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**Commonwealth of Pennsylvania v. Gabriel Domonic Lee, Defendant**  
Court of Common Pleas of the 39th Judicial District of Pennsylvania,  
Franklin County Branch, Criminal Action No. 1994-2011

HEADNOTES

*Criminal Law - Sufficiency and Weight of the Evidence; Unlawful Delivery of a Schedule II Controlled Substance; Confidential Informant; Surveillance Photographs; Corroborating Evidence*

*Sufficiency of the Evidence – Standard of Review*

1. The standard the Court employed when reviewing sufficiency of the evidence claims is as follows: “whether, viewing all the evidence admitted at trial in the light most favorable to the verdict winner, there is sufficient evidence to enable the fact-finder to find every element of the crime beyond a reasonable doubt.” Commonwealth v. Lopez, 57 A.3d 74, 79 (Pa. Super. 2012).

2. Evidence is sufficient to support a verdict when “it establishes each material element of the crime charged and the commission thereof by the accused, beyond a reasonable doubt.” Commonwealth v. Norley, 55 A.3d 526, 531 (Pa. Super. 2012) (citation omitted). The Commonwealth is not required to establish guilt “to a mathematical certainty, and may sustain its burden by means of wholly circumstantial evidence.” Commonwealth v. McKellick, 24 A.3d 982, 990 (Pa. Super. 2010).

3. The appellate court “may not substitute [its] judgment for that of the fact-finder; if the record contains support for the convictions they may not be disturbed.” Commonwealth v. McKellick, 24 A.3d 982, 990 (Pa. Super. 2010). Any doubts as to the weight of the evidence, the credibility of the witnesses, and the defendant’s guilt, are meant to be “resolved by the fact-finder, unless the evidence is so weak and inconclusive that, as a matter of law, no probability of fact can be drawn from the combined circumstances.” *Id.*

*Sufficiency of the Evidence – Unlawful Delivery of a Controlled Substance – Persons not Registered under the Act*

4. The elements of Unlawful Delivery are as follows: [T]he manufacture, delivery, or possession with intent to manufacture or deliver, a controlled substance by a person not registered under this act, or a practitioner not registered or licensed by the appropriate State board, or knowingly creating, delivering or possessing with intent to deliver, a counterfeit controlled substance. 35 Pa. C.S.A. § 780-113(a)(30). The Commonwealth must prove that delivered a controlled substance, i.e., cocaine, to another person, i.e., a confidential informant.

5. Lee only argues the sufficiency of the evidence as it relates one element, arguing that the Commonwealth failed to produce evidence that Lee “was not a person registered under the act, nor a practitioner registered or licensed by the appropriate state board.”

6. The Commonwealth was not required to present evidence that Lee was not a registrant or licensed practitioner under Section 113(a)(30). That burden was on the Defendant. 35 Pa. C.S.A. § 780-121 (“In any prosecution under this act, it shall not be necessary to negate any of the exemptions or exceptions of this act in any complaint, information or trial. The burden of proof of such exemption or exception shall be upon the person claiming it.”).

7. Although the “non-authorization” under Section 113(a)(30) is an element of the

offense, the Commonwealth is not required “to disprove, in every case, every potential type of authorization to possess controlled substances which the CSDDCA recognizes.” Commonwealth v. Sojourner, 408 A.2d 1108, 1113 (Pa. Super. 1979). The Superior Court explicitly expressed disfavor with requiring the Commonwealth to prove that the defendant was not any type of “practitioner” under the CSDDCA. Id. (“With respect to “practitioners” alone, the Commonwealth would be required to offer proof of non-authorization from as many as eleven different licensing boards of agencies.”).

8. Instead, the applicable framework is a burden shifting scheme, requiring that “the accused come forward with some credible evidence of authorization (assuming the government’s case-in-chief has not provided such evidence) before the government need negative authorization beyond a reasonable doubt.” Commonwealth v. Sojourner, 408 A.2d 1108, 1114 (Pa. Super. 1979). Therefore, the burden of proof is first placed on the Defendant. Subsequent Pennsylvania cases have interpreted the CSDDCA consistent with this rule.

9. Lee’s argument is therefore without merit, as Lee did not present any evidence that he fell within the ambit of Section 780-113(a)(30). Therefore, the Commonwealth was not required to present evidence that Lee was not a registrant or practitioner under the statute.

#### *Weight of the Evidence – Standard of Review*

10. A trial court may grant a new trial where “the verdict is against the weight of the evidence, when the jury’s verdict is so contrary to the evidence as to shock one’s sense of justice, and the award of a new trial is imperative so that right may be given another opportunity to prevail.” Commonwealth v. Murray, 597 A.2d 111, 113 (Pa. Super. 1991).

11. “A true weight of the evidence challenge concedes that sufficient evidence exists to sustain the verdict but questions which evidence is to be believed.” Commonwealth v. Lewis, 911 A.2d 558, 566 (Pa. Super. 2006). When the challenge is based on the credibility of trial testimony, the evidence must be “so unreliable and/or contradictory as to make any verdict based thereon pure conjecture.” Commonwealth v. McLean, 578 A.2d 4, 6 (Pa. Super. 1990).

#### *Weight of the Evidence – Unlawful Delivery of a Controlled Substance*

12. Lee argues that the only evidence that he produced the drugs was based on the informant’s testimony, despite the following problems: (1) the search of the informant, (2) the lack of corroborating photographic evidence, (3) the Detective’s failure to observe the transaction, and (4) the role Mike Zolla played in the transaction and his involvement with the informant.

