

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA,	:	
	:	
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	:	
vs.	:	No. CR-419-2012
	:	
Lloyd David Moyer III,	:	
	:	
Defendant	:	

William E. McDonald, Esquire	Counsel for Commonwealth Assistant District Attorney
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Brian J. Collins, Esquire	Counsel for Defendant
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MEMORANDUM OPINION

Matika, J. - June 28, 2013

In this case, the Defendant, Lloyd David Moyer III, (hereinafter "Defendant"), has filed a timely omnibus pre-trial motion pursuant to Pennsylvania Rules of Criminal Procedure 578 and 579. Included in this motion are the following: petition for writ of habeas corpus, motion for competency/taint hearing, motion to suppress statement, and motion for view of alleged crime scene.¹ The Court will address each one seriatim.

¹ On the date of the initial hearing on Defendant's omnibus pre-trial motion, Counsel for Defendant withdrew the motion to view alleged crime scene without prejudice to raise said motion again at time of trial. Accordingly, this opinion will address the remaining three motions in the order in which they appear herein.

FACTUAL AND PROCEDURAL BACKGROUND

The alleged victims in this case are R.M., a minor (D.O.B. May 28, 2005) and B.M., also a minor (D.O.B. December 26, 2006). At the time of the alleged offenses, the victims were five (5) and three (3), respectively. As of the first day of the competency hearing, held on September 28, 2012, the victims were seven (7) and five (5), respectively.

A preliminary hearing was held on September 30, 2011 before now retired Magisterial District Judge Bruce Appleton. At that hearing, both R.M. and B.M. were called to testify; however, upon motion of defense counsel, both minors were found to be incompetent to testify.²

The Commonwealth, on February 27, 2012, re-filed the same charges against the Defendant,³ which after a subsequent preliminary hearing held on April 18, 2012 were bound over to the Court of Common Pleas. Of the two (2) minors, only R.M. testified at the preliminary hearing as she was found to be competent to testify.

² Transcript of Preliminary Hearing at 41-42, 52 (Sept. 30, 2011). Having found both minors incompetent to testify, the Magisterial District Judge, on motion of the Defendant, granted the motion to dismiss the charges. Transcript of Preliminary Hearing at 76 (Sept. 30, 2011).

³ The charges filed against the Defendant in the instant action are: one count of involuntary deviate sexual intercourse (18 Pa.C.S.A. § 3123(b)); two counts of corruption of minors (18 Pa.C.S.A. § 6301(a)(1)); one count of indecent assault (18 Pa.C.S.A. § 3126(a)(7)); and two counts of indecent exposure (18 Pa.C.S.A. § 3127(a)).

At the preliminary hearing held on April 18, 2012, the Commonwealth called three witnesses, namely, Larry Moyer, father of R.M., R.M. herself, and Trooper Christopher Bonin. Larry Moyer testified that he is married to his wife, Christine, and they have three (3) children, two of whom are the alleged victims in this case. On November 20, 2010, Larry and Christine made arrangements to have his sister, Anne Marie Serfass, who lives in Parryville, watch R.M. and B.M. while they attended a wedding in Northampton. It was the intention to have R.M. and B.M. stay overnight at "Aunt Anne's house."

Larry Moyer dropped the girls off at Aunt Anne's house around 4:30 P.M. When R.M. and B.M. were dropped off at Aunt Anne's house on November 20, 2010, the Defendant, who lives next door, was on the upstairs floor of Aunt Annie's house.

At the preliminary hearing, R.M., who was six (6) at that time, was questioned extensively regarding her qualifications and competency to testify. R.M. was determined to be competent and permitted to testified regarding, inter alia, the events of November 20, 2010.⁴ R.M. testified that while at Aunt Anne's house she was playing video games with B.M. and "Schwooper"⁵ in Aunt Anne's upstairs bedroom. At one point in time, R.M.

⁴ Transcript of Preliminary hearing at 29-42 (April 18, 2012).

⁵ Defendant's nickname.

testified that Schwooper "put his bip in her mouth." She further identified "bip" as being located in the groin area, and described it as pink in color and a "circle."⁶

Lastly, the Commonwealth called Trooper Christopher Bonin to the stand. Trooper Bonin testified that as he commenced the investigation into the allegations, he had an opportunity to interview the Defendant. During this interview, Trooper Bonin stated that the Defendant "admitted to inserting his penis into [R.M.'s] mouth at Mrs. Serfass' house at 218 Center Street."⁷

After all witnesses testified, Magisterial District Judge Homanko determined that a prima facie case was made out by the Commonwealth on all charges and bound all counts over to the Court of Common Pleas.

