

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

RASHEEN RIVERS,

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 1004 EDA 2013

Appeal from the Judgment of Sentence March 13, 2013
In the Court of Common Pleas of Delaware County
Criminal Division at No(s):CP-23-CR-0006706-2012

BEFORE: BENDER, P.J.E., SHOGAN, J., and FITZGERALD, J.*

MEMORANDUM BY BENDER, P.J.E.:

FILED MAY 30, 2014

Appellant, Rasheen Rivers, appeals from the judgment of sentence of 25 to 60 months' incarceration, followed by five years' probation, imposed after he was convicted of delivering a controlled substance and attempted delivery of a non-controlled substance. On appeal, Appellant solely challenges the sufficiency of the evidence to sustain his conviction for attempted delivery of a non-controlled substance, arguing that the Commonwealth failed to prove that he took a substantial step towards committing the underlying delivery offense. We affirm.

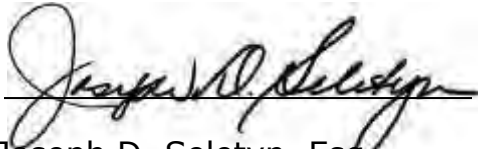
We have examined the certified record, the briefs of the parties, and the applicable law. Additionally, we have reviewed the thorough opinion of

* Former Justice specially assigned to the Superior Court.

the Honorable Kevin F. Kelly of the Court of Common Pleas of Delaware County. We conclude that Judge Kelly's extensive and well-reasoned decision accurately disposes of the issue presented by Appellant.¹ Accordingly, we adopt Judge Kelly's opinion as our own and affirm Appellant's judgment of sentence on that basis.

Judgment of sentence affirmed.

Judgment Entered.

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

Joseph D. Seletyn, Esq.
Prothonotary

Date: 5/30/2014

¹ Judge Kelly also addresses a second issue raised by Appellant in his Pa.R.A.P. 1925(b) statement, wherein Appellant claims that the court erred by admitting photographic evidence depicting scarring on Appellant's arms. **See** Trial Court Opinion, 12/26/13, at 31-36. Appellant has abandoned this issue on appeal; thus, we adopt Judge Kelly's opinion only to the extent that it disposes of Appellant's sufficiency claim. **Id.** at 1-31.

IN THE COURT OF COMMON PLEAS OF DELAWARE COUNTY, PENNSYLVANIA
CRIMINAL

COMMONWEALTH OF PENNSYLVANIA : NO. 6706-12
: :
v. : :
: :
RASHEEN RIVERS : :

A. Sheldon Kovach, Esquire – Deputy District Attorney for the Commonwealth
Steven M. Papi, Esquire – Attorney for Rasheen Rivers

OPINION

Kelly, J.

Date: December 26, 2013

This case commenced on August 16, 2012, with the Defendant’s arrest and the filing of a criminal complaint by Officer Kristine McAleer of the Upper Darby Police Department charging Rasheen Rivers (hereinafter referred to as “Defendant” or “Rivers”) with the following Controlled Substance, Drug, Device and Cosmetic Act violations: Delivery of a Controlled Substance and/or Possession with Intent to Deliver a Controlled Substance – Two (2) Counts;¹ Possession of a Controlled Substance – Two (2) Counts;² and Possession of Drug Paraphernalia – Two (2) Counts.³

On October 4, 2012, a preliminary hearing was held before the magisterial district court and after the Commonwealth’s presentation of evidence, Defendant Rivers was held for trial court proceedings as to all charged offenses. N.T. 10/4/12, pp. 3-14.

¹ 35 Pa.C.S. §780-113 (a)(30).

² 35 Pa.C.S. §780-113 (a)(16).

³ 35 Pa.C.S. §780-113 (a)(32).

Before the trial court on November 1, 2012, the Defendant was formally arraigned at which time the Office of the District Attorney of Delaware County lodged against him a Criminal Information averring the following offenses: Count 1 – Possession of a Controlled Substance;⁴ Count 2 – Possession of a Controlled Substance;⁵ Count 3 - Delivery of a Controlled Substance;⁶ Count 4 – Possession with Intent to Deliver a Controlled Substance;⁷ Count 5 – Possession of Drug Paraphernalia;⁸ and Count 6 – Possession of Drug Paraphenalia.⁹

On January 8, 2013, the Commonwealth filed a Motion to Amend Informations Pursuant to Pa.R.Crim.P. 564 to include the offense of Criminal Attempt - Delivery of a Non-Controlled Substance, 18 Pa.C.S. §901 (35 Pa.C.S. §780-113(a)(35)). By order of that same day (January 8, 2013), without objection, the court granted this motion and amended the prosecution's information to include Count 7 - Criminal Attempt - Delivery of a Non-Controlled Substance. *Id.*

A jury trial commenced before this court on January 10, 2013, and concluded the following day, January 11, 2013.¹⁰ As to all prosecuted charges, Count 3 – Delivery of a Controlled Substance, and Count 7 – Criminal Attempt - Delivery of a Non-Controlled

⁴ 35 Pa.C.S. §780-113(a)(16).

⁵ *Id.*

⁶ 35 Pa.C.S. §780-113(a)(30).