#### *Weight of the Evidence – Evidence that Lee Produced the Drugs*

13. The Court was presented with more than just the testimony of the CI. The Commonwealth presented testimony from several players involved in the clandestine operation that formed the basis for the case against the Defendant: The CI, Officer Bryan Chappell (in charge of surveillance), and Detective Jason Taylor (in charge of informant). All three individuals recounted what had happened on October 3, 2011 from their various perspectives.

14. This Court found the CI’s testimony to be credible that he purchased the drugs from Lee. His recounting of the events was consistent with the photographic evidence, as well as the testimony of the two police officers involved in the controlled buy. The fact that the same informant may have been used in other surreptitious drug buys does not render the evidence against Lee “so unreliable and/or contradictory as to make any verdict based thereon pure conjecture.”

### *Weight of the Evidence – Search of the Confidential Informant*

15. The Court was presented with credible testimony that the pre-buy search conducted on the informant was adequate. The CI's pockets were turned inside out, his shoes were taken off, and his waistband was checked. The informant was patted down along the outside of his clothing. No money or contraband was found on his person. Upon the conclusion of the transaction, the CI turned over the cocaine to the police, after which he was searched again.

16. Lee provides no evidence in support of his challenge to this search of the CI. The search described at trial is the standard search performed by officers in a controlled buy.

### *Weight of the Evidence – Photographs – Corroborating Evidence*

17. Lee's challenges to the photographic evidence and the lack of corroboration of the informant's description of the events are meritless. Several photographs were presented depicting the transaction, from start to finish. The mere fact that there was not a picture that captured the exact moment where Lee spit the cocaine into his hand before he handed it to the CI does not negate the rest of the evidence presented. Circumstantial evidence can be enough to establish guilt beyond a reasonable doubt.

18. The photographs presented credible evidence that Lee delivered the drugs to the CI in exchange for money, which Lee counted and placed in his pocket. The testimony of the informant confirmed this, as well as the testimony of the officers present. The absence of a photo showing the precise instant where the cocaine changed hands was not fatal to the case. "The existence of arguably more persuasive means of corroboration did not by itself render insufficient that information which was produced by police action." Commonwealth v. Woods, 590 A.2d 1311, 1314 (Pa. Super. 1991).

### *Weight of the Evidence – The Detective's Failure to View the Drug Transfer*

19. The fact the Detective Taylor did not see the transfer of drugs and money does not render Lee's conviction against the weight of the evidence. Detective Taylor was in charge of the CI, not of the surveillance. Detective Taylor parked his vehicle approximately two blocks down from where the transaction was to take place, and watched the CI walk down the street to meet Lee. He was not close enough to witness each precise moment of the transaction. See, e.g., Commonwealth v. Thompson, 985 A.2d 928, 941 (Pa. 2009) (Castille, C.J., concurring) (discussing undercover surveillance of controlled dug buys, noting that "[f]rom a distance, it would be difficult to have a clear view of the small objects that changed hands").

20. Detective Taylor's testimony still presented corroborating evidence that Lee provided the drugs to the CI in exchange for cash. The CI was given \$170.00 to purchase cocaine, and subsequently returned to Detective Taylor's vehicle and turned over the cocaine. Detective Taylor searched the CI upon his return, finding no money or contraband, other than the drugs purchased from Lee. Thus, Lee is incorrect that there was no other evidence of the transaction other than the informant's testimony.

### *Weight of the Evidence – Informant's Interactions with Third Party*

21. Although there were several photographs depicting the CI standing alongside the third person present, those photographs do not negate the evidence in support of Lee's conviction. The CI testified that he and the third party were together for less than 10 minutes before Lee approached them. Lee presented no evidence that money was exchanged before he arrived.

22. Additionally, whether that third party also purchased drugs from the CI at a later time does not render the evidence against Lee inconsequential. The photographs provided credible evidence to support a finding that Lee delivered the drugs to the CI for money. That was

corroborated by the CI and by the two officers present at the drug buy. This Court, in its role as the fact-finder, found that testimony to be credible, and found Lee’s version of the events to be lacking in consistency and credibility. See, e.g., Commonwealth v. Dancy, 650 A.2d 448, 452 (Pa. Super. 1994) (“The finder of fact chose to believe the testimony of the officers. . . . This credibility judgment is fully within the province of the fact finder.”). Lee’s unverified allegation of subsequent purchases does not alleviate the weight of the evidence in support of his guilty verdict for the transaction that he was involved in.

Appearances:

E. Edward Qaqish, Esq., *Counsel for Defendant*

Franklin County District Attorney’s Office

**OPINION SUR 1925(a)**

Before Meyers, J.

**STATEMENT OF THE CASE**

On August 13, 2013, following a trial without jury, Appellant Gabriel D. Lee was convicted of Unlawful Delivery of a Schedule II Controlled Substance, 35 Pa. C.S.A. § 780-113. Lee was sentenced on September 11, 2013. Upon Lee’s request for appointment of counsel, the Court appointed Bret Beynon, Esq., to represent Lee for all post-sentence and appeal matters.