On August 29, 2012, the Defendant filed this omnibus pre-trial motion. Included in the motion are the following:

- 1) petition for writ of habeas corpus;
- 2) motion for competency/taint hearing;
- 3) motion to suppress statement; and
- 4) motion for view of alleged crime scene.⁸

⁶ Transcript of Preliminary hearing at 44-48 (April 18, 2012).

⁷ Transcript of Preliminary hearing at 83 (April 18, 2012).

⁸ As previously stated, the motion to view the alleged crime scene was

On September 28, 2012, the Court commenced a hearing on the remaining motions. On this particular date, both R.M. and her younger sister B.M. were called to testify in camera. They were both questioned extensively regarding their competency to testify as well as the issue of potential taint. The Court thereafter continued the matter until December 17, 2012, where Trooper Bonin was called to testify regarding the circumstances surrounding his receipt of Defendant's alleged admission. Trooper Bonin indicated that he and Corporal Gross had gone to the Defendant's home to ask Defendant if he would come to the barracks to be interviewed by law enforcement regarding the allegations made by R.M. and his alleged involvement.

The Trooper stated that the Defendant, accompanied by his father, did appear at the State Police Barracks on July 1, 2011. Once there, the Defendant was led into an interview room by Trooper Bonin.⁹ Trooper Bonin informed the Defendant that he was neither in custody nor under arrest, and he could leave at any time. The Defendant was also told that no matter the outcome of the interview he was going to leave the barracks that day.

Trooper Bonin also testified that the Defendant was never

withdrawn by Defendant without prejudice to re-file said motion at time of trial.

⁹ As per the policy of the Pennsylvania State Police, the Defendant's father was not permitted to accompany his son into the interview room and was required to stay in the waiting room.

given his *Miranda*¹⁰ warnings because he was not in custody. The Defendant stated he understood and consented to the interview being audio-taped.¹¹ During the entire interview, the door to the interview room was left opened.

After presenting the allegations to the Defendant, but after some time questioning him, the Defendant eventually told Trooper Bonin that he stuck it, that being his penis, in R.M.'s mouth for a second. As promised, after the interview the Defendant was allowed to leave the barracks.

Prior to the interview of the Defendant, both R.M. and B.M. were interviewed on July 1, 2011 at the Children's Advocacy Center.¹² The purpose of these interviews was to question R.M. and B.M. relative to the allegations made against the Defendant. The interviews of the two alleged victims at the Children's Advocacy Center corroborated what R.M. stated at the April 18, 2012 preliminary hearing as what occurred between her and the Defendant.

The Court must now decide:

1) was there a prima facie case presented by the Commonwealth at the April 18, 2012 preliminary hearing;

¹⁰ *Miranda v. Arizona*, 384 U.S. 436 (1966).

¹¹ Commonwealth's Exhibit "3" - Audio Tape Interview of Defendant.

¹² Commonwealth's Exhibit "2" Audio-Video Interview of two alleged victims.

2) should Defendant's statement to Trooper Bonin on July 1, 2011 be suppressed; and

3) are R.M. and B.M. competent to testify, or alternately, has their testimony been tainted.

DISCUSSION

I. Petition for Writ of Habeas Corpus

Defendant's first petition raised in the omnibus pre-trial motion is a writ of habeas corpus. In the motion, Defendant argues that the Commonwealth's evidence is legally insufficient to establish a prima facie case on each of the counts charged against him.

A prima facie case consists of evidence, read in the light most favorable to the Commonwealth, that sufficiently establishes both the commission of the crime and that the accused is the probably perpetrator of that crime. *Commonwealth v. Fountain*, 811 A.2d 24, 25-26 (Pa. Super. Ct. 2002). The Commonwealth need not prove the defendant's guilt beyond a reasonable doubt; rather the Commonwealth must show sufficient probable cause that the defendant committed the offense, and the evidence should be such that if presented at trial, and accepted as true, the judge would be warranted in allowing the case to go to the jury. *Commonwealth v. Keller*, 823 A.2d 1004, 1010-11

(Pa. Super. Ct. 2003). "In determining the presence or absence of a prima facie case, inferences reasonably drawn from the evidence of record that would support a verdict of guilty are to be given effect, but suspicion and conjecture are not evidence and are unacceptable as such." *Commonwealth v. Packard*, 767 A.2d 1068, 1071 (Pa. Super. Ct. 2001).

