

No. 339629

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WASHINGTON STATE COURT OF APPEALS  
DIVISION III

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STATE OF WASHINGTON,

Respondent,

vs.

KEITH W. BEIERS,

Appellant.

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Consolidated with No. 350126

In re The Personal Restraint Petition of Keith W. Beiers,

Petitioner.

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SUPPLEMENTAL BRIEF OF APPELLANT/PETITIONER

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Pursuant to the Court's request of October 2, 2017, this supplemental brief addresses the State's use of Mr. Beiers' pre-arrest silence at trial and the impact of its use of pre-arrest silence on the prosecutorial misconduct and ineffective assistance of counsel claims in light of Salinas v. Texas, 133 S.Ct. 2174 (U.S. 2013) and State v. Magana, 197 Wn. App. 189, 389 P.3d 654 (2016). Specifically, the issue is whether it was proper for the prosecutor to use Mr. Beiers' silence as substantive evidence of his guilt.

The facts pertinent to the present issues are as follows: At the CrR 3.5 hearing, Officer Dollard testified that Mr. Beiers' statements at the time of his initial contact were in response to his attempt to secure the scene and not part of the investigative stage. (RP 29) By all accounts, this initial encounter lasted no longer than necessary to secure the scene, at which point law enforcement placed Mr. Beiers under arrest and read him his Miranda warnings. (RP 19-29) Upon being read his Miranda rights, Mr. Beiers told Officer Dollard that he had done nothing wrong and was defending himself. Mr. Beiers then invoked his to remain silent. (RP 28)

In ruling on the CrR 3.5 issues, the trial court ruled there were two groups of statements. The first group included pre-arrest and pre-Miranda warning statements. The court ruled that the questions from Officer Dollard about Mr. Beiers' injuries and a gun being fired were investigatory

type of statements to ascertain what was occurring. (RP 33) The trial court ruled that the pre-arrest and pre-Miranda statements were admissible as part of the investigation and not pointed towards any kind of guilt seeking questions. (RP 33)

Mr. Beiers testified at trial. (RP 455) He recounted his version of the events that night during direct examination. (RP 477, 500) The start of cross examination began with the State asking, or rather telling, Mr. Beiers: "You never told them that, did you," to which Mr. Beiers answered, "I never told them that." (RP501)

The details of Mr. Beiers' initial encounter at the time of his arrest are set forth in detail in the Brief of Appellant, pages 7-14.

A key point for analysis of this issue is that the State's repeated use of Mr. Beiers' silence was directed towards pre-arrest/pre-Miranda silence as well as post-arrest/post-Miranda silence. The theme of the State's approach was to link Mr. Beiers' silence with the reason for his arrest, thereby implying that he was silent because he was guilty.

Both Salinas and Magana, 197 Wn.App. 189 (2016) are limited to instances of pre-Miranda rights.

In Salinas, the court held that in order for a defendant to assert the privilege against self-incrimination reserved by the Fifth Amendment, the defendant must "claim it" at the time he relies on it. Salinas, 133 S.Ct. at

2179. If the defendant fails to invoke the Fifth Amendment, it is not improper for the prosecutor to use the defendant's silence as substantive evidence of guilt. See id. at 2180. However, the court also laid out a relevant exception to the general rule that a defendant must invoke the Fifth Amendment in order to claim its protection: a defendant need not invoke the Fifth Amendment when "some form of official compulsion denies him 'a free choice to admit, to deny, or to refuse to answer.'" Id. (quoting Garner v. United States, 424 U.S. 648, 656-57 (1976)) (internal quotation marks omitted).

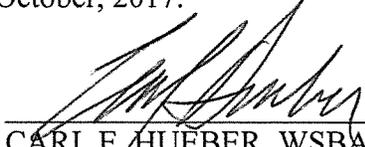
Further, the rule from Salinas, that "absent an express invocation of the right to silence, the Fifth Amendment is not an obstacle to the State's introduction of a suspect's pre-arrest silence as evidence of guilt," controls in Washington. See Magana, 197 Wn. App. at 195. Likewise, the exceptions to this general rule also control in Washington. See id.

Here, Mr. Beiers specifically invoked and claimed his right to remain silent and was formally arrested. (RP 28) Salinas and Magana apply to pre-arrest, pre-Miranda silence; Mr. Beiers' silence came after he was read the Miranda warnings and while he was in police custody. (RP 22, 26-28) So, Salinas' general rule is inapplicable for two reasons. First, post-arrest, post-Miranda silence cannot be commented on by the prosecution or used as evidence of a defendant's guilt. Griffin v.

California, 380 U.S. 609, 615 (1965). Second, even if the defendant wasn't read the Miranda warnings prior to the silence at issue, he was still subject to the "inherently compelling pressures of an unwarned custodial interrogation," and thus, under a Salinas exception, was not required to invoke the Fifth Amendment privilege. Miranda v. Arizona, 384 U.S. 436, 467-68 (1966); See Salinas, 133 S.Ct. at 2180; RP 22.

For the same reasons set forth above, both Salinas and Magana are factually and legally distinguishable from Mr. Beiers' case. Accordingly, they have no impact on the prosecutorial misconduct and ineffective assistance of counsel claims.

DATED this 12th day of October, 2017.

  
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DECLARATION OF SERVICE

The undersigned hereby declares under penalty of perjury under the laws of the State of Washington that on October 12, 2017, I caused a true and correct copy of the foregoing document to be served on the following parties in the manners indicated:

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DATED on October 12, 2017, at Spokane, Washington.



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Supplemental Brief of Appellant/Petitioner

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