⁷ *Id.*

⁸ 35 Pa.C.S. §780-113(a)(32).

⁹ *Id.*

¹⁰ Beginning and ending on January 8, 2013, the court conducted jury selection. N.T. 1/8/13, pp. 44-192. The jury was sworn on January 10, 2013, immediately prior to the commencement of the actual trial proceeding.

Substance, the jury found Defendant Rivers guilty.¹¹ N.T. 1/11/13, pp. 78-84. *See* Jury's Verdict, dated January 11, 2013.

A sentencing hearing was held on March 13, 2013. At sentencing, defense counsel acknowledged prior reasonable notice of the Commonwealth's past lodged of record intention to seek a mandatory minimum sentence pursuant to 18 Pa.C.S. §6317;¹² however, after the prosecution's presentation of such evidence, the court concluded the same was not sufficiently proven and did not impose the Drug Free School Zones' two (2) year minimum sentence. N.T. 3/13/13, pp. 4-5, 48-52. Defendant Rivers in accord with the applicable Pennsylvania Sentencing Guidelines' standard range was sentenced to a term of incarceration at a state correctional institution of twenty-five (25) months to sixty (60) months on Count 3 (Delivery of a Controlled Substance) and a five (5) year consecutive period of state probation regarding Count 7 (Criminal Attempt – Delivery of a Non-Controlled Substance). N.T. 3/13/13, pp. 5-30, 33, 48-52. *See also* Certificate of Imposition of Judgment of Sentence.

Defendant Rivers on April 10, 2013, timely lodged a counseled Notice of Appeal to the Superior Court of Pennsylvania. By order dated May 13, 2013, the court directed the Defendant's attorney to file of record a Concise Statement of Matters Complained of on Appeal. Pa.R.A.P. 1925(b). Responding to this court's order (May 13, 2013), the Defendant's appellate counsel lodged on May 29, 2013, a Statement of Matters Complained of on Appeal.

¹¹ At trial, the Commonwealth proceeded only on the following charges: Count 3 – Delivery of a Controlled Substance; and Count 7 – Criminal Attempt - Delivery of a Non-Controlled Substance. The balance of past filed criminal information counts, absent defense opposition, were withdrawn by the prosecution. N.T. 1/8/13, pp. 6-7.

¹² The Commonwealth filed of record on February 20, 2013, its Notice of Intention to Seek Imposition of Mandatory Minimum Sentences pursuant to Drug-Free School Zones, 18 Pa.C.S. §6317.

The Defendant's Statement of Matters Complained of on Appeal raises two (2) assignments of error.¹³ These appellate claims are each addressed below *seriatim*.

The evidence was insufficient to support the conviction for the charge of Attempted Distribution or Sale of a Non-controlled Substance since the Commonwealth failed to prove beyond a reasonable doubt that Mr. Rivers took a substantial step towards the distribution or sale of a non-controlled substance.

By this error assignment, Defendant Rivers challenges the legal sufficiency of the Commonwealth's evidence to sustain his conviction for criminally attempted Delivery of a Non-Controlled Substance (Count 7). Consideration of applicable law in combination with an appropriate review of the salient trial record readily reveals this appellate claim of the Defendant to be wholly meritless.

Material to the sufficiency of evidence challenge advanced by Defendant Rivers on appeal, Delivery of a Non-Controlled Substance is statutorily defined under Pennsylvania's Controlled Substance, Drug, Device and Cosmetic Act per that below:

§780-113. Prohibited Acts; Penalties

- (a) The following acts and the causing thereof within the Commonwealth are hereby prohibited:

...

(35)

...

(ii) Except as otherwise provided by law, no person shall knowingly distribute or sell a non-controlled substance upon the express or implied representation that the substance is a controlled substance. In determining whether there has been a violation of this subclause, the following factors shall be considered:

¹³ The Defendant by the plain terms of his appellate complaints' statement has not in any manner directly challenged his Delivery of a Controlled Substance (Count 3) conviction.

(A) Whether the non-controlled substance in its overall ... appearance is substantially similar in size, shape, color and markings or lack thereof to a specific controlled substance.

...

(C) Whether the non-controlled substance is packaged in a manner ordinarily used for the illegal delivery of a controlled substance.

...

(E) Whether the consideration tendered in exchange for the non-controlled substance approximates or exceeds the price at which the substance would sell upon illegal delivery were it actually the specific controlled substance it physically resembles.

35 Pa.C.S. §780-113(a)(35)(ii)(A)(C)(E).

The following provision of the Pennsylvania Crimes Code defines Criminal Attempt to commit an offense, including Delivery of a Non-controlled Substance:

§901. Criminal Attempt

(a) Definition of attempt.- A person commits an attempt when, with intent to commit a specific crime, he does any act which constitutes a substantial step toward the commission of that crime.

