

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,	:
	:
vs.	: NO. 925-2006
	:
MARK B. FISHER,	:
	:
Defendant	: 1925(a) OPINION

Date: February 6, 2008

**OPINION IN SUPPORT OF THE ORDER OF JUNE 12, 2007 IN COMPLIANCE
WITH RULE 1925(a) OF THE RULES OF APPELLATE PROCEDURE**

Defendant Mark B. Fisher has appealed this court's imposition of sentence issued on June 12, 2007 following his jury trial conviction on charges of Delivery of a Controlled Substance, Possession with Intent to Deliver a Controlled Substance, Possession of a Controlled Substance, Possession of Drug Paraphernalia, and Criminal use of a Communication Facility. Fisher argues that the evidence at trial was insufficient to prove guilt beyond a reasonable doubt and the verdict was contrary to the weight of the evidence. Fisher also contends that the court erred by denying Fisher's Motion to Suppress evidence consisting of Fisher's video-taped confession to police. Fisher's appeal should be denied and the verdict affirmed.

I. Background

On May 12, 2006, Fisher was arrested by the Williamsport Police on charges of Delivery of a Controlled Substance, Possession with Intent to Deliver a Controlled Substance, Possession of a Controlled Substance, Possession of Drug Paraphernalia, and Criminal use of a Communication Facility. Counsel for Fisher entered an appearance and waiver of arraignment on August 7, 2006. Pretrial was originally scheduled for September 7, 2006, but was continued

until December 21, 2006. At pretrial, the case was scheduled for trial in the March 2007 trial term. On December 26, 2006, Fisher filed a *pro se* document entitled “Motion for the Suppression of Evidence under Rule 576 A.3.9.” The document did not state what evidence was sought to be suppressed nor did it state any reason or grounds for suppression. Within the motion Defendant asked whether he needed to present evidence and witnesses for the pre-trial. Also within the document, Fisher asked for a dismissal. At the time of this filing, Fisher was represented by counsel. In response, this court issued an order on January 17, 2007 pursuant to the Pennsylvania Rules of Criminal Procedure Rule 576(A)(4) advising Fisher that no action would be taken on the Motion since he was represented by counsel and counsel had not signed the Motion. The court then directed the Prothonotary’s Office to forward a copy of the Motion to Fisher’s attorney, Gregory Drab, and the attorney for the Commonwealth.

On the eve of trial, March 22, 2007, Mr. Drab raised an oral motion on the record for leave to file a suppression motion. Notes of Testimony, 3/22/07, pg. 2. The evidence to be suppressed was Fisher’s post-arrest video-taped confession to police on the grounds that it was involuntarily made while Fisher was allegedly intoxicated and/or made under unlawful police inducement by the promise to speak favorably to Fisher’s parole officer. *Id.* at 4. The motion was subsequently denied in an order dated March 22, 2007.

On March 23, 2007 and March 26, 2007, a jury trial was held before this court at which Fisher was represented by counsel. On March 26, 2007, the jury found Fisher guilty of Delivery of a Controlled Substance and Possession with Intent to Deliver a Controlled Substance under 35 § 780-113(A)(30), Possession of a Controlled Substance under 35 § 780-113(A)(16), Possession of Drug Paraphernalia under 35 § 780-113(A)(32), and Criminal use of a Communication Facility under 18 § 7512(a). On April 5, 2007, Fisher filed a Motion for Relief of Verdict as well

as dismissal of his appointed counsel, Gregory Drab. Sentence was imposed on June 12, 2007 and on June 22, 2007 Fisher filed a Post-sentence Motion. On July 9, 2007 this court denied Fisher's Post-sentence Motion as well as his Motion for Reconsideration. On July 16, 2007, Fisher's Notice of Appeal to the Superior Court was filed. On July 18, 2007 this court issued an order in compliance with Pennsylvania Rules of Appellate Procedure Rule 1925(b) directing Fisher to file a Concise Statement of Matters Complained of on Appeal within fourteen days of the order. On July 30, 2007, Fisher filed by and through his attorney, Robert Cronin, a Concise Statement of Matters Complained of on Appeal.