Subsequently, the Court received several *pro se* letters from Lee which were forwarded to attorney Beynon. Attorney Beynon filed a transcript request on March 25, 2014. On March 25, 2014, this Court held a status conference, where attorney Beynon admitted that she failed to file timely post-sentence motions or an appeal on behalf of her client, resulting in a waiver of Lee’s right to file an appeal. Based on the evidence presented, this Court found that Lee was entitled to reinstatement of his direct appeal rights. This Court subsequently ordered Lee’s appeal rights reinstated, and appointed E. Edward Qaqish, Esq., to represent him. On April 28, 2014, Lee filed a Notice of Appeal. Lee filed his Concise Statement of Matters Complained of Upon Appeal on May 16, 2014.

**FACTUAL BACKGROUND**

The following facts were established through testimony presented at trial. The Commonwealth first presented testimony from the confidential informant (“CI”). N.T. Transcript of Proceedings of Jury Trial, 8/13/2013, at p. 14. On October 3, 2011, the CI was working as a confidential informant for the Franklin County Drug Task Force. Id. at 16. On that date, the CI purchased cocaine from the Defendant, Gabriel Lee. Id. at 18. He had known Lee at least one week prior to the transaction. Id. The CI first met Lee at a bar in Greencastle, where he lamented that he was new in town and did not know where he could “get anything.” Id. at 19-20. To this, Lee replied that “[a]nytime you need something, give me a call.” Id. at 20. Lee identified himself as “G,” the name he went by on the street. Id. at 20. The CI then informed Detective Jason Taylor of his newly acquired source in preparation for a deal to be set up. Id.

The CI testified that he attempted to contact Lee by phone and text message, but received no reply. Id. The CI then ran into Lee again, and their business relationship took off from there. Id. On October 3, 2011, the CI called Lee and requested “an eight ball of cocaine.” Id. at 21. The two men discussed the price of that commodity, which came out to \$170.00. Id. Lee instructed the CI to contact him when he was in the area. Id.

The CI met with Detective Taylor, where he was searched prior to the meeting with Lee. Id. The CI testified that his pockets were pulled inside out, he took his shoes off and Detective Taylor shook them, and he was patted down. Id. Detective Taylor then provided the CI with \$170.00. Id. at 22. The CI called Lee, who told him to meet at Papa John’s, located approximately 80-100 yards from Lee’s residence, and is within sight of that residence. Id. While the CI was waiting at Papa John’s, he attempted to call Lee at least three times but got no answer. Id. Lee and his friend Mike Zolla then approached the Papa John’s. Id. Lee carried a dog with him. Id. at 23. The CI walked toward the two men and indicated that he had the money. Id. The CI testified that he pulled the money out and “Lee spit the cocaine from his mouth and we made the exchange.” Id. The cocaine was in a small plastic bag. Id. at 24. After Lee handed the cocaine to the CI, the three men proceeded to walk across the street towards the Papa John’s. Id. The CI stated that the transaction took approximately two minutes. Id. at 24. After this encounter, Lee and Zolla walked up an alley next to the pizza shop. The CI returned to Detective Taylor’s vehicle, where he turned over the cocaine purchased from Lee. Id. at 28.

The Commonwealth next presented testimony from Officer Bryan Chappell of the Waynesboro Police Department. Id. at 59-60. Officer Chappell has worked in law enforcement for thirteen years. Id. at 60. In October of 2011, Officer Chappell was working as a detective with the

Franklin County Drug Task Force. Id. During his time there, he conducted approximately 50 drug investigations. Id. at 61. On October 3, 2011, Officer Chappell assisted with the controlled drug buy in this case, setting up surveillance in a large SUV on South Carlisle Street. Id.

Officer Chappell watched the CI walk South on S. Carlisle Street. Id. at 62. He testified that he saw a golden car parked North on S. Carlisle Street against the curb. Id. at 63. Out of that car emerged Lee and a second male, who was identified as Mike Zolla. Id. at 62-63. Officer Chappell watched the CI as he met with Lee and Zolla. Id. at 62. Lee had a dog in his hand. Id. Lee then went into his residence while Zolla remained outside with the CI. Id. at 63. Officer Chappell was approximately a block and a half away from the meeting, taking photographs with his camera. Id. at 63-64. He did not witness a “hand-to-hand” transaction between Lee and the CI. Id. at 67-68. Officer Chappell stated that he was 100 percent positive that he saw Lee meet with the CI on October 3, 2011 for the transaction. Id. at 66.

The Commonwealth then presented testimony from Detective Jason Taylor, an investigator with the Franklin County Drug Task Force. Id. at 74. Detective Taylor has worked in law enforcement for sixteen years, including over 1,000 drug investigations. Id. at 74-75. He briefly described the role confidential informants play in drug investigations, explaining that they are involved in over 90 percent of those investigations. Id. at 75. Throughout his career, Detective Taylor has been involved with approximately 100 confidential informants. Id. at 76. He stated that the CI became an informant in the summer of 2008 or 2009. Id.

Detective Taylor stated that the Task Force arranged a controlled cocaine purchase on October 3, 2011. Id. at 77. Detective Taylor previously told the CI to contact Lee and arrange the transaction. Id. The purchase was set for around 3:30 p.m. Id. at 80. Upon meeting the CI, Detective Taylor searched him for money or contraband, after which he provided The CI with the \$170.00 purchase money. Id. at 78. The transaction was to take place in the area near the Papa John’s on S. Carlisle Street, which was near Lee’s residence. Id. The CI was equipped with a wire under his clothing. Id. at 86.<sup>1</sup> Detective Taylor drove the CI to the location, and watched him walk South down the street to meet Lee. Id. at 78-79. He stated that the location was a little more than half a block from Lee’s residence, which was in sight of the Papa John’s. Id. at 80. Detective Taylor was two blocks down the street from the transaction. Id. at 97.