18 Pa.C.S. §901(a).

As necessary for a criminal attempt conviction, an act constitutes “ ... a substantial step if it is a major step toward commission of the crime and also strongly corroborates the jury’s belief that the person, at the time he ... did the act, had a firm intent to commit that crime. An act can be a substantial step even though other steps would have to be taken before the crime could be carried out.” Pa.SSJI (Crim) 12.901A. “[This] substantial step test broadens the scope of

attempt liability by concentrating on the acts the defendant has done and does not any longer focus on the acts remaining to be done before the actual commission of the crime.” *Commonwealth v. Moss*, 852 A.2d 374, 383 (Pa.Super. 2004) *citing Commonwealth v. Zingarelli*, 839 A.2d 1064, 1069 (Pa.Super. 2003) *quoting Commonwealth v. Gilliam*, 273 Pa.Super. 586, 589-90, 417 A.2d 1203, 1205 (1980). A defendant need not be in the actual process of committing the crime when arrested in order as a matter of law to be guilty of criminal attempt. *Id.* See also *Commonwealth v. Parker*, 957 A.2d 311, 317 (Pa.Super. 2008).

The test for determining the sufficiency of evidence is well-established. In evaluating any such claim, the court is mandated to view the trial evidence in the light most favorable to the Commonwealth and drawing all rational inferences therefrom must determine whether a reasonable jury could have found that all of the elements of the crime charged were established beyond a reasonable doubt. *Id.* at 317 *citing Commonwealth v. Riley*, 434 Pa.Super. 414, 417, 643 A.2d 1090, 1091 (1994).

This sufficiency standard is equally applicable to cases where the evidence is circumstantial rather than direct so long as the combination of the inferential evidence links the accused to the crimes beyond a reasonable doubt. *Commonwealth v. Little*, 879 A.2d 293, 297 (Pa.Super. 2005) and *Commonwealth v. Rickabaugh*, 706 A.2d 826, 844 (Pa.Super. 1997). Although a conviction must be based on “ ... more than mere suspicion or conjecture, the Commonwealth need not establish guilt to a mathematical certainty.” *Commonwealth v. Davis*, 861 A.2d 310, 323 (Pa.Super. 2004) *citing Commonwealth v. Coon*, 695 A.2d 794, 797 (Pa.Super. 1997). Moreover, when evaluating the legal adequacy of the trial evidence, a court may not substitute its judgment for that of the fact-finder. If the record contains support for the conviction, it may not be disturbed. *Id.* at 323-24 *citing Commonwealth v. Marks*, 704 A.2d

1095, 1098 (Pa.Super. 1997) citing *Commonwealth v. Mudrick*, 510 Pa. 305, 308, 507 A.2d 1212, 1213 (1986).

The Superior Court in *Commonwealth v. Parker supra* 957 A.2d at 318 concluded the prosecution's evidence was legally sufficient to support the defendant's conviction for attempted delivery of a non-controlled substance. In *Parker*, when encountered by law enforcement the defendant was found in possession of bagged candle wax which the police officer testified was consistent in size, shape, coloration, and packaging with that of crack cocaine. *Id.* at 317-18. Although there was no evidence at trial offered about the defendant approaching anyone in an effort to sell the faked cocaine, he did acknowledge to police that he would have sold the ersatz crack " ... if the opportunity presented itself." *Id.* at 317. Despite the evidentiary absence of Defendant Parker having approached and/or met with a possible drug buyer, or even engaging in any manner of arrangements for the sale of the cocaine looking wax, the Superior Court held that his actions otherwise constituted the "substantial step" requisite of criminal attempt toward the commission of the non-controlled substance's delivery. *Id.* at 318. Specifically, the appellate court relying on its prior opinion in the matter of *Commonwealth v. Irby*, 700 A.2d 463 (Pa.Super. 2007) concluded that the action Defendant Parker undertook to package " ... candle wax in plastic baggies as cocaine ... " was the "substantial step" legally necessary to establish attempted criminality and his conviction for Criminal Attempt – Delivery of a Non-Controlled Substance was hence lawful. *Id.*

In *Commonwealth v. Irby supra* 700 A.2d at 465, the Superior Court determined that the defendant's efforts to sell an undercover police officer bagged candle wax was as a matter of law legally sufficient to sustain a delivery of a non-controlled substance conviction. Defendant Irby met with an undercover investigator and handed over a small, plastic package containing a

substance resembling crack cocaine which on closer inspection the officer realized was softer than rock cocaine. *Id.* at 464. The undercover officer returned the package to the defendant and told him that he did not want to “ ... buy any wax.” *Id.* at 464. Defendant Irby then attempted to sell the undercover officer a different package and the officer again declined the purchase on once more realizing that this second bag was as well an ersatz controlled substance. *Id.* at 464. Relevant to the sufficiency challenge at bar, the Superior Court rejected Defendant Irby’s seeming argument that an actual sale or monetary exchange was a requisite element of the completed crime of delivering a non-controlled substance and employing principles of statutory construction with the Drug Act’s clause thirty-five (35) non-controlled substance provisions relatedly opined that “ ... it is readily apparent [the defendant] cannot escape the consequences of his actions simply because on this occasion he chose a knowledgeable consumer upon whom to perpetrate the fraud.” *Id.* at 465.