In his statement of matters, Fisher set forth four main issues. They are as follows:

- (1) Whether the court erred by denying Fisher's Motion to Suppress any evidence of Fisher's statements made to police as Fisher alleges he was intoxicated at the time the statements were made;
 - (a) Specifically, whether the trial court failed to adhere to established case law which requires in-camera review of video-taped confessions;
- (2) Whether the evidence was sufficient to prove Fisher committed the offense of Delivery of a Controlled Substance beyond a reasonable doubt;
- (3) Whether the evidence is contrary to the verdict for the count of Delivery of a Controlled Substance given there was testimony that Fisher was authorized to Deliver a Controlled Substance as a confidential informant for the police and a cooperative of the District Attorney's Office;
- (4) Whether the court's verdict of guilty regarding Delivery of a Controlled Substance was against the weight of the evidence when Fisher claims the Commonwealth's witness, Officer Kristopher Moore, was not credible.

Defendant's Concise Statement of Matters Complained of on Appeal Pursuant to Pa.R.A.P. 1925(b).

II. Discussion

(1) Motion to Suppress

As to the first issue, the court believes that Fisher's claim regarding this court's denial of the Motion to Suppress the video-taped confession must fail. On the eve of trial, March 22, 2007, Fisher's counsel, Mr. Drab, opened the record for the purpose of making an oral motion to suppress evidence on the record. Mr. Drab requested the court for leave to file a motion to suppress. Mr. Drab acknowledged that the motion was untimely and informed the court that Fisher had previously filed a *pro se* suppression motion. *Id.*

Fisher's *pro se* motion filed December 28, 2006, was properly denied by an order issued January 17, 2007 pursuant to Pennsylvania Rules of Criminal Procedure Rule 576(A)(4). At the March 22nd proceedings, the court read into the record the contents of both Fisher's *pro se* motion and the court's responding order. N.T., 3/22/07, pg. 2-3. The court noted that although Fisher's *pro se* motion contained the heading of "Motion for the Suppression of Evidence," the contents of the motion did not state what evidence was to be suppressed or any basis for suppression. *Id.* at 3. The contents of Fisher's motion did not resemble that of an effective motion to suppress, but contained questions to the court asking if he had to present evidence at pretrial and whether he should subpoena witnesses. *Id.* The motion also posed questions to the Commonwealth asking why certain evidence had been left out of their case. *Id.* Finally, the motion made reference to a Motion to Dismiss which Fisher stated he filed *pro se* on December 11, 2006. *Id.* The court noted that there were several other hand written motions in the file but that none of them had anything to do with a motion to suppress evidence. *Id.* at 3-4.

In his oral motion, Mr. Drab argued that Fisher's video-taped confession should be suppressed because Fisher claims to have been intoxicated during the interview rendering the confession involuntary. *Id.* at 4. Mr. Drab also stated that during the interview, there was discussion of Officer Ungard putting in a favorable word to Fisher's Parole Officer, Stephen

DeLullo, in exchange for Fisher's cooperation in making the confession. *Id.* Mr. Drab argued that under the totality of the circumstances the taped confession was not voluntary. *Id.* at 5.

In response to Mr. Drab's contentions, the Commonwealth argued that the motion was untimely and that a signed evidence receipt shows Defense counsel had had knowledge of the tape since September 13, 2006. *Id.* The Commonwealth stated further that there had been a fair opportunity for Defense counsel to review the evidence and that no suppression motion had since been filed by any counsel representing Fisher. *Id.* Finally the Commonwealth referenced the lateness of the motion, arguing that because trial was set to be held the following morning, and a jury had been selected, granting the motion at this late date would severely prejudice the Commonwealth and give them grounds for an appeal. *Id.*

On March 22, 2007, the court denied counsel's oral motion for leave to file a motion to suppress, but ordered counsel was not precluded from addressing the issue of voluntariness of the confession at trial. The court further provided in the order that the Commonwealth had the burden of proving the voluntariness of the statement by a preponderance of the evidence and the jury would be appropriately instructed. *Id.* at 6-7. The trial transcripts of March 23rd and March 26th show that the provisions of this order were followed at trial.

