use Mr. Derhammer’s lack of inquiry regarding the welfare of the victims as

evidence of his guilt. Defense counsel further suggested that Molina prohibits the use of Mr. Derhammer's pre-arrest silence in the context presently considered. (Id. N.T. 7).

In Commonwealth v. Molina,<sup>v</sup> <sup>the</sup> Superior Court was asked to determine whether the Commonwealth may urge the jury to use a non-testifying Defendant's pre-arrest, pre-Miranda silence as substantive evidence of guilt. The Court concluded that such an inference violated the protections afforded by the Fifth Amendment to the United States Constitution and Article 1, Section 9 of the Pennsylvania Constitution. The factual context considered in Molina is as follows. Police initially received information that the victim might be held against her will in Molina's home. A detective went to the address and was advised Molina no longer lived there. Later that day, Molina contacted the detective, and before being asked if he was aware she was missing, Molina advised the detective that he did not know where the victim was but word "out on the street" was Molina was somehow involved in her disappearance and that was not true. The detective asked Molina to come to police headquarters to be interviewed and Molina refused. During closing argument commonwealth counsel commented on Molina's refusal to cooperate with the detective and asked "Why?". Molina argued, and Superior Court ultimately agreed, that the trial court committed reversible error when it permitted the Commonwealth, over objection, to reference the Defendant's pre-arrest silence in response to police questioning as substantive evidence of guilt.

The majority opinion in Molina contains a comprehensive survey of prior precedent from both the United States Supreme Court and Pennsylvania Supreme Court interpreting the aforementioned constitutional provisions. The Molina opinion reviews both pre-arrest pre-Miranda silence; post-arrest pre-Miranda silence; and post-arrest post-Miranda silence. Included in <sup>the</sup> Superior Court's analysis is a discussion of the utilization of a Defendant's pre-arrest silence to impeach credibility should he testify. (Id. 33 A.3d at 60, 61). In this regard, the opinion observes Commonwealth v. Bolus, 680 A.2d 839 (Pa. 1996) established <sup>that</sup> should a Defendant testify, his pre-arrest silence can be used as impeachment.<sup>3</sup> The Molina court thereafter conducts an exhaustive analysis of the ability of the Commonwealth to use a Defendant's pre-arrest

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<sup>3</sup> When a defendant elects to testify, neither the Fifth Amendment nor due process principles are offended by a prosecutor's reference to that defendant's silence, when that reference is used to impeach the testifying defendant's credibility. Commonwealth v. Kuder, 62 A.3d 1038, 1049 (Pa.Super. 2013).

silence, occurring in response to a request by law enforcement, as substantive evidence of guilt. After cataloging cases revealing a deep divide in both the circuit courts of appeal and state appellate courts which have considered the issue, the Molina majority agrees with the first, sixth, seventh, and tenth circuits that the prosecution cannot use a non-testifying Defendant's pre-arrest silence to support the contention that the Defendant is guilty of the crimes charged, as such use infringes on a Defendant's right to be free from self-incrimination. (Id. 33 A.3d at 62).

Additionally, Molina instructs "We find it of no moment whether the silence occurred before or after arrest or before or after Miranda warnings were administered. The Fifth Amendment was enacted to protect against self-incrimination, whether they are in custody or not, charged with a crime, or merely being questioned during the investigation of a crime." (Id. 33 A.3d. at 63).

The dissenters in Molina concluded that under the circumstances there considered the Defendant did not have a protected constitutional interest in his decision to remain silent in the pre-arrest setting and that, assuming one existed, the Commonwealth's reference to his refusal to speak to police officers did not involve the use of pre-arrest silence as substantive evidence of guilt. (Id. 33 A.3d at 72).

Subsequently, in Commonwealth v. Adams,<sup>the</sup> Superior Court considered the trial court's admission of testimony from a law enforcement officer concerning the Defendant's pre-arrest refusal to speak with the officer as a result of the officer's attempted interview. During closing argument, defense counsel referenced the Defendant's pre-arrest refusal to speak with law enforcement about the crime. The assistant district attorney responded to defense counsel's argument in this regard.

Judge Allen, initially engages in a lengthy review of Molina indicating "[O]ur disposition in Molina guides our resolution of the present case..." (Id. 39 A.3d 310, 316). After reviewing the rationale and essential holding of Molina, the Adams opinion concludes it is distinguishable from the context there considered. Judge Allen references Molina's language instructing that *it's* holding does not impose a prima facie bar against any mention of a Defendant's silence but rather guards against the exploitation of a Defendant's right to remain silent by the prosecution. Molina noted the mere revelation of a Defendant's pre-arrest silence does not establish innate

prejudice where it was not used in any fashion that was likely to burden Defendant's Fifth Amendment right or to create inference of admission of guilt. (Id. 39 A.3d at 318).

The Adams court concludes the law enforcement officers' original testimony during trial regarding the Defendant's refusal to cooperate with the investigation was offered for a narrow purpose, to demonstrate the nature and focus of the investigation, and as foundational evidence demonstrating how the police came to obtain Defendant's DNA sample which was later admitted into evidence at trial. The trial court limited the statements and neither the witness nor the Commonwealth implied that Defendant's silence constituted a tacit admission of guilt. (Id. 39 A.3d at 319).

The factual context of Adams is distinctly dissimilar to that presently considered.<sup>4</sup> The Commonwealth is clearly, in our judgment, attempting to use the absence of an affirmative statement by Derhammer in the form of an interrogatory regarding the victims' welfare as substantive evidence of guilt.