As well, in *Commonwealth v. Moss supra* 852 A.2d at 383,¹⁴ the Superior Court determined the evidence sufficient to uphold the trial court’s conclusion that Defendant Sullivan facilitated a drug dealer’s attempted, unlawful delivery of a controlled substance and affirmed the defendant’s conviction for Criminal Use of a Communications Facility, 18 Pa.C.S. §7512.¹⁵ The *Moss* record reflected that the defendant placed a telephone call and inquired about purchasing drugs from Johnson, a drug dealer, and that Johnson agreed to make the sale. *Commonwealth v. Moss supra* 852 A.2d at 383. A surveillance report indicated that shortly after a second intercepted telephone conversation, the drug dealer, Johnson, was seen briefly entering

¹⁴ This complete opinion name is *Commonwealth v. Anthony Moss, Dana Austin, and Robert Sullivan*, but the court for citation purposes has referred to the case by the lead defendant with the resultant captioning, *Commonwealth v. Moss supra*.

¹⁵ Criminal Use of a Communications Facility, 18 Pa.C.S. §7512, is defined in relevant part as follows: “A person commits a felony of the third degree if that person uses a communication facility to commit, cause or facilitate the commission or the attempt thereof of any crime which constitutes a felony.” (Emphasis added).

the defendant's home. *Id.* at 383. Thus, the court noted: "... [the defendant] made the necessary preparations and arranged a meeting point at which he and Johnson [the drug dealer] would complete the illicit transaction. Shortly thereafter, Johnson [the drug dealer] arrived at [the defendant's] home and [the defendant] allowed him inside. This evidence, viewed in a light most favorable to the Commonwealth, is sufficient to establish that [the defendant] took a substantial step toward completing the drug transaction." *Id.*

Relevant to Defendant Rivers' sufficiency of the evidence claim and the long-settled controlling standard of review, the following fairly summarizes the salient, trial testimony.

Timothy Bernhardt as of trial was a police officer with the Upper Darby Police Department and for approximately twelve (12) years had been so employed. N.T. 1/10/13, pp. 41-42. Over the past eight (8) years, he had been assigned to that police agency's Narcotics Unit. N.T. 1/10/13, p. 42. During the previous seven (7) years, Officer Bernhardt had also been a member of the Delaware County Criminal Investigation Division's Drug Task Force. N.T. 1/10/13, p. 44. Resulting from these professional drug enforcement experiences, Officer Bernhardt participated in drug investigations utilizing various knowledgeable, informational sources well in excess of a hundred times resulting in the preparation and/or execution of both drug related search warrants and Drug Act arrest warrants. N.T. 1/10/13, pp. 44-47. He relatedly conducted numerous undercover investigations posing as both purchaser and seller of drugs throughout Delaware County. N.T. 1/10/13, pp. 44-47, 58-59. Officer Bernhardt successfully completed specialized training relevant to drug enforcement conducted by, *inter alia*, the Pennsylvania Narcotics Officers Association (PNOA), the Drug Enforcement Agency (DEA), and the Mid-Atlantic Great Lakes Organized Crime Law Enforcement Network (MAGLOCLLEN). N.T. 1/10/13, pp. 42-43. These professional education programs included

instruction on undercover operations, drug manufacturing, street drug identification, and the weights illicit substances are commonly sold as well as the corresponding prices. N.T. 1/10/13, pp. 42-43. Without objection, Officer Bernhardt was recognized as an expert in the field of the distribution and packaging of illicit controlled substances. N.T. 1/10/13, pp. 47-48.

In an undercover capacity, Officer Bernhardt purchased controlled substances, including cocaine, throughout the entire Township of Upper Darby with the majority of his investigative efforts spent in the high drug traffic area of 69th and Market Streets, the terminal area. N.T. 1/10/13, pp. 48-49. The terminal area is a major transportation thoroughfare often described as an “open drug market.” N.T. 1/10/13, p. 49. Officer Bernhardt had on numerous occasions while in an undercover capacity been approached by persons in the “6800 ... and 6900 block, inside and outside the terminal ... ” to purchase controlled substances. N.T. 1/10/13, pp. 49-50. In that area (69th and Market Streets), Officer Bernhardt bought cocaine in an undercover capacity “[i]n all increments from \$10 [and] \$20 bags up to half ounces, quarter ounces.” N.T. 1/10/13, p. 49.

On or about July 3, 2012, at approximately 11:30 p.m., in the area of 69th and Market Streets, Officer Bernhardt was the surveillance officer or “eyeball” watching and assisting Officer McAleer conduct an undercover drug investigation. N.T. 1/10/13, pp. 50-51, 79-80. In the capacity of the “eyeball,” Officer Bernhardt worked in plain clothes and was using an unmarked police vehicle. N.T. 1/10/13, p. 51. On that night (July 3, 2012), Officer Bernhardt was aware that Officer McAleer had earlier that day made arrangements to meet an individual nicknamed “Freeze” to buy cocaine in the area of the 6800 block of Market Street near front of the 69th Street terminal. N.T. 1/10/13, pp. 51-52, 55. Officer Bernhardt took up a surveillance position “ ... on the 6800 block within eyes’ distance ... ,” approximately twenty-five (25) to

thirty (30) feet away from Officer McAleer. N.T. 1/10/13, pp. 52, 80. He also testified “ ... that area of the 6800 block of Market Street [was] well lit. Even at night time it’s daytime there with all the lights.” N.T. 1/10/13, p. 52. “I’m watching her movements, who comes and goes to her car [*sic*], where she parks, what she’s doing, the people that are around, any storefronts, businesses that are open, traffic that’s coming, anyone that’s – would be observing or watching and doing surveillance on us [*sic*].” N.T. 1/10/13, p. 51. Officer Bernhardt previous “ ... was given a description of a black male that [Officer McAleer] would be meeting in the area” N.T. 1/10/12, p. 53.