In Fisher's testimony, the only instance in which he alluded to being intoxicated was when he was making the buy for Confidential Informant, (hereafter "CI"), Joclyn Persun, and not when he was under police custody. N.T. 03/23/07, 140. Fisher testified that he was on 200 milligrams of Trazadone for his headaches when he made the arrangements with Persun on May 11, 2006 purchase crack cocaine. *Id.* Fisher was not arrested and taken into police custody until the morning of May 12th. N.T., pg. 03/23/07, 75-76, 157-158. There is no testimony from Fisher indicating that after he was arrested and during his taped interview he was on any type of

drug. There is also no testimony from Fisher, Officer Maines or Parole Officer DeLullo indicating that the police would speak favorably to DeLullo in exchange for Fisher's cooperation during the interview.

The Commonwealth carried its burden of proving voluntariness by its submitting into evidence Exhibit #1, Fisher's Miranda rights waiver, and Exhibit #4, Fisher's video-taped confession. N.T., 3/23/07, pg. 118. Both were admitted without objection by Defense counsel. *Id.* Moreover, Fisher did not object to the Commonwealth's request that Exhibit #1, going to the voluntariness issue, go out with the jury for deliberations. N.T. 03/26/07, pg. 32. Finally, the court properly instructed the jury on the issue of voluntariness. *Id.* at 26, 32.

Given defense counsel's untimely delay without a satisfactory reason for such delay, the lack of factual basis to uphold the suppression motion, and the provisions made in the order denying the motion, this court properly exercised its discretion in denying the motion and leaving the matter for the jury to decide.

Fisher's alternate contention that this court failed to adhere to established case law requiring all video-taped confessions be reviewed in-camera is without merit. Fisher has failed to cite any such case law and this court was unable, after an exhaustive search, to reveal any cases reflecting such a rule.

(2) Sufficient Evidence of Delivery of a Controlled Substance

At trial, Fisher's counsel failed to address issues of voluntariness for Fisher's video-taped confession, but chose to focus the thrust of his defense on whether Fisher had authority as a CI to make the cocaine purchase instead of pursuing a tactic of keeping his statement for the jury. This brings us to Fisher's second contention that there was insufficient evidence for the jury to find Fisher guilty of the offense of Delivery of a Controlled Substance. In particular, Fisher

claims the evidence was insufficient because the Commonwealth failed to prove that he intended to deliver a controlled substance in violation of the statute because he was legally authorized as a CI to make such a transaction. Our court finds the evidence sufficient to uphold the charge.

In evaluating a challenge to the sufficiency of the evidence, a court must determine whether, viewing the evidence in the light most favorable to the Commonwealth as the verdict winner, together with all reasonable inferences therefrom, the trier of fact could have found that each and every element of the crimes charged was established beyond a reasonable doubt.

Commonwealth v. Little, 879 A.2d 293, 297 (2005). Although a conviction must be based on more than mere suspicion or conjecture, the Commonwealth is not required to establish guilt to a mathematical certainty. *Commonwealth v. Thomas*, 867 A.2d 594, 597 (2005). If the record contains support for the conviction, then the fact-finder's decision may not be disturbed. *Id.* The fact-finder is free to believe some, all, or none of the evidence. *Id.*

The crime of Delivery of a Controlled Substance is set forth in 35 P.S. § 780-113(a)(30), which states:

Except as authorized by this act, the 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.

Delivery is further defined by The Controlled Substance, Drug, Device and Cosmetic Act as follows: “‘DELIVER’ or ‘DELIVERY’ means the actual, constructive, or attempted transfer from one person to another of a controlled substance, other drug, device or cosmetic whether or not there is an agency relationship.” 35 P.S. § 780-102. A defendant actually transfers drugs whenever he physically conveys drugs to another person. *Commonwealth v. Murphy*, 844 A.2d 1228, 1234 (2004). In order for a defendant to be liable for the delivery of a controlled

substance, “there must be evidence that he knowingly made an actual, constructive, or attempted transfer of a prohibited controlled substance to another person *without the legal authority to do so.*” *Id.* (emphasis added).