Defendant, in his motion and accompanying brief claim that the Commonwealth has failed to establish any of the crimes that have been charged against him on the basis that "the crucial element of the existence of the Defendant's penis had not been established." In other words, the Defendant argues to the Court that the Commonwealth's evidence is insufficient in that the alleged victims have not sufficiently identified the Defendant's penis, and such identification is necessary to establish an element of all of the charges against him.

At the preliminary hearing, the alleged victim, R.M., was asked to tell the Court, that being the Magisterial District Judge, what occurred between her and the Defendant.¹³ Her response was "Schwooper put his bip in my mouth and he didn't say anything." Transcript of Preliminary Hearing at 46 (April 18, 2012). Further, when asked "what she meant by a "bip"" and

¹³ This question was asked by the Commonwealth to R.M. and centered on what happened at Aunt Anne's house on the date in question while she was in the upstairs bedroom playing video games with her sister and the Defendant whose nickname is "Schwooper."

"what part of his (the Defendant's) body was it," R.M. stepped down from the witness stand and pointed at her groin area. Transcript of Preliminary Hearing at 47 (April 18, 2012). The alleged victim was also asked to describe Defendant's "bip," to which she testified in direct examination that it was pink and "like circle." Transcript of Preliminary Hearing at 47 (April 18, 2012). On cross-examination, R.M. further described Defendant's penis as "round." Transcript of Preliminary Hearing at 71 (April 18, 2012). When pressed by Defense Counsel, R.M. was asked to differentiate between the size of the Defendant's "bip" and her infant brother's bip, explaining that her brother's bip was smaller. Transcript of Preliminary Hearing at 71-73 (April 18, 2012).

Clearly, the witness was referring to the Defendant's penis when she used the word "bip" in naming it. Moreover, R.M. described Defendant's penis as pink and round, referring to the head of Defendant's penis. With such testimony being presented, and the Court being convinced that the alleged victim's testimony was referencing Defendant's penis, the Court concludes that the Commonwealth has met its burden of proof insofar as establishing that Defendant placed his penis in R.M.'s mouth. Accordingly, the Commonwealth has established a prima facie case on the charges filed against the Defendant.

II. Motion for Competency/Taint

Defendant next raises the issue of the competency of both alleged victims, R.M. and B.M., insofar as testifying at trial, in addition to claiming that their testimony has been "tainted" and therefore they should not be permitted to testify. In this case, the Court had the opportunity to review multiple transcripts of proceedings where R.M. and B.M. testified. Such proceedings included the interviews of both alleged victims at the Child Advocacy Center in Scranton, as well as a colloquy of both R.M. and B.M. that was conducted by the Court at the hearing before it. The Court bases its decision on Defendant's motion challenging the competency of the alleged victims from these proceedings.

Competency of a witness is generally presumed, however when competency is called into question the burden falls upon the objecting party to demonstrate incompetency. *Commonwealth v. D.J.A.*, 800 A.2d 965, 969 (Pa. Super. Ct. 2002). The objection party must present clear and convincing evidence that the witness lacks the minimum capacity to: 1) communicate; (2) observe an event and adequately recall that observation; and (3) understand the necessity to speak the truth *Commonwealth v. Delbridge* 855 A.2d 27, 40 (Pa. 2003); *Commonwealth v. Pena*, 31 A.3d 704, 707 (Pa. Super. Ct. 2011).

Competency is a threshold legal issue that must be decided by the trial court. *Commonwealth v. Dowling*, 883 A.2d 570, 576 (Pa. 2005). Pennsylvania law requires that a child witness be examined for competency. *Delbridge*, 855 A.2d at 39. "When the witness is less than fourteen (14) years of age, there must be a searching judicial inquiry as to mental capacity, but discretion nonetheless resides in the trial judge to make the ultimate decision as to competency." *Commonwealth v. Short*, 420 A.2d 694, 696 (Pa. Super. Ct. 1980). A competency hearing of a minor witness is directed to the mental capacity of that witness to perceive the nature of the events about which he or she is called to testify, to understand questions about that subject matter, to communicate about the subject at issue, to recall information, to distinguish fact from fantasy, and to tell the truth. *Delbridge*, 855 A.2d at 45.