Having a clear view of his colleague’s car, Officer Bernhardt observed Officer McAleer in an undercover police vehicle and the people who were approaching and/or around her motor vehicle. N.T. 1/10/13, p. 53-54. He saw a black male (Defendant Rivers) walk towards Officer McAleer’s car and enter her vehicle’s passenger side. N.T. 1/10/13, pp. 54-55, 81. Approximately two (2) or three (3) minutes after Defendant Rivers got into Officer McAleer’s car, Officer Bernhardt noted the undercover vehicle started moving. N.T. 1/10/13, p. 56. Officer Bernhardt “ ... observed the brake lights go on and the car go in gear, at which time [Officer McAleer] circled the block on Market Street and headed ... west into the Township of Upper Darby on West Chester Pike.” N.T. 1/10/13, p. 56. When Officer McAleer’s vehicle exited the 6900 block of Market Street, Officer Bernhardt was uncertain of her destination. N.T. 1/10/13, pp. 56-57. Officer Bernhardt in his undercover police vehicle followed behind Officer McAleer. N.T. 1/10/13, p. 57. He traveled for less than five (5) minutes, approximately a mile or a mile and a half, to the Barclay Square Apartments in the 1500 block of Garrett Road. N.T. 1/10/13, pp. 57, 88.

Officer McAleer pulled into the parking lot of the Barclay Square Apartments near the front of the buildings marked “B and C.” N.T. 1/10/13, p. 57. “[Officer Bernhardt] stopped short so [he] could see the back of her car, and then when the door opened and the lights from the inside of the car went on, [he] proceeded to go past so [he] could see the Defendant getting out of the car.” N.T. 1/10/13, pp. 88-89. Officer Bernhardt observed Defendant Rivers exit Officer McAleer’s vehicle and walk directly to the front of “B” and “C” buildings. N.T. 1/10/13, p. 57. Officer Bernhardt was approximately “two to three car lengths” away from Officer McAleer’s vehicle when the Defendant exited the car. N.T. 1/10/13, p. 88. Officer McAleer drove off. N.T. 1/10/13, p. 57. “Then, [Officer McAleer] called me on the phone and said that, you know [*sic*], she was good to go. She made the transaction [*sic*]. She dropped the Defendant off at his residence.” N.T. 1/10/13, p. 57.

Officer Bernhardt did not lose visual contact with the Defendant from the time he saw Defendant Rivers get into Officer McAleer’s vehicle in the area of 6800 Market Street until the time he saw him exit the vehicle in the Barclay Square Apartment complex. N.T. 1/10/13, p. 59.

At trial, Officer Bernhardt identified Defendant Rivers as the black male he saw on July 3, 2012, approach and enter Officer McAleer’s vehicle. N.T. 1/10/13, pp. 54-55. He further identified the Defendant to be the same individual whom he saw on that day (July 3, 2012) exit Officer McAleer’s vehicle near the front of buildings “B” and “C” in the Barclay Square Apartments. N.T. 1/10/13, pp. 58. Officer Bernhardt as well identified Defendant Rivers as the person who sold Officer McAleer that “bag” on July 3, 2012. N.T. 1/10/13, p. 77.

On or about August 16, 2012, at approximately 7:30 p.m., Officer Bernhardt, Officer McAleer, and other members of the department’s Narcotics Unit were once more positioned in the area of 69th and Market Streets in Upper Darby. N.T. 1/10/13, p. 59. Officer McAleer had

made arrangements to again purchase a quantity of cocaine from Defendant Rivers in the area of the 6800 block of Market Street. N.T. 1/10/13, p. 60. On this occasion, the location of the drug transaction was the unit block of Long Lane and Fairfield Avenue, approximately two (2) blocks from the transit terminal. N.T. 1/10/13, pp. 60-61, 73, 85. “ ... [T]he unit block of Long Lane runs into the unit block of Garrett Road, which [is] the bottom of Garrett Road, the unit block would be [the] 6800 block of Market Street ... which is two blocks from the terminal.” N.T. 1/10/13, p. 61. In that vicinity, “ ... there are two (2) bars, Brownie’s Pub located on the unit block of Garrett Road and Brandon House Pub located on the unit block of Long Lane.” N.T. 1/10/13, p. 61.

Based on where Officer McAleer had arranged to meet Defendant Rivers, Officer Bernhardt positioned his vehicle in the area of the unit block of Long Lane, “[a]cross the street from there is [*sic*] an apartment complex with four or five parking spaces in front of it. [Officer Bernhardt] was parked on the corner of Chestnut and Long Lane observing the unit block of Long Lane and to [*sic*] the Brandon House bar in an unmarked vehicle.” N.T. 1/10/13, p. 61. Officer Bernhardt was the driver of the undercover vehicle and Officer McAleer was the passenger in the vehicle “ ... so her [*sic*] and I could discuss the location where it would be best [*sic*] to meet the Defendant, and she was able to identify the Defendant, wherever he was to come from [*sic*], to notify the uniformed TNT officers to stop the Defendant.” N.T. 1/10/13, p. 62. At that time, Officer McAleer was using the police radio to advise the uniformed Tactical Narcotics Team (TNT) “ ... of, you know, [*sic*] the Defendant, what he was wearing, and the direction that he was heading [*sic*].” N.T. 1/10/13, p. 65.