Fisher’s sufficiency claim fails because the Commonwealth submitted and the record contains evidence that Fisher knowingly and intentionally made a physical transfer of a controlled substance, crack cocaine, to another person, the C.I., Joclyn Persun, without legal authority to do so. At trial, the Commonwealth’s witness, Joclyn Persun, (hereafter “Persun”), stated that on the date of May 11, 2006, she was working as a C.I. in the execution of a controlled buy for the Lycoming County Drug Task Force. N. T., 3/23/07, pg. 48, 64. When Persun agreed to become a CI, she told Officer Kenneth Maines of the Drug Task Force, that she believed she could buy crack cocaine from Fisher as part of a controlled buy operation organized by the Drug Task Force. *Id.* at 49-50, 65.

Persun testified that after the plans for the controlled buy with police were made, she met a friend of Fisher’s, “Abbey,” who would act as aid in the transaction by introducing Persun to Fisher and overseeing the sale of cocaine from Fisher to Persun. *Id.* at 50. Persun testified that she and Abbey met with Fisher and attempted to purchase cocaine, but the sale did not occur at this initial meeting. *Id.* Persun then returned to the Drug Task Force building and placed a phone call to Fisher with the police present. *Id.* Persun stated that when she placed the call she asked for “Mark”, and the person on the other end identified himself as Mark. *Id.* Persun asked Fisher if she could purchase crack cocaine from him. *Id.* at 51. Fisher answered that she could and told her to meet him at his residence to obtain the drugs. *Id.* Upon this instruction from Fisher, the conversation ended. *Id.* Persun then called Fisher back to request a time for the pick up of the crack cocaine. *Id.*

After the details of the deal between Fisher and Persun were set up, the police loaned Persun an unmarked drug task force vehicle to make the pick up. *Id.* Before Persun entered the vehicle, the police thoroughly searched her person and the vehicle before permitting Persun to drive to Fisher's. *Id.* at 51-52, 67-68. The police did not uncover any contraband from their search. *Id.* at 52. The police gave Persun \$100 in marked bills to make the controlled buy from Fisher. *Id.*

The controlled buy itself was video-taped by Officer Moore, introduced into evidence and played at trial. *Id.* at 111-114, Commonwealth's Exhibit #3. The tape showed Persun arriving at Fisher's residence at 1315 Miller Avenue and Fisher coming out of the building and getting into Persun's vehicle. *Id.* at 52, 68. Persun testified that Fisher instructed her to drive to 646 Center Street. *Id.* at 70. The police monitored Persun's vehicle at all times during the transaction. *Id.* at 69.

When Persun and Fisher arrived at the pick up location on Center Street, Persun declined Fisher's invitation to follow him inside the building because she stated she felt uncomfortable. *Id.* Fisher entered the building alone and remained inside for seven to eight minutes per Persun's estimation. *Id.* When Fisher got back into the car he had with him a plastic baggy appearing to contain approximately \$100 worth of crack cocaine. *Id.* at 62.

On the way back to Fisher's residence, Persun testified that Fisher did not immediately give the entire bag of crack cocaine to her, but asked if she wanted to come into his house to get high with him. *Id.* at 53. Persun declined the offer. *Id.* Fisher then asked Persun if he could take some of the crack cocaine from the sale for himself. *Id.* Persun said that he could, and she gave him the cellophane wrapper from her cigarettes for him to collect and contain the amount of crack he wanted. *Id.* , at 61. Officer Maines testified that it is common for drug addicts who sell

drugs to “break off” a piece of the sale for themselves to satisfy their own drug habit. *Id.* at 73. Persun did not observe the amount of crack Fisher took for himself from the purchase bag. *Id.* at 61-62. Fisher then exited the vehicle and left the original purchase bag and the remainder of the crack with Persun. *Id.* at 53, 62.