In applying those principles, the Court turns to the case at bar and the general competency of the two young children, B.M. and R.M. At the time of the alleged incident, the children were three (3) and five (5) years of age, respectively. By the time the initial omnibus pre-trial hearing, the alleged victims were five and seven years old, respectively. Introduced as evidence at the omnibus hearing were the transcripts from both preliminary hearings. At the first hearing, held on September

30, 2011, Magisterial District Judge Bruce Appleton found both alleged victims incompetent to testify based on his belief that the children were not able to articulate sufficiently enough to disprove the defense's claim that both children were incompetent to testify.

At the second preliminary hearing, held before Magisterial District Judge Joseph Homanko some seven (7) months later, the Commonwealth called only the older child R.M. to testify. R.M. was found to be competent by the Magisterial District Judge and therefore testified at that hearing. At the omnibus pre-trial hearing, both R.M. and B.M. were called to testify. It is the accumulation of all of these testimonial opportunities that the Court considers in determining the general competency of both R.M. and B.M.

Based on a review of these transcripts and the testimony presented at the omnibus hearing before the Court, the Court finds that B.M. is not competent to testify at trial. The reason for such a determination is that during the questioning of B.M. at the omnibus pre-trial hearing, she could not sufficiently articulate a response to the questions posed to her. Even when pressed for an answer, she was unable to do so, and on many occasions was unable to provide any answer or exhibited a lack of memory. While the Court believes B.M. knows

the difference from of right and wrong, and the truth from a lie, it is B.M.'s inability to provide coherent and meaningful answers that renders her disqualified from testifying at trial.

The Court however, does find that, from a general competency standpoint, R.M. is competent to testify. R.M. was questioned extensively at all three proceedings in which she testified, and from those proceedings, the Court concludes that she was able to form clear, relevant, and intelligent answers to most questions asked of her. R.M. was able to articulate responses to basic questions such as her age, her birthday, her school she attends and along with her teacher, and where she lives and with whom. R.M. was also able to tell the difference between the truth and a lie and was also able to express the consequences of telling a lie. Most importantly, the alleged victim was able to provide testimony and information regarding the specific allegations made by her in this case. More specifically, R.M. was able to coherently testify that the Defendant placed his "bip" in her mouth while at Aunt Anne's house. At the second preliminary hearing R.M. described Defendant's "bip" as pink and a circle. Additionally, R.M. stated that Defendant's "bip" is located in his groin area. The Court is convinced as to R.M.'s general competency to testify at trial.

The inquiry, however, into R.M.'s overall competency to testify does not end there as Defendant also secondarily challenges the alleged victim's competency to testify claiming her testimony is "taint."

Taint has been defined as "the implantation of false memories or distortion of actual memories through improper and suggestive interview techniques" and is a subject properly explored during a hearing testing the competency of a child witness in sexual abuse cases. *Delbridge*, 855 A.2d at 39. Taint is commonly the result of interview techniques of law enforcement, social service personnel, and other interested adults that are so unduly suggestive and coercive as to infect the memory of the child; the result renders the child incompetent to testify. *Id.* at 35 (citing *See, Julie Jablonski, Assessing the Future of Taint Hearings*, 33 Suff. J. Trial & App. Adv., 49, 50 (1998)). As a result, it is important and necessary to ascertain whether such interview techniques used in the case at bar were unduly suggestive or whether the responses provided by R.M. were her own responses based upon her recollection of the facts.

The allegation of taint centers on the second element of the competency test, i.e., that the witness must have been capable of observing the event to be testified about and have

the ability to remember it. *Delbridge*, 855 A.2d at 39-40. An allegation of taint must be supported by clear and convincing evidence. *Commonwealth v. Lukowich*, 875 A.2d 1169, 1173 (Pa. Super. Ct. 2005). In order for the court to investigate the issue of taint at a competency hearing, the moving party must proffer some evidence that would suggest the witness's testimony is tainted. *Delbridge*, 855 at 41. When determining whether a defendant has presented some evidence of taint, the court must consider the integrity of the circumstances surrounding the child's allegations. *Id.*

The courts have comprised a list of factors that should be considered when determining the threshold question of whether the witness's testimony is tainted. These factors are: 1) the age of the child; 2) the existence of a hostile motive towards the defendant on the part of the child's primary custodian; 3) the possibility that the child's primary custodian is unusually likely to read abuse into normal interactions; 4) whether the child was subjected to repeated interviews by various adults in positions of authority; 5) whether an interested adult was present during the course of any interviews; and 6) the existence of independent evidence regarding the interview techniques employed. *Id.*; *Commonwealth v. Judd*, 897 A.2d 1224, 1229 (Pa. Super. Ct. 2006).