On that night (August 16, 2012), Officer Bernhardt and the Narcotics Unit had decided based on Officer McAleer’s undercover contacts with Defendant Rivers and the related

investigative activities to take the Defendant into custody at that time or conduct a “buy bust” enforcement action. N.T. 1/10/13, p. 66. “ ... [I]n this case, it was determined that there wasn’t a ladder to climb and ... that’s why the Defendant would be taken into custody at the second [sic] [drug transaction].” N.T. 1/10/13, p. 83. The Tactical Narcotics Task Force officers were two (2) uniformed officers assigned to assist “ ... in the apprehension of any defendants that we’re going to place into custody [sic]. [The undercover narcotics officers do not dress in uniform] ... so it’s a safety issue that, you know [sic], people know that it is the police, they are being arrested, and [the TNT officers are] fully visible in a uniform.” N.T. 1/10/13, p. 62. “We were via communication police radio [sic] advising them of our status [sic].” N.T. 1/10/13, p. 63.

At approximately 7:30 p.m. (August 16, 2012), Officer Bernhardt and Officer McAleer saw Defendant Rivers leave the Brandon House Pub. N.T. 1/10/13, p. 64. Based on his own observations of Defendant Rivers on July 3, 3012, Officer Bernhardt was certain that it was the Defendant who he now watching exiting the Brandon House Pub.¹⁶ N.T. 1/10/13, p. 65. After making this “visual contact,” Officer Bernhardt instructed the TNT officers to take the Defendant into custody. N.T. 1/10/13, pp. 65-66, 78. Officer Bernhardt observed “[t]he Defendant, ... [as he] exits [sic] the Brandon House Pub, comes out of the bar [sic], [and] makes a right heading east into the terminal area. At that time, [he] ... advis[ed] the TNT officers of the description, where he is [sic], the location, at which time they come around me again [sic] in their marked – fully marked Upper Darby Township police vehicle. ... Officer George was driving the vehicle. Officer Kenny was a passenger. Officer Kenny got out, [sic] followed behind the Defendant.

¹⁶ At trial, Officer Bernhardt identified the Defendant to be the same person he saw on August 16, 2012, leave the Brandon House Pub. N.T. 1/10/13, p. 64.

Officer George pulled ahead [*sic*] and Officer Kenny and Officer George got out at the same time [*sic*], [and] took the Defendant into custody.” N.T. 1/10/13, pp. 66-67.

Officer Bernhardt had purchased powdered cocaine in an undercover capacity in excess of fifty (50) times. N.T. 1/10/13, p. 67. He described a “beat bag” as “ ... a bag ... in this case, [of] powdered cocaine that they were trying to pawn off [*sic*], trying to say [*sic*] that it is cocaine when it isn’t. ... You’ll buy [*sic*] an amount of powdered cocaine and it’ll be baking soda, it’ll be a laxative, and a lot of times [*sic*] the defendants will just sprinkle a small amount of the powdered cocaine on top of it. If you were to try it right then and there [*sic*], you would get some type [*sic*] of reaction. You would know that it was cocaine. However, the rest of the bag – substance would be junk [*sic*]. It would be beat [*sic*].” N.T. 1/10/13, p. 68.

Officer Bernhardt in his expert capacity testified at trial regarding Commonwealth Exhibit C-1, the clear ziploc bag recovered from the Defendant incident to his arrest. N.T. 1/10/13, pp. 69-70. In describing this bag seized from Defendant Rivers, Officer Bernhardt noted that it “ ... is used to contain a controlled substance [*sic*], in this case, the powdered cocaine.” N.T. 1/10/13, pp. 69-70. *See* Commonwealth Exhibit C-1 (Ziploc bag containing a white powdered substance recovered from Defendant Rivers, August 16, 2012). He also testified “[t]his [ziploc bag] would be equivalent to -- ... without being full but like [*sic*] a 50-piece – a half of a gram of powdered cocaine, which would sell for \$50. ... [T]his would be equivalent what [*sic*] I would buy on the street as a 50-piece [*sic*].” N.T. 1/10/13, pp. 70-71. While working undercover, after a hand to hand drug transaction and purchasing a bag similar in packaging to Commonwealth Exhibit C-1, Officer Bernhardt offered that obviously he would not have an opportunity to “ ... try the cocaine, to sniff it or inject it or anything like that. So I go by [*sic*] look and feel and then I’ll put it in my pocket and go about my business. ... We can’t pull

out [*sic*] a test kit to make sure it's good and say [*sic*], oh, no, this is no good [*sic*]. You've got to give it to me [*sic*]. You just kind of go on your word [*sic*]. You're in business where you're meeting someone [*sic*] and you've made arrangements to purchase something, so you're going to go on the word [*sic*] that it is what it is. So I would put this in my pocket and go about my business [*sic*] and return to police headquarters to field test it." N.T. 1/10/13, pp. 68-69, 71-72.