Persun then drove directly to meet the police officers at a prearranged meet up destination. When she arrived she turned over the bag of crack cocaine to the police officers. *Id.* at 54. At the meet up destination, Officer Moore performed a field test on the contents of the bag he received from Persun. *Id.* at 96. The contents of the bag tested positive for cocaine. *Id.* Officer Moore then sealed the drugs in an evidence envelope which he signed and dated May 11, 2006. *Id.* at 89-90. The drugs were to remain sealed in the bag upon their arrival at a lab where they would be tested once more. *Id.* at 97. At trial the Commonwealth entered the uncontested testimony of forensic scientist William Kupstis from the Pennsylvania State Police Regional lab in Wyoming, PA confirming the contents of the bag as containing 38/100th of a gram cocaine base. *Id.* at 116-117, Commonwealth’s Exhibit #6.

After field testing the contents of the bag, the police officers asked Persun a few short questions and searched her person and the vehicle before taking her back to Drug Task Force building. *Id.* This search did not reveal any contraband. *Id.* Upon her return, the officers debriefed her and searched her person again. *Id.* This search also did not reveal any contraband. *Id.*

The evidence presented at trial is sufficient for a reasonable trier of fact to infer beyond a reasonable doubt that Fisher actually transferred a controlled substance, crack cocaine, to Persun as she was acting as a CI. The remaining issue, as argued by Fisher, is whether he had the legal authority to do so. It is Fisher’s contention that he also was working as an agency authorized CI

at the time of the controlled buy on May 11, 2006, and therefore was legally authorized to transfer the cocaine in an effort to aid drug enforcement officers to the arrest of a dealer.

The testimony and evidence presented at trial was sufficient for a reasonable trier of fact to infer that Fisher was not legally authorized to transfer crack cocaine to Persun as a CI. The testimony shows that (1) no member of any law enforcement agency had given Fisher authority to act as a CI, (2) the buy accomplished by Fisher was not done according to established police procedures for controlled buys using CI's, (3) none of the appropriate paperwork had been filled out to authorize Fisher to be a CI and Fisher admitted that he was aware he needed to fill out such paperwork (4) Fisher never informed police upon his initial arrest that he was working as a CI, and (5) Fisher admitted to his parole officer after his arrest that he "jumped the gun" in his assumption that he had legal authority to make the controlled buy.

No member of any law enforcement agency ever gave Fisher permission to act as a CI in the controlled buy on May 11, 2006. Officer Maines of the Drug Enforcement Task Force testified at trial that at the time of the controlled buy on May 11, 2006, Maines was not aware of Fisher being signed up or authorized to be a CI with his unit or any other law enforcement agency. *Id.* at 78-79. Fisher's Parole Officer, Stephen DeLullo, testified that after Fisher was arrested, he advised Fisher that he had had no authorization either from the Parole Board or the District Attorney's Office to make the buy as a CI on May 11, 2006 and that was the reason for his current detainment. *Id.* at 185, 199.

The manner in which Fisher purchased the cocaine was not in accordance with set procedures for effecting a controlled buy using a CI. At trial Fisher agreed on cross examination that the controlled buy accomplished by Persun and police was executed according to a standard procedure followed by all CI's. N.T. 145. Fisher agreed that the procedure of the police was as

follows: (a) establish a detailed plan with the CI before the purchase is accomplished, (b) search the CI's person and the vehicle to be used before the buy takes place, (c) provide the CI with a recorded amount of marked bills to effect the transaction, (d) set up surveillance to monitor the buy, (e) meet at a previously arranged location after the buy, (f) order the CI turn over the drugs to police possession immediately after the purchase, (g) search the CI's person and the vehicle used again after the purchase, (h) and debrief the CI at police headquarters. *Id.*

Officer Moore testified at trial on March 26, 2007 that the Drug Task Force has a set policy and procedure that they explain and employ for every CI used. N.T., 3/26/2007, pg. 4. Moore also stated that at the very least a photograph is taken of the CI and a criminal history is run on the individual. *Id.* Moore explained that a substantial list of requirements and demands is placed on the CI and it is explained to the CI the activities they are and are not allowed to engage in. *Id.* Finally, Moore stated that he had never used a CI to deliver drugs to a third party in the manner accomplished by Fisher on May 11th. *Id.* at 5. Fisher stated that such an operation would be beyond his office's scope of duty. *Id.*