In this case, the only interview R.M. was called to testify at, besides being called as a witness before the Magisterial District Judge and this Court, was the interview at the Children's Advocacy Center, where she was six years old.¹⁴ Even so, this one interview of the alleged victim gives the Court reason to delve deeper into the issue of taint.

Further, as the *Judd* Court stated "[o]ur Supreme Court has noted that the ability of a six year old to properly recall and comprehend past events and then adequately communicate these memories is inherently suspect." *Judd*, 897 A.2d at 1229 (citing *Delbridge*, 855 A.2d at 41). The Court therefore finds a basis to further explore the issue of taint.

Defendant argues that taint is present throughout R.M.'s recitation of the alleged incident. He points to such issues as her age, multiple and suggestive interviews, and the way she responded to "prepared" direct examination queries as compared to the way she had difficulty responding to "unprepared for" cross-examination.

As previously stated, R.M. was five (5) at the time of the alleged incident, six (6) years old throughout the interview and preliminary hearing stages, and seven (7) at the time of the

¹⁴ While there was a comprehensive interview with the Children's Advocacy Center, there is a suggestion that R.M. was "interviewed" by her parents about these allegations; however, no specific information was provided to the Court as to how this interview occurred.

omnibus pre-trial hearing before the Court. Her age alone calls into question her competency to testify; however, through proper questioning of R.M., the Court finds that she had a sufficient and competent ability to present the facts of the event in question. Therefore, R.M.'s age alone does not provide clear and convincing evidence of taint.

The Court thus turns to the interview and hearing process to ascertain whether such interviews were suggestive and leading to the point where the questions prompted the responses the Commonwealth was seeking, that being that the "Schwooper put his 'bip' in my (R.M's) mouth."

In the case of *Commonwealth v. Davis*, 939 A.2d 905 (Pa. Super. Ct. 2007), the Appellate Court upheld the trial court's ruling that a nine (9) year old was incompetent to testify because the witness's testimony was tainted due to the suggestive nature of the interview process by the detective. *Id.* at 910-11. The majority of the questions posed by the detective were leading and suggestive of the answers the Commonwealth was expecting and hoping for. The Appellate Court, quoting the trial court that stated that this investigative technique amounted to "a series of leading questions, and questions describing the circumstances, calculated to elicit affirmative or negative answers from the child rather than

simply soliciting the child's narrative of the events." *Id.* at 906 (quoting Trial Ct. Op. at 4).

In regards to the interview of R.M. at the Children's Advocacy Center, the Court is convinced that this interview was devoid of any taint as that term relates to the allegations in question. The interviewer was very cautious in her approach of questioning R.M. throughout. As the interviewer began question R.M. about the alleged event, she asked R.M. a very general question about not being able to do something at Aunt Anne's house, to which R.M. replied she "can't go over there (Aunt Anne's house) anymore because Schwooper put his bippie in my mouth." Commonwealth's Exhibit "2" Audio-Video Interview of two alleged victims. Clearly, this question asked for, but did not suggest the answer given. Moreover, when asked what part of Schwooper's body R.M. was referring to, she immediately pointed and circled the genital area on the anatomically correct drawing of a male. See, Defendant's Exhibit "3) - anatomical drawing of a male. Similarly, no suggestiveness was present in this question to the alleged victim.

Turning the Court's attention to the preliminary hearing, while there was a degree of leading questions posed to R.M. by the Assistant District Attorney, these questions were not relevant insofar as it relates to the alleged conduct of the

Defendant. When the Assistant District Attorney inquired of R.M. about the specific allegations that are before the Court, at neither preliminary hearing were such questions suggestive or leading. The Court finds, after reading the transcript of the testimony from both hearings, that the proceedings were devoid of any questions that would suggest to R.M. the answer the Commonwealth was seeking, that being, "Schwooper put his 'bip' in my (R.M.'s) mouth at Aunt Anne's house."¹⁵ Unlike the *Davis* case, this Court does not find sufficient evidence to establish that R.M.'s testimony was tainted. The minor's independent recollection of the incident was intact and techniques used to elicit such testimony were neither suggestive nor leading.