After the drug buy, the CI returned to Detective Taylor’s vehicle and turned over the cocaine. Id. at 81. The CI stated that he purchased the

<sup>1</sup> Detective Taylor testified that the quality of the recording was poor and it was difficult to hear the conversation between The CI, Lee, and Zolla. Id. at 87.

drugs from Lee. Id. Detective Taylor searched the CI again and found no money or contraband on his person. Id. The substance purchased was in a small plastic bag, in a white powdery form, which was later confirmed to be cocaine. Id. at 81-82.<sup>2</sup> Detective Taylor was later recalled to testify by the Defendant, where he focused on the Task Force’s procedure regarding the money used in controlled drug buys, and for weighing the drugs recovered. Id. at 133-135. Detective Taylor testified that, based on his experience in drug investigations, he believed that Lee did have the ability to hold a bag of cocaine in his mouth while he spoke to an informant. Id. at 136-137.

The Court also heard testimony from the Defendant, Gabriel Lee. Id. at 108. Lee stated that on October 3, 2011, he left his cell phone in Hagerstown, Maryland. Id. at 110. Lee presented conflicting testimony regarding his trip to Hagerstown.<sup>3</sup> He testified that upon his return from Hagerstown, he found his friend Mike Zolla standing outside his residence. Id. at 111. He stated that he was unaware that the CI was on his way to meet him, and denied speaking to him that day. Id. When he went inside his home, his fiancé asked him to take their dog out. Id. Lee stated that when he came out of his house, he saw the CI and Zolla talking, but “thought nothing of it” because the two gentlemen were friends. Id. Lee stated that if the CI had purchased drugs, it wasn’t from him but from Zolla. Id. at 112. Lee maintained that it was not his phone that the CI called, and that he never sold the CI any drugs. Id. at 112, 113, 116.

At the conclusion of the trial, the Court placed its findings on the record, ruling that the Commonwealth had proven beyond a reasonable doubt that Lee did deliver a scheduled II controlled substance, cocaine, to another person, the confidential informant. On appeal, Lee raises several challenges based on the sufficiency and weight of the evidence presented at trial. This Court will address each argument individually.

## DISCUSSION

### I. Sufficiency of the Evidence:

First, Lee challenges the sufficiency of the evidence to sustain his conviction for Unlawful Delivery of a Controlled Substance. This Court will set out the applicable standard before discussing the sole issue Lee raises.

<sup>2</sup> The Commonwealth also presented testimony from Robert Wagner, a retired Pennsylvania State Police forensic scientist. Id. at 98-99. Mr. Wagner discussed the procedures for testing to determine if certain substances are drugs. Id. at 101. He tested the substance purchased from the transaction in this case, and found the substance to be 1.4 grams of cocaine. Id. at 107.

<sup>3</sup> For example, on cross-examination, he stated that he and Zolla went to Hagerstown together to visit his family. Id. at 117. Lee then stated that Zolla knew people in Hagerstown. Id. at 120. He later stated that someone dropped him and Zolla off at Lee’s residence after going to Hagerstown. Id. at 121.

### A. Standard of Review:

The standard of review for sufficiency of the evidence claims is well settled in Pennsylvania. The Court must determine: “whether, viewing all the evidence admitted at trial in the light most favorable to the verdict winner, there is sufficient evidence to enable the fact-finder to find every element of the crime beyond a reasonable doubt.” Commonwealth v. Lopez, 57 A.3d 74, 79 (Pa. Super. 2012) (citing Commonwealth v. Chine, 40 A.3d 1239, 1242 (Pa. Super. 2012)), appeal denied, 62 A.3d 379 (Pa. 2013). Evidence is sufficient to support a verdict when “it establishes each material element of the crime charged and the commission thereof by the accused, beyond a reasonable doubt.” Commonwealth v. Norley, 55 A.3d 526, 531 (Pa. Super. 2012) (citation omitted). The Commonwealth is not required to establish guilt “to a mathematical certainty, and may sustain its burden by means of wholly circumstantial evidence.” Commonwealth v. McKellick, 24 A.3d 982, 990 (Pa. Super. 2010) (quoting Commonwealth v. DiPanfilo, 993 A.2d 1262, 1264 (Pa. Super. 2010)).

Most importantly, the appellate court “may not substitute [its] judgment for that of the fact-finder; if the record contains support for the convictions they may not be disturbed.” Id. Any doubts as to the weight of the evidence, the credibility of the witnesses, and the defendant’s guilt, are meant to be “resolved by the fact-finder, unless the evidence is so weak and inconclusive that, as a matter of law, no probability of fact can be drawn from the combined circumstances.” Id. For the reasons set forth below, this Court finds that there was sufficient evidence to support Lee’s convictions for Unlawful Delivery of a Controlled Substance, and respectfully requests that the Superior Court affirm its decision.

### B. Unlawful Delivery of a Controlled Substance:

Lee argues that his conviction of was not supported by sufficient evidence. Lee was convicted of Unlawful Delivery of a Controlled Substance pursuant to 35 Pa. C.S.A. § 780-113(a)(30). The elements of the crime are set forth as follows:

[T]he manufacture, delivery, or possession with intent to manufacture or deliver, a controlled substance **by a person not registered under this act, or a practitioner not registered or licensed by the appropriate State board**, or knowingly creating, delivering or possessing with intent to deliver, a counterfeit controlled substance.