At trial, Fisher acknowledged he knew he was not following normal procedures for a controlled buy. N.T., 3/23/2007, pg. 167. Furthermore, Fisher testified that he knew he should have contacted police first to affect the buy. *Id.* at 137. When asked at trial why he continued with the purchase on May 11, 2006 despite failing to reach police to obtain permission, Fisher replied, "That's a good question. But I—I did go through with it. I went through with it because I believed that it was a way—it way a way in." *Id.* at 149. Specifically Fisher stated that he made no effort to contact police after the transaction because he had to take care of his ailing mother and "time flew by." *Id.* at 155.

None of the necessary paperwork had been filled out for Fisher to be authorized to work as a CI. On May 10, 2006, Robert Chianelli, an acquaintance of Fisher's, asked for Fisher's help in regards to Chianelli's son who had recently been found guilty on drug charges. N.T. 171, 174. *Id.* Fisher volunteered to help Chianelli. N.T. 174. On May 10th, Fisher went to a meeting at the District Attorney's Office with Robert Chianelli's, Chianelli's son's attorney, William Miele, Officer Moore, Officer Dincher and Officer Maines. *Id.* At the meeting, Chianelli asked whether Fisher could be of assistance in a controlled buy in exchange for Chianelli's son entering a rehab program instead of going to state prison where he would not be offered such programs. *Id.* at 174. Fisher stated that the Officers were interested in using him as a CI, but that because Fisher was on State Parole, he would have to get permission from his Parole Officer first. *Id.* at 130.

Following the meeting, Fisher was not given any papers or forms to fill out regarding permission to be a CI. *Id.*, 172. Fisher testified that he knew he "had to go through a process of getting permission" as a state parolee before he could assist in any controlled buy situation. *Id.* Fisher testified that the meeting ended "because I was basically asked to get permission from my probation officer and that there could be really not too much more discussion until this was taken care of." *Id.* at 131.

Officer Moore testified that it was his and Officer Ungard's responsibility to fill out paperwork for Fisher, as a parolee, to be able to work as a CI. N.T., 3/26/07, pg. 20. Moore said that none had been completed for Fisher and that during his experience as a member of the Drug Task Force, he had never filled out any of the paperwork necessary to allow a parolee to be a CI. *Id.* at 21. At the time of the controlled buy on May 11, 2006, Moore testified that he was not aware of Fisher working as a CI nor was he aware of any paperwork being done allowing Fisher

to be a CI on that date. *Id.* at 21-22. According to Moore, the only time he had discussed possibly using Fisher as a CI was after Fisher's arrest on May 12, 2006. *Id.* at 22.

One to two hours after the meeting with Chiannelli at the District Attorney's Office, Fisher went back to his home where his Parole Officer, Stephen DeLullo, met him on a routine in-home visit to obtain a urine sample. *Id.* at 131, 134. Fisher testified that he asked DeLullo whether he could operate as a CI. *Id.* at 134. DeLullo testified that he was "very, very, very, very adamant" that the requisite application and procedures be followed first in order for Fisher to be a CI. *Id.* at 195. DeLullo testified that a majority of his hour long visit, all but 10 to 15 minutes, were spent discussing the CI issue and that he made himself "very clear" on the point that Fisher did not have permission to act as a CI unless the Parole Board granted him permission by a written request from the District Attorney and then by filling out the appropriate paperwork had been filled out. *Id.* at 183, 191, 187, 189, 196.

Fisher testified that he was not given any papers or forms to fill out by DeLullo for obtaining permission to be a CI. *Id.* at 136. At trial when Fisher was asked whether he believed he should have received some paperwork to fill out confirming his status as a CI prior to purchasing the cocaine, Fisher stated, "I'm sure I probably did, Okay? But as I said, I...maybe I wasn't thinking straight. I don't know." *Id.* at 135. From the above testimony of Officer Maines, Officer DeLullo and Fisher, it was reasonable for the fact trier to conclude beyond a reasonable doubt that Fisher had not completed the necessary paperwork to be a CI and that Fisher was aware of this fact.