Lastly, Defendant believes R.M.'s testimony has been tainted by virtue of inconsistencies throughout. While the Court concurs that there are inconsistencies in R.M.'s interview and testimony, such inconsistencies do not bear on the issue of competency and taint. "Questions concerning inconsistent testimony . . . go to the credibility of the [witness]." *Commonwealth v. DeJesus* 860 A.2d 102, 107 (Pa. 2004). A determination of credibility lies with the fact finder and any

¹⁵ Transcript of Preliminary Hearing at 32 (Sept. 30, 2011); Transcript of Preliminary Hearing at 46-47 (April 18, 2012). It should also be noted that no questions were posed to either R.M. or B.M. at the omnibus pre-trial hearing regarding the alleged incident. Both counsel for the Commonwealth and Defendant felt that there was sufficient evidence in the transcripts of the preliminary hearings and Advocacy Center interview on the specific allegations.

conflict in that testimony is to be resolved by the fact finder. *Commonwealth v. Price*, 616 A.2d 681, 685 (Pa. Super. Ct. 1992).

The Court finds that Defendant has not presented clear and convincing evidence that R.M.'s testimony was tainted. Therefore, the Court concludes that R.M. is competent to testify at trial.

III. Motion to Suppress

Defendant's third issue raised in his omnibus pre-trial motion is a motion to suppress Defendant's statement to Trooper Bonin. Defendant argues that the statement made by him to the Pennsylvania State Police violated the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution and Article 1 Section 9 of the Pennsylvania Constitution. It is claimed by Defendant that such statement obtained was coerced and not voluntary based upon Trooper Bonin's interrogation techniques and the fact Defendant was never advised of his *Miranda* rights.

In a motion to suppress, the burden is on the Commonwealth to establish by a preponderance of the evidence that the challenged evidence is admissible. *Commonwealth v. Iannaccio*, 480 A.2d 966 (Pa. 1984). In a motion to suppress a confession made by a defendant to police authorities, the Commonwealth must show that the confession was voluntary. See, *Commonwealth ex*

rel. Butler v. Rundle, 239 A.2d 426 (Pa. 1968). In making such a determination, the Court must apply a two-step analysis: 1) was the Defendant under custodial interrogation thus requiring *Miranda* warnings; and 2) Was the confession made by Defendant voluntary?

a) **Whether Defendant faced Custodial Interrogation as to require *Miranda* warnings**

Since *Miranda* warnings protect an individual against the coercive nature of custodial interrogation, these warnings are required only where there has been such a restriction on a person's freedom as to render him in custody. *J.D.B. v. North Carolina*, ___ U.S. ___, 131 S. Ct. 2394 (2011). The warnings articulated in *Miranda v. Arizona*, 384 U.S. 436 (1996), become mandatory whenever one is subjected to custodial interrogation. The United States Supreme Court has defined custodial interrogation as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Commonwealth v. Meyer*, 412 A.2d 517 (Pa. 1980).

The Supreme Court has declined to accord talismanic power to the freedom-of-movement inquiry when determining whether an individual is in custody for purposes of *Miranda*, and instead asks the additional question whether the relevant environment presents the same inherently coercive pressures as the type of

station house questioning at issue in *Miranda*. *Howes v. Fields*, ____ U.S.____, 132 S. Ct. 1181 (2012). When a defendant is questioned, the determination of custody for purposes of *Miranda* should focus on all of the features of the interrogation; these include the language that is used in summoning the defendant to the interview and the manner in which the interrogation was conducted. *Id.*