We fail to discern how the Commonwealth's reliance on Commonwealth v. Jermyn, 533 A.2d 74 (Pa. 1987) requires or dictates a different result. In Jermyn, the Pennsylvania Supreme Court considered a Defendant's election to respond to a police officers' accusation in an equivocal fashion. The Defendant neither admitted nor denied guilt but implicitly challenged the police to prove their charge. The Jermyn court held the introduction of those statements did not run afoul of the Fifth Amendment since once a suspect elects to respond, the import of that response or those responses are properly available for the jury's consideration. (Id. 533 A.2d at 81).

In the instant matter, we are not considering the Defendant's equivocal responses. The Defendant gave multiple, arguably inconsistent statements regarding his whereabouts and involvement in this matter. As previously indicated, he was specifically asked in two (2) separate interviews by two (2) different law enforcement officers essentially whether he committed the arson resulting in the deaths. The Defendant denied any involvement. The Commonwealth is certainly free to reference the interaction and exchanges Mr. Derhammer had throughout his

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<sup>4</sup> Similarly, the recent *en banc* decision of Com. v. Fischere – A.3d. -, 2013 PA. Super. 191 (2013), is distinguishable from the instant matter, holding that the Commonwealth's use of defendant's pre-arrest silence was justified under the "fair-response doctrine" after the door was opened by defense cross-examination of a police witness.



transportation and interview process. We are simply prohibiting Detective Foy or any other law enforcement official from representing that Mr. Derhammer failed to inquire about the welfare of the alleged victims; further, we are prohibiting this failure from being offered and considered as substantive evidence of his guilt should Defendant elect not to testify at trial.

Similarly, we find no support for the Commonwealth's position in Commonwealth v. Champney, issued by the Pennsylvania Supreme Court on April 24, 2013. (574 CAP and 575 CAP). In Champney, an equally divided court affirmed the determination by the trial court that counsel was ineffective in failing to seek suppression of certain statements made by the Defendant on May 13, 1998. The opinion in support of affirmance concluded that the factual context there considered yielded the conclusion that the Defendant invoked his right to counsel. The opinion in support of reversal arrived at the opposite conclusion, determining that the Defendant did not invoke his right to counsel with sufficient clarity as to render trial counsel ineffective for deciding not to seek suppression of the statement made months earlier. We fail to discern how these opposed conclusions or their rationale support the Commonwealth's position in the matter before this court.

Finally, before concluding our analysis, we note that the United States Supreme Court, on June 17, 2013, issued an opinion in Salinas v. Texas. Our review of this plurality opinion does not suggest or require the conclusion that we erred in granting the discussed motion in limine. In Salinas, the Defendant was neither placed in custody nor received Miranda warnings and voluntarily responded to police officers' questions about a murder but remained silent when asked whether ballistic testing would match his shotgun to shell casings found at the scene of the crime.

Justice Alito, the Chief Justice, and Justice Kennedy rejected the appellant's Fifth Amendment claim, concluding that he failed to expressly invoke the privilege in response to the officer's question. Justice Thomas and Justice Scalia concluded that appellant's claim would fail even if he appropriately invoked the Fifth Amendment privilege since the prosecutor's comments regarding his pre-custodial silence did not compel him to give self-incriminating testimony.

Justice Breyer filed a dissenting opinion joined by Justice Ginsburg, Justice Sotomayor, and Justice Kagan.

The plurality opinion in Salinas therefore did not conclude that the prosecution may use a Defendant's pre-custodial silence as substantive evidence of guilt. The essential holding of the plurality in Salinas is inapplicable presently since we are not considering a context where Mr. Derhammer was confronted by police with evidence or accusation and either refused to answer or remained silent. In that scenario, Salinas would permit the prosecution to utilize his non-custodial silence. Rather, in the present context, the Commonwealth seeks to employ the Defendant's absence of an affirmative statement in the form of a question concerning the victims' welfare as substantive evidence of his guilt. For the reasons set forth in this Opinion we conclude the Commonwealth may not do so.

**ORDER ATTACHED SEPARATELY AS PAGE 15**

COMMONWEALTH OF PENNSYLVANIA

IN THE COURT OF COMMON PLEAS  
OF LUZERNE COUNTY

vs.

CRIMINAL DIVISION

JOSEPH WALTER DERHAMMER,

Defendant

NO. 3474

OF

2012

**ORDER**

AND NOW, this 13<sup>th</sup> day of August, 2013, upon review of the record in the above-captioned matter, it is hereby **ORDERED AND DIRECTED** that the attached Opinion is entered pursuant to Pa.R.A.P. 1925(a) in response to Commonwealth's Statement of Matters Complained of on Appeal.

It is further **ORDERED AND DIRECTED** that the Clerk of Courts/Office of Judicial Records shall transmit this Order and Opinion to the Superior Court of Pennsylvania within **THREE (3) DAYS OF FILING** and shall serve a copy of same on all counsel of record pursuant to Pa.R.Crim.P. 114.

BY THE COURT:

  
\_\_\_\_\_  
JOSEPH F. SKLAROSKY, JR.

J.

cc: For Defendant:  
Thomas M. Marsilio, Esquire  
William J. Watt, III, Esquire

For Commonwealth:  
Mary Hanlon Mirabito, Esquire  
Nancy Violi, Esquire  
Assistant District Attorneys

Court Administration

CRIMINAL DIV.  
LUZERNE COUNTY  
2013 AUG 13 PM 1:38  
CLERK OF COURTS