§ 780-113(a)(30) (emphasis added).

Based on the framework outlined above, to sustain a conviction

for unlawful delivery, the Commonwealth must have proven beyond a reasonable doubt that Lee delivered a controlled substance, i.e., cocaine, to another person, i.e., a confidential informant. On appeal however, Lee only challenges the sufficiency of the evidence as it relates to the language highlighted above, arguing that the Commonwealth failed to produce evidence that Lee “was not a person registered under the act, nor a practitioner registered or licensed by the appropriate state board.”<sup>4</sup> For the following reasons, this Court believes that Lee’s argument is meritless.

The Commonwealth was not required to present evidence that Lee was not a registrant or licensed practitioner under Section 113(a)(30). In prosecutions for Unlawful Delivery of a Controlled Substance, it is not incumbent upon the Commonwealth in every case to prove that the defendant does not fall within the ambit of that exception. A review of the relevant jurisprudential landscape shows that this burden has been placed first on the Defendant.

Section 121 of the Controlled Substance, Drug, Device and Cosmetic Act (“CSDDCA”) reads as follows: “In any prosecution under this act, it shall not be necessary to negate any of the exemptions or exceptions of this act in any complaint, information or trial. The burden of proof of such exemption or exception shall be upon the person claiming it.” 35 Pa. C.S.A. § 780-121; see also Burden of Proof in Drug Offenses, *Office of the Attorney General*, Official Opinion No. 75-24, 1975 WL 393032 (July 30, 1975) (“[T]he exceptions [in Section 113(a)(30)] to the outright proscription need not be negated by the Commonwealth.”). The legal basis for this has been outlined as follows: “If an exception is material in arriving at the definition of the crime, it is generally held the State has the burden of showing the exception does not apply because it is then one of the essential elements of the offense. However, where the exception merely furnishes an excuse for what would otherwise be criminal conduct, the duty devolves upon the defendant to bring himself within the exculpatory provision.” Commonwealth v. Stoffan, 323 A.2d 318, 325 (Pa. Super. 1974).

In Commonwealth v. Sojourner, 408 A.2d 1108 (Pa. Super. 1979), the Pennsylvania Superior Court explained the burden of proof for the Section 113(a)(30) exceptions more thoroughly. Upon reviewing the statute and prior case law, the Superior Court first noted that “non-authorization” under the statute is an element that must be proven by the Commonwealth beyond a reasonable doubt. Sojourner, 408 A.2d at 1113. The Court further explained however, that the Commonwealth is not required “to disprove, in every case, every potential type of authorization to possess controlled substances which the CSDDCA recognizes.” Id. The Superior Court

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<sup>4</sup> This quoted language has been referred to as the “license or registration exception” of section 113(a)(30). See Burden of Proof in Drug Offenses, *Office of the Attorney General*, Official Opinion No. 75-24, 1975 WL 393032 (July 30, 1975).

explicitly expressed disfavor with requiring the Commonwealth to prove that the defendant was not any type of “practitioner” under the CSDDCA. Id. (“With respect to “practitioners” alone, the Commonwealth would be required to offer proof of non-authorization from as many as eleven different licensing boards of agencies.”). The Superior Court then set out a burden shifting scheme, requiring that “the accused come forward with some credible evidence of authorization (assuming the government’s case-in-chief has not provided such evidence) before the government need negative authorization beyond a reasonable doubt.” Id. at 1114. Therefore, the burden of proof is first placed on the Defendant.

Subsequent Pennsylvania cases have interpreted the CSDDCA consistent with the rule set out in Sojourner. See, e.g., Commonwealth v. Clark, 683 A.2d 901, 905-06 (Pa. Super. 1996) (interpreting 35 P.S. § 780-121 and noting that “a defendant charged with possession of a controlled substance must prove by a preponderance that he or she was registered to possess that controlled substance and exempt from the statute’s operation” in context of entrapment discussion); Commonwealth v. S., 597 A.2d 137, 139 (Pa. Super. 1991) (“As the Commonwealth correctly notes, section 780-121 of the [CSDDCA] clearly places *the burden of coming forward with evidence of authorization on the defendant at trial.*”) (emphasis in original).

Based on the foregoing, Lee’s argument on appeal is without merit. Lee did not present evidence that he fell within the ambit of Section 780-113(a)(30). Therefore, the Commonwealth was not required to present evidence that Lee was not a registrant or practitioner under Section 780-113(a)(30). The focal point of Lee’s case, as highlighted by the evidence and testimony presented at trial, was whether Lee did in fact deliver a controlled substance to the confidential informant. Although Lee does not challenge the sufficiency of the evidence in regards to the other elements of the offense, the Court notes that the Commonwealth did present sufficient evidence to sustain its burden beyond a reasonable doubt. Because Lee presented no evidence that he was authorized to possess or deliver a controlled substance, the Commonwealth had no obligation to present evidence to the contrary. It is for these reasons that this Court believes Lee’s argument on appeal is without merit. Accordingly, the Court respectfully requests the Superior Court affirm its decision.

## II. Weight of the Evidence:

Next, Lee challenges the weight of the evidence to sustain his conviction for Unlawful Delivery of a Controlled Substance. This Court will first set out the applicable standard, before proceeding to address the

various arguments Lee raises.