Officer Bernhardt was certain in his identification of Defendant Rivers as being the same person involved in the drug transaction on July 3, 2012. N.T. 1/10/13, pp. 76-77. " ... [T]here's some distinguishing features [*sic*] on the Defendant that when observed, they can't be changed. ... The Defendant has scarring." N.T. 1/10/13, p. 77. When Defendant Rivers was taken into custody on August 16, 2012, Officer Bernhardt again observed [t]he scarring was visible." N.T. 1/10/13, p. 77.

Sean Kenny as of trial was a police officer with the Upper Darby Police Department and had been so employed for approximately five (5) years. N.T. 1/10/13, pp. 92, 94. Over the past eight (8) months, he had been assigned to the Narcotics Unit, specifically the Tactical Narcotics Task Force (TNT). N.T. 1/10/13, pp. 92-94. The function of the TNT " ... [is] to patrol high crime, high drug areas in the township, [and to] investigate complaints from citizens about just general quality-of-life issues in the township." N.T. 1/10/13, p. 93. As a member of the TNT, Officer Kenny also assisted the undercover officers and detectives of that division in executing search warrants and, as needed with "takedowns or buy busts," when suspects were taken into custody. N.T. 1/10/13, p. 93. TNT officers wear full police uniforms. N.T. 1/10/13, p. 93. TNT officers drive marked police vehicles. N.T. 1/10/13, p. 93.

On August 16, 2012, Officer Kenny received a request from Officer Bernhardt to assist in a "takedown" or "buy bust" that was to occur at or around 7:30 p.m. in the 69th Street terminal

vicinity. N.T. 1/10/13, p. 94. That evening Officer Kenny was patrolling in a marked police vehicle with Officer Fran George, another TNT member. N.T. 1/10/13, pp. 94-95. He and Officer George were wearing “full” TNT police uniforms. N.T. 1/10/13, p. 95. The TNT officers were “ ... somewhere in the area of Copley ... and Chestnut. We were parked waiting for further instructions from ... [t]he Narcotics officers, Officer Bernhardt, Officer McAleer.” N.T. 1/10/13, p. 95.

At some point, Officer Kenny and Officer George were instructed by Officer McAleer and/or Officer Bernhardt to proceed towards the area of the Brandon House Pub near Fairfield and Long Lane. N.T. 1/10/13, p. 96. They were given the description of an individual (Defendant Rivers). N.T. 1/10/13, p. 96. The officers approached a black male matching the description.¹⁷ N.T. 1/10/13, p. 96. Officer Kenny got out of the police vehicle in a position behind the Defendant while Officer George continued driving. N.T. 1/10/13, pp. 97-98. “[He] g[ot] out behind the Defendant [*sic*]. That way, in case there [was] a foot pursuit [*sic*], I [could] chase while my partner [was] still in the vehicle so we ... ha[d] an advantage [*sic*].” N.T. 1/10/13, p. 97.

After Officer Kenny exited the police vehicle, Officer George proceeded east on Long Lane in the direction of Fairfield. N.T. 1/10/13, p. 98. Officer Kenny was approaching Defendant Rivers on foot from behind. N.T. 1/10/13, p. 98. As he came up on the Defendant, Officer Kenny announced “ ... police and you’re under arrest.” N.T. 1/10/13, p. 98. “[The Defendant] looks [*sic*] back over his shoulder. After seeing me, he then quickly reaches [*sic*] towards his waistband. It appears he begins [*sic*] shoving something into his pants. ... [t]hey

¹⁷ At trial, Officer Kenny identified Defendant Rivers as the individual who matched the description given to him by Officer Bernhardt and/or Officer McAleer and whom he and Officer George took into custody on August 16, 2012. N.T. 1/10/13, pp. 96-97. Officer Kenny further testified the Defendant was the only person about the area fitting the description he was given. N.T. 1/10/13, p. 99.

were some type of running pants [*sic*]. ... [l]oose fit.” N.T. 1/10/13, pp. 98-99. The Defendant “ ... was instructed to show [Officer Kenny] his hands, put his hands up. After ... about two seconds, he did comply. He put his hands up, placed them behind his back and complied to handcuffing [*sic*].” N.T. 1/10/13, p. 99. Defendant Rivers was taken into custody on the unit block of Long Lane, about one hundred (100) yards from the 69th Street terminal. N.T. 1/10/13, p. 106.