After his arrest when he had the taped interview with Officer Maines at City Hall, Fisher never mentioned to Maines that he believed he was authorized to work as a CI on May 11, 2006. Maines testified that during the interview, after Fisher had been advised of and waived his

Miranda Rights, (*Id.* at 77), Fisher never mentioned he was working as a CI on May 11, 2006. *Id.* at 78-79. Fisher also testified to the same, stating that he never mentioned being a CI during the taped interview following his arrest because he did not want to be labeled as an “informant” by the newspapers. N.T. 154-156.

After Fisher was arrested for his involvement in the cocaine purchase, he admitted to his parole officer that he knew he did not have the necessary legal authority to participate in the controlled buy as a CI. On May 15, 2006, DeLullo spoke with Fisher at the county prison to give him notice as to why the parole board was detaining him. *Id.* at 184-185. Again DeLullo further explained to Fisher that if Fisher had received permission and filled out the requisite paper work first, he would not be in incarcerated. *Id.* at 200-201. DeLullo’s notes of the 15 minute meeting with Fisher detail that Fisher “admitted to jumping the gun and not receiving...authorization from the DA/PD to make the buy.” *Id.* at 198. At trial Fisher admitted to telling DeLullo at the prison that he “must have jumped the gun.” N.T., 3/23/07, pg. 159.

Given the testimony that no law enforcement agency had given Fisher authority to act as a CI, Fisher’s actions during the buy were not done according to established police procedures for CI’s, no paperwork authorizing Fisher to be a CI had been completed, Fisher was aware of the need for the paperwork, Fisher never informed police after his arrest that he was working as a CI, and Fisher admitted to his parole officer that he “jumped the gun” and did not have legal authority to act as a CI, there was sufficient evidence for a trier of fact to find beyond a reasonable doubt that Fisher did not have legal authority to transfer a controlled substance.

(3) Weight of the Evidence for Delivery of a Controlled

The third issue raised by Fisher, that the jury’s guilty verdict for Delivery of a Controlled Substance was against the weight of the evidence, also must not be disturbed. Specifically,

Fisher bases this claim on the assertion that the Commonwealth's witness, Officer Moore, was not credible. As a general rule, a weight of the evidence claim is primarily addressed to the discretion of the judge who actually presided at trial. *Armbruster v. Horowitz*, 813 A.2d 698, 702 (2002). It is axiomatic that it is the function of the jury as the finder of fact to determine the credibility of the witnesses. *Commonwealth v. Champney*, 832 A.2d 403, 408 (2003), *cert. denied*, 542 U.S. 939, (2004) (citing *Commonwealth v. Johnson*, 668 A.2d 97, 101 (1995), *cert. denied*, 519 U.S. 827(1996)). A new trial should be granted only in truly extraordinary circumstances, *i.e.*, "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.*" *Abruster*, 813 A.2d at 703. *Id.* (emphasis in original).

In this case, the jury's finding of guilt was not so contrary to the evidence as to shock one's sense of justice thereby necessitating a new trial. Officer Moore's testimony, when viewed in a light most favorable to the Commonwealth and taking into consideration all the other aforementioned evidence, supports the jury's verdict. The jury is free to believe Officer Moore despite Fisher's contrary testimony. Furthermore there is nothing in the record, and Fisher cites no specific evidence, to support a finding that Officer Moore was not credible in his testimony. Without specific evidence detailing an "extraordinary circumstance," a jury's finding of fact as to the credibility of witnesses must not be disturbed on appeal.

For the foregoing reasons, the jury's verdict of March 26, 2007 should be affirmed and Fisher's appeal dismissed.

BY THE COURT,

William S. Kieser, Judge

cc: Robert Cronin, Esquire
DA
Judges
Gary Weber, Esquire (Lycoming Reporter)
Rebecca Penn, Esquire-Law Clerk