#### A. Standard of Review:

The standard of review for challenges based on the weight of the evidence is well established in Pennsylvania. A trial court may grant a new trial where “the verdict is against the weight of the evidence, when the jury’s verdict is so contrary to the evidence as to shock one’s sense of justice, and the award of a new trial is imperative so that right may be given another opportunity to prevail.” Commonwealth v. Murray, 597 A.2d 111, 113 (Pa. Super. 1991). When the decision of the trial court is challenged on appeal, “[the] appellate court’s role is not to consider the underlying question of whether the verdict is against the weight of the evidence. . . . Rather, appellate review is limited to whether the trial court palpably abused its discretion in ruling on the weight claim.” Commonwealth v. Lewis, 911 A.2d 558, 566 (Pa. Super. 2006).

Furthermore, “[a] true weight of the evidence challenge concedes that sufficient evidence exists to sustain the verdict but questions which evidence is to be believed.” Id. When the challenge is based on the credibility of trial testimony, the evidence must be “so unreliable and/or contradictory as to make any verdict based thereon pure conjecture.” Commonwealth v. McLean, 578 A.2d 4, 6 (Pa. Super. 1990). For the reasons set forth below, this Court found the witnesses and their testimony to be credible, and ruled that the weight of the evidence supported Lee’s conviction. Therefore, this Court believes that Lee’s arguments are meritless, and respectfully requests that the Superior Court affirm its decision.

#### B. Unlawful Delivery of a Controlled Substance:

Lee was convicted of Unlawful Delivery of a Controlled Substance pursuant to 35 Pa. C.S.A. § 780-113. On appeal, Lee asserts that the verdict was against the weight of the evidence for several reasons. Lee argues that the only evidence that he produced the drugs was based on the informant’s testimony, despite the following problems: (1) the search of the informant, (2) the lack of corroborating photographic evidence, (3) the Detective’s failure to observe the transaction, and (4) the role Mike Zolla played in the transaction and his involvement with the informant. This presents an overall challenge divided into two parts: Lee’s challenge to the evidence showing he produced the drugs, and then four specific challenges to certain aspects of the transaction. The Court will address each argument individually.

##### *1. Evidence that Lee Produced the Drugs:*

Lee's main argument is that the only evidence showing he produced the drugs was based on the informant's testimony. This is simply not supported by the record. The Commonwealth presented testimony from several players involved in the clandestine operation that formed the basis for the case against the Defendant: The CI, Officer Bryan Chappell (in charge of surveillance), and Detective Jason Taylor (in charge of informant). All three individuals recounted what had happened on October 3, 2011 from their various perspectives.

As stated more fully below, a key point in Lee's overarching challenge seems to be the lack of direct evidence to support his conviction. Lee challenges the observations of the police involved in the transaction, as well as the lack of photographic evidence. The Court first notes that it is well settled that the Commonwealth may establish guilt "by means of wholly circumstantial evidence." Commonwealth v. McKellick, 24 A.3d 982, 990 (Pa. Super. 2010).

The CI was the buyer in the transaction, and thus he presented testimony grounded in his personal knowledge of the event. N.T. Transcript of Proceedings of Jury Trial, 8/13/2013, at p. 14, *et. seq.* The CI stated that he had no feelings of animosity or ill will towards Lee. Id. at 28. Questions regarding the credibility of the CI's testimony were for the Court, as fact-finder in a non-jury trial, to decide. This Court found the CI's testimony to be credible. The CI's recounting of the events was consistent with the photographic evidence, as well as the testimony of the two police officers involved in the controlled buy. Although every second of the transaction was not captured on camera, the Court found that the entirety of the evidence, including the testimony of the informant, support a verdict of guilty. See, e.g., Commonwealth v. W., 937 A.2d 516 (Pa. Super. 2007) (sufficient evidence where informant testified that: he arranged to buy cocaine from defendant, officers searched informant before the buy to verify that he did not possess drugs or money, gave informant \$1,900 purchase money, observed informant meeting with defendant at a restaurant, after which informant turned over the two ounces of cocaine purchased).

Lee presents nothing to undermine that credibility other than his assertions regarding the CI's other transactions with Mike Zolla. The fact that the informant utilized by the Franklin County Drug Task Force in this case may have arranged other surreptitious drug buys does not render the evidence against Lee "so unreliable and/or contradictory as to make any verdict based thereon pure conjecture." Commonwealth v. McLean, 578 A.2d 4, 6 (Pa. Super. 1990). Based on the foregoing, this Court believes that Lee's conviction was not against the weight of the evidence, and respectfully requests that the Superior Court affirm its decision.

## *2. The Search of the Confidential Informant:*

Next, Lee challenges the thoroughness of the search of the informant prior to the controlled buy. This Court finds no basis for Lee's challenge in the record. There was substantial testimony presented at trial to establish that the informant was searched thoroughly.

The CI testified about the pre-buy search that Detective Taylor performed on him. N.T. Transcript of Proceedings of Jury Trial, 8/13/2013, at p. 21. The CI stated that his pockets were pulled inside out, he took his shoes off and Detective Taylor shook them, and he was patted down. Id. No money or contraband was found. Id. The CI was then provided with \$170.00 from Detective Taylor. Id. at 22.