To ascertain whether someone was in custody for *Miranda* purposes, a court must examine the circumstances surrounding the questioning and then determine whether those circumstances would cause a reasonable person to have understood his situation to be comparable to a formal arrest. *Commonwealth v. Williams*, 650 A.2d 420, 427 (Pa. 1994). Moreover, the test for custodial interrogation does not depend upon the subjective intent of the law enforcement officer, rather, the test focuses on whether the individual being interrogated reasonably believes his freedom of action is being restricted. *Commonwealth v. Levanduski*, 907 A.2d 3, 24-25 (Pa. Super. Ct. 2006); *U.S. v. Murdock*, 699 F.3d 665 (1st Cir. 2012). The factors a court utilizes to determine, under the totality of the circumstances, whether a detention has become so coercive as to constitute the functional equivalent of an arrest include: the basis for the detention; its length; its location; whether the suspect was transported against his or her

will, how far, and why; whether restraints were used; whether the law enforcement office showed, threatened, or used force; and the investigative methods employed to confirm or dispel suspicions. *Levanduski*, 907 A.2d at 25. The fact that a police investigation has focused on a particular individual does not automatically trigger "custody," thus requiring *Miranda* warnings. *Commonwealth v. Mannion*, 725 A.2d 196, 200 (Pa. Super. Ct. 1999) (en banc).

In the case before the Court, Defendant was not placed in police custody as to require *Miranda* warnings. The police went to Defendant's home and asked Defendant if he would be willing to talk to the police at their barracks. Defendant was not escorted in handcuffs to the barracks by the officers, but rather Defendant's father drove him to the police station. Thus, Defendant's presence at the police barracks was voluntary.

Inside the police barracks, although Defendant's father was instructed that he could not be present in the interview room and must remain in the waiting room, Trooper Bonin informed Defendant that he was free to leave at any time and regardless of his answers he, the Defendant, would be leaving the barracks that night. As the interview started, Defendant stated he knew why the police asked to speak to him, indicating that he was aware of the allegations made by the two alleged victims.

Within the first fifteen minutes of the interview, Defendant's recollection of the alleged event changed, and two minutes later, Defendant admitted to the alleged acts. The entire interview lasted twenty-seven minutes with the door to the interview room remaining open the entire time.

The facts and circumstances in this case are analogous to the facts in *Commonwealth v. Baker*, 963 A.2d 495 (Pa. Super. Ct.), where the Appellate Court determined that defendant was not in custody as to require *Miranda* warnings. In *Baker*, the defendant was not transported against her will, but rather agreed to meet with investigators. As the interview started, the defendant in *Baker* was informed that she was free to leave whenever she chose to as the interview room door remained unlocked and she was not handcuffed, shackled, or restrained. *Id.* at 501. During the interview, which only lasted an hour and forty minutes, the interviewers made no threats nor used any forceful tactics. *Id.* Based on the totality of the circumstances, the Superior Court upheld the trial court's ruling in not suppressing defendant's statement.

Defendant argues to the Court that the scenario before it is analogous to the case of *Commonwealth v. DiStefano*, 782 A.2d 574 (Pa. Super. Ct. 2001); however, the Court disagrees. In *DiStefano*, the defendant was detained for eleven hours overnight

at the police barracks. Further, in *DiStefano* the police took defendant's keys away from him and told the defendant he could not leave when the defendant expressed a desire to end the interview. *Id.* at 580.

At the hearing before the Court, Defendant claims he felt he could not leave because the Trooper raised his hand as if to say "stop" when Defendant tried to get up. However, the Trooper never told the Defendant he could not leave the interview room nor prevent Defendant from leaving the room. At anytime Defendant could have walked out of the interview and left the police barracks. Therefore, the Court finds this case to be more analogous to *Baker* than *DiStefano* and thus find that the Defendant was not under the custodial interrogation of the police and thus was not entitled to *Miranda* warnings.

b) Whether Defendant's statement was voluntary

Although the Court determined that the Defendant was not subject to a custodial interrogation by the police, the Defendant's statement can still be suppressed if statement was made involuntarily. "When deciding a motion to suppress a confession, the touchstone inquiry is whether the confession was voluntary." *Commonwealth v. Nester*, 709 A.2d 879, 882 (Pa. 1998) (citing *Arizona v. Fulminante*, 499 U.S. 279 (1991)). In determining whether a confession was involuntary, the ultimate

issue is whether the defendant's will was overborne by the inducements or other pressures applied, so that the resulting confession was the result of coercion, rather than the result of his own free will. *Commonwealth v. Goodwin*, 333 A.2d 892, 895 (Pa. 1975). The confession must be the product of an essentially free and unconstrained choice by its maker. *Commonwealth ex rel. Gaito v. Maroney*, 220 A.2d 628, 631 (Pa. 1966).