Detective Taylor also explained the details of his search of the CI. He testified that, prior to sending the CI to meet with Lee, he searched him for money and contraband. Id. at 78. This was done to ensure the CI did not possess anything that would hurt the integrity of the drug investigation. Id. at 79. Detective Taylor performed the "standard search" for this type of controlled buy. Id. This entailed removing the CI's shoes, checking his socks, turning his pockets inside out, and checking his waistband. Id. He also stated that, if an informant has a hat or a hooded sweatshirt, those areas are also searched. Id. Additionally, Detective Taylor performed a pat down of the "outer shell of clothing around the crotch area." Id. According to Detective Taylor, the CI was wearing red gym shorts and a zip-up hoodie. Id. He stated that based on his experience, the type of clothes worn by an informant does not make it more or less difficult to find any contraband or money during this type of search. Id. Upon the CI's return from the sale, he turned over the cocaine. Id. at 80. Detective Taylor then performed the same search on the CI, finding no money or contraband on his person. Id.

Lee provides no evidence in support of his challenge to this search of the informant. This Court finds that Detective Taylor presented credible evidence that the CI was searched thoroughly. The search described above is the standard search performed by officers in a controlled buy. No money or contraband was found on the CI prior to or after the transaction. Thus, this Court cannot find that the verdict was "so contrary to the evidence as to shock one's sense of justice." Commonwealth v. Murray, 597 A.2d 111, 113 (Pa. Super. 1991). Therefore, this Court believes that Lee's conviction was not against the weight of the evidence.

## *3. Corroborating Evidence - Photographs:*

Lee challenges the photographic evidence of the transaction and

the lack of corroboration of the informant's description of the events. Specifically, Lee argues that "over 90 pictures of a short transaction did not corroborate [the CI's] claim that [Lee] spit the controlled substance out of his mouth into his hand to transfer it to [the CI's]." For the reasons set forth below, this Court believes that Lee's argument is meritless.

The photographs presented at trial provided weighty evidence to support Lee's conviction. Officer Chappell set up the surveillance of the drug transaction. N.T. Transcript of Proceedings of Jury Trial, 8/13/2013, at p. 61. Commonwealth's Exhibit 4 shows Lee, the CI, and Zolla standing on the sidewalk across from Papa John's, with the CI reaching into his pocket for the money. Id. at 26. Officer Chappell testified that Exhibit 4 showed Lee facing the CI, while the CI reached into the right pocket of his shorts. Id. at 65. Officer Chappell testified that he did not witness a "hand-to-hand" transaction between Lee and the CI. Id. at 67-68. Commonwealth's Exhibit 1 shows Lee, holding a dog in his left hand and money in his right hand, the CI, and Zolla walking North on S. Carlisle Street. Id. at 64. The CI testified that the photo showed him talking, Lee counting the money given to him, and Zolla behind the CI smoking a cigarette. Id. at 26. Commonwealth's Exhibit 2 shows the same: Lee with a dog in his left hand and money in his right hand, the CI, and Zolla smoking a cigarette. Id. at 26, 65. Commonwealth's Exhibit 3 is a photograph of Lee, the CI, and Zolla, proceeding North, showing the CI with his hand in his left pocket, and Lee with his hand in his right pocket. Id. at 27, 64. Commonwealth's Exhibit 5 shows Lee, the CI, and Zolla still proceeding North on S. Carlisle Street, with their hands now out of their pockets. Id. at 65. Commonwealth's Exhibit 6 shows the three men walking down the street, engaged in some type of discussion. Id. at 27.

When asked about Exhibits 1 and 2, Lee testified that the photos did show him holding something in his right hand, but he couldn't be sure what it was. Id. at 124. He stated: "I can't say that it's money. I can't say that it's not money." Id. Lee also challenged the credibility of the CI's statements that Lee was in fact holding money. Id. at 125.

Lee presented the CI with 90 photographs, four photos on each page, and asked him to indicate where exactly did Lee spit the drugs from his mouth into his hand. Id. at 35. The CI identified Defendant's Exhibit 17, top right photo, as the time when he was "handed the cocaine from Mr. Lee." Id. at 36. Defendant's Exhibit 18, top right, is the same photo as Commonwealth's Exhibit 4, showing the CI reaching into his pocket with Lee directly facing him. The CI admitted that there was no photograph that actually showed Lee spitting the cocaine into his hand from his mouth. Id. at 57. Lee testified that the photographs did not show him transferring

any drugs to the CI. Id. at 113. Lee also noted that it would be difficult for him to count the money with one hand while holding his dog in the other. Id. at 113-14.

This Court cannot find that Lee's conviction was against the weight of all the foregoing evidence. The mere fact that there was not a picture that captured the exact moment where Lee spit the cocaine into his hand before he handed it to the CI does not negate the rest of the evidence presented. As stated above, circumstantial evidence can be enough to establish guilt beyond a reasonable doubt. The photographs present credible evidence that Lee delivered the drugs to the CI, and the CI in turn exchanged those drugs for money, which Lee counted and placed in his pocket. The testimony of the informant confirmed this, as well as the testimony of the officers present. The absence of a photo showing the precise instant where the cocaine changed hands was not fatal to the case. "The existence of arguably more persuasive means of corroboration did not by itself render insufficient that information which was produced by police action." Commonwealth v. Woods, 590 A.2d 1311, 1314 (Pa. Super. 1991). This Court cannot ignore the credible evidence presented, through photographs and testimony, and therefore finds that Lee's conviction was not against the weight of the evidence.

#### *4. The Detective's Failure to view the Drug Transfer:*

Lee also challenges the lack of corroborating evidence from the police involved with the transaction. Specifically, Lee states that "the Detective who watched the entire transaction did not see the transfer of drugs." At trial, Detective Taylor testified that he did not see the transfer of drugs and money between Lee and the CI. N.T. Transcript of Proceedings of Jury Trial, 8/13/2013, at 97. That fact does not render the guilty verdict against the weight of the evidence.