While some extreme methods utilized to secure confessions may be held inherently coercive, and thereby automatically render any resulting confession involuntary, normally no one factor is determinative, and the voluntariness of confessions generally is determined on a case-by-case basis. See, *Commonwealth v. Watts*, 465 A.2d 1288 (Pa. Super. Ct. 1983), *aff'd* 489 A.2d 747 (Pa. 1985). In determining if the Defendant's statement was voluntary, the court must examine the totality of the circumstances surrounding the confession. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973); *Commonwealth v. Jones*, 683 A.2d 1181 (Pa. 1996). The Supreme Court of this Commonwealth outlined certain factors a court should consider in determining if a statement made by a defendant was voluntary. See, *Commonwealth ex rel. Butler v. Rundle*, 239 A.2d 426, 431 (Pa. 1968). These factors are: the duration, and the methods of interrogation; the conditions of detention, the manifest

attitude of the police toward the defendant, the defendant's physical and psychological state and all other conditions present which may serve to drain ones powers of resistance to suggestion and undermine his self-determination. *Id.*

In evaluating such factors to the case before the Court, Defendant's confession to Trooper Bonin was made voluntarily. As stated previously, the entire interview lasted twenty-seven minutes. Throughout the interview, the Trooper never raised his voice towards the Defendant nor made any threats towards him. Defendant was free to end the interview and leave the room at anytime as nothing prevented Defendant from doing so. Further, Defendant stated at the end of the interview that he never felt threatened to tell the truth, but rather told the truth for his own good.

Defense counsel argues to the Court that Defendant's admission was based upon his lack of mental capacity. At the hearing before the Court, Defendant presented a school physiologist who testified to Defendant's lack of mental capacity. Based upon such testimony proffered by the school physiologist, Defendant claims his lack of mental capacity inhibited him from fully understanding the importance and consequences of any statement offered to the police.

As the courts have stated, when the question of

voluntariness passes beyond the realm of physical coercion and into degrees of psychological coercion, most careful attention will be afforded to any facts, circumstances, or events tending to overbear the will of the defendant. *Rundle*, 239 A.2d at 430. With respect to the personal characteristics and attributes of the defendant, the relevant factors to be considered include his age; his education and intelligence; his physical, mental, and emotional condition at the time of the interrogation; and his prior experience or lack thereof with police. *Commonwealth v. Perez*, 845 A.2d 779, 785 (Pa. 2004).

Applying such factors to this case, the Court finds that Defendant had the requisite mental capacity to fully understand the significance and ramifications of the police asking to question him about the alleged incident. Defendant is a high school graduate who indicated to the police that he was planning on attending college someday. Defendant stated at the interview that he knew why he was asked to speak to the police. Additionally, at the hearing before the Court the Defendant did not exhibit any difficulties in comprehending the proceeding. Defendant is asking the Court to make the casual connection between Defendant's alleged mental deficiencies, even though not much evidence was presented on that issue, and his confession. The Court is not willing to make the connection for the

Defendant.

Accordingly, the Court finds that Defendant voluntarily made his statement to Trooper Bonin and thus denies his motion to suppress his statement. Consequently, the Court enters the following order:

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA,	:	
	:	
	:	
	:	
vs.	:	No. CR-419-2012
	:	
Lloyd David Moyer III,	:	
	:	
Defendant	:	

William E. McDonald, Esquire	Counsel for Commonwealth Assistant District Attorney
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Brian J. Collins, Esquire	Counsel for Defendant
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ORDER OF COURT

AND NOW, this _____ day of June, 2013, upon consideration of the Defendant's Omnibus Pre-Trial Motion, and after hearing, it is hereby

ORDERED and DECREED that the Motion is **GRANTED in part and DENIED in part as follows:**

1. Defendant's Petition for Writ of Habeas Corpus is **DENIED;**
2. Based upon Defendant's Motion for Competency/Taint Hearing of the alleged to victims, R.M. and B.M., is **ORDERED and DECREED** that:

- a. Alleged victim R.M., (D.O.B 5/28/05), is found to be competent so that she is able to testify at trial; and
- b. Alleged victim B.M., (D.O.B. 12/26/06), is found to be incompetent to testify at trial;

3. Defendant's Motion to Suppress Defendant's Statement is
DENIED.

BY THE COURT:

Joseph J. Matika, Judge