Detective Taylor was in charge of the informant, he was not in charge of surveillance of the controlled buy. Id. at 97. Officer Chappell was in charge of surveillance. Id. Detective Taylor parked his vehicle approximately two blocks down from where the transaction was to take place. Id. While he was able to watch the CI walk down the street and meet with Lee and Zolla, he was not close enough to witness each precise moment of the transaction. This does not mean his observations carry no weight, and does not render the verdict against the weight of the evidence. See, e.g., Commonwealth v. Thompson, 985 A.2d 928, 941 (Pa. 2009) (Castille, C.J., concurring) (discussing undercover surveillance of controlled drug buys, noting that "[f]rom a distance, it would be difficult to have a clear view of the small objects that changed hands").

Additionally, Detective Taylor’s testimony still presented corroborating evidence that Lee provided the drugs to the CI in exchange for cash. Detective Taylor provided the CI with \$170.00 to purchase cocaine, and watched the CI walk to meet with Lee. *Id.* at 78-79. The CI subsequently returned to Detective Taylor’s vehicle and turned over the cocaine. *Id.* at 81. Detective Taylor searched the CI upon his return, finding no money or contraband, other than the drugs purchased from Lee. *Id.* Thus, Lee is incorrect that there was no other evidence of the transaction other than the informant’s testimony. *See, e.g., Commonwealth v. Baker*, 615 A.2d 23, 26 (Pa. 1992) (informant’s statements about source of the drugs was corroborated by “the Agent’s first-hand knowledge that the informant entered the North West Street address in a controlled situation with money for the express purpose to buy cocaine and that he exited the residence and gave the Agent cocaine”). Based on the foregoing, this Court believes that Detective Taylor’s failure to view the actual transfer of drugs himself does not render the guilty verdict against the weight of the evidence.

#### *5. The Informant’s Interaction and Relationship with Michael Zolla:*

Finally, Lee challenges his conviction based on his assertion that the informant “spent a long amount of time speaking to Michael Zolla prior to this transaction,” and purchased drugs from Zolla several days later. Thus, Lee appears to be arguing that Zolla was the one who produced the drugs and not him. This Court finds this argument to be without merit.

Lee is correct that there are several photographs depicting the CI standing next to Zolla prior to the exchange with Lee. These photographs are part of the Defendant’s Exhibits. At trial, Lee asked the CI to look at all 90 photographs. *N.T. Transcript of Proceedings of Jury Trial*, 8/13/2013, at p. 49. Defendant’s Exhibits 1 through 8 depict the CI and Zolla. *Id.* at 50-51. Lee testified that the photographs showed the CI and Zolla standing outside Lee’s house for several minutes before Lee came out. *Id.* at 113. The CI testified that he and Zolla were together for less than 10 minutes before Lee approached them. *Id.* at 53. Lee presented no evidence that any drugs or money was exchanged between the CI and Zolla. Nor did Lee highlight any specific photograph(s) purporting to show any such exchange. Lee merely focused on the fact that, before he emerged from his residence, the CI and Zolla were together for a short period of time.<sup>5</sup> This does not negate the evidence showing that Lee sold cocaine to the CI.

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<sup>5</sup> At trial, Lee also maintained that it was not his phone The CI called to set up the buy, it was Zolla’s phone. *Id.* at 112. No evidence was presented in support of that assertion. The Commonwealth presented evidence that Zolla had an African accent, as he was from the Congo. *Id.* at 130. The CI testified that he had previously spoken to Zolla and was aware of his accent. *Id.* The CI stated that the person whom he called and answered the phone that day to arrange the buy did not have an accent. *Id.* This Court found the evidence established that it was Lee who answered the phone when The CI called to arrange the drug purchase.

Lee draws focus to the relationship between the CI and Zolla. At trial, Lee testified that the CI purchased drugs from Zolla three days after the transaction at issue, resulting in Zolla being arrested. Id. at 112-13. The CI testified that he recalled making multiple drug purchases from Lee and Zolla at different times. Id. at 56, 129. The CI could not remember the exact dates of any drug purchases from Zolla. Id. at 56, 128.

Whether the CI purchased drugs from Zolla three days after the transaction with Lee does not render the evidence against Lee inconsequential. The photographs provided credible evidence to support a finding that Lee delivered the drugs to the CI for money. The CI maintained that Lee was the person who sold him cocaine. That testimony was corroborated by Officer Chappell and Detective Taylor. This Court, in its role as the fact-finder, found that testimony to be credible, and found Lee's version of the events to be lacking in consistency and credibility. See, e.g., Commonwealth v. Dancy, 650 A.2d 448, 452 (Pa. Super. 1994) ("The finder of fact chose to believe the testimony of the officers. . . . This credibility judgment is fully within the province of the fact finder."). Lee's unverified allegation of subsequent purchases between the CI and Zolla does not alleviate the weight of the evidence in support of his guilty verdict for the transaction that he was involved in. Based on the foregoing, this Court believes that Lee's argument on appeal has no merit.

## **CONCLUSION**

Based on the foregoing reasons, this Court believes that Appellant Gabriel Lee's claims are without merit. Lee's conviction of Unlawful Delivery of a Controlled Substance was supported by sufficient and weighty evidence presented at trial. Accordingly, this Court respectfully requests that the Superior Court affirm its decision.