After placing the Defendant in handcuffs, “ ... the initial thing [Officer Kenny] did was check the front of [the Defendant’s] waistband with [*sic*] moving [his] hand across the front, and then [he] grabbed a hold [*sic*] of the pants, [and] the waistband, and shook the pants. ... A clear Ziploc bag containing a white powder fell out of his pants [*sic*] down through the pant legs ... at his feet [*sic*] on the ground.” N.T. 1/10/13, p. 100. Officer Kenny identified this recovered item as Commonwealth Exhibit C-1, “ ... a clear Ziploc bag containing a white powder ... [that measured approximately a]bout an inch by inch [*sic*]” N.T. 1/10/13, pp. 101, 107. *See* Commonwealth Exhibit C-1 (Ziploc bag containing white powder recovered from Defendant Rivers, August 16, 2012). Officer Kenny also seized from the Defendant a cell phone and keys. N.T. 1/10/13, pp. 102, 107. Officer Kenny identified Commonwealth Exhibit C-3 as the cell phone he recovered from the Defendant’s person. N.T. 1/10/13, pp. 102-03. *See* Commonwealth Exhibit C-3 (Cell phone recovered from Defendant Rivers, August 16, 2012). Officer Kenny as well identified Commonwealth Exhibit C-4 as “ ... key rings with two labels, one marked ... C-310” also recovered from the Defendant’s person. *See* Commonwealth Exhibit C-4 (Key rings recovered from Defendant Rivers, August 16, 2012). N.T. 1/10/13, p. 103. Officer Kenny secured these items seized from Defendant Rivers’ person and turned them over to Officer McAleer. N.T. 1/10/13, p. 104. *See* Commonwealth Exhibit C-1 (Ziploc bag

containing white powder recovered from Defendant Rivers, August 16, 2012); Commonwealth Exhibit C-3 (Cell phone recovered from Defendant Rivers, August 16, 2012); and Commonwealth Exhibit C-4 (Key rings recovered from Defendant Rivers, August 16, 2012).

Officer Kenny, along with Officer George, transported Defendant Rivers from the arrest scene to the Upper Darby Police Department. N.T. 1/10/13, p. 104. Upon returning to the police station, he “ ... obtain[ed] all the personal information, physical descriptions from the Defendant and complete [*sic*] a rundown [*sic*] of this information, and [the] detectives will [*sic*] then process him, fingerprints and photographs.” N.T. 1/10/13, pp. 104-05. Officer Kenny obtained the Defendant’s address which “ ... was 1600 Garrett Road, Apartment C, 310. ... Barclay Square Apartments.” N.T. 1/10/13, p. 105. [The keys recovered from the Defendant, “[o]ne key was labeled for C Building and one key was labeled for Apartment C-310.” N.T. 1/10/13, p. 105. See Commonwealth Exhibit C-4 (Key rings recovered from Defendant Rivers, August 16, 2012). The phone number the Defendant gave police upon his arrest was (484 470-3034). N.T. 1/10/13, pp. 192-93. See also Defendant Exhibit D-1 (Upper Darby Incident Report). Officer Kenny noticed upon interacting with the Defendant that “[h]e had scars all over his body. They appeared to be burn marks.” N.T. 1/10/13, p. 105.

Christine McAleer as of trial was a police officer with the Upper Darby Police Department and for approximately three (3) years had been so employed. N.T. 1/10/13, pp. 110-11. Over the past year, she had been assigned to the Narcotics Unit of that police agency working in an undercover capacity. N.T. 1/10/13, p. 111. Since becoming a member of the Narcotics Unit in February 2012, Officer McAleer had conducted over twenty (20) “hand-to-hand,” undercover drug investigations. N.T. 1/10/13, pp. 111-12. Prior to this specialized

assignment, she was for two (2) years a uniformed police officer with the Darby Borough Police Department. N.T. 1/10/13, p. 111.

In an undercover capacity, Officer McAleer was assigned to “patrol” the 69th and Market Streets area of Upper Darby Township. N.T. 1/10/13, p. 112. “It’s a very, very high traffic [*sic*] area. There’s [*sic*] numerous people in and out all hours of the day. And walking up and down those streets, easily [*sic*], two or three people within 10 minutes will pass you [*sic*], whisper kind of [*sic*] as they pass you, I got what you need [*sic*], indicating narcotics sales and, ... giving out [*sic*] phone numbers for anything that you may want or need as far as the narcotics [*sic*].” N.T. 1/10/13, pp. 112-13.

Prior to July 3, 2012, Officer McAleer was approached by a black male, later identified as Defendant Rivers, who offered to sell her controlled substances.¹⁸ N.T. 1/10/13, p. 113. She was walking about the area of 69th and Market “ ... dressed in regular civilian clothes ... you know [*sic*], normal, everyday clothes [with her hair styled in] dreadlocks.” N.T. 1/10/13, p. 114. The Defendant “offered if I [*sic*] – do you need anything? What do you need? That kind of thing [*sic*]. And I took his cell phone number. I, you know [*sic*], didn’t [*sic*] have any money at the time, that kind of thing [*sic*], and took his phone number. He told me I could reach out [*sic*] using that phone number for future transactions.” N.T. 1/10/13, p. 115. “[Defendant Rivers] told me to call him ‘Freeze.’” N.T. 1/10/13, p. 117. Officer McAleer saved the Defendant’s phone number (484 470-3034) into her cell phone to contact him in the future to purchase controlled substances. N.T. 1/10/13, p. 115-16. *See also* Commonwealth Exhibit C-5 (Affidavit of Probable Cause).

¹⁸ At trial, Officer McAleer identified Defendant Rivers as the black male who previous to July 3, 2012, provided his telephone number and offered to sell her illicit substances. N.T. 1/10/13, pp. 113-14.

On July 3, 2012, Officer McAleer called the phone number (484 470-3034) she was given by Defendant Rivers and made arrangements with him to purchase a quantity of cocaine. N.T. 1/10/13, p. 117. She asked the person who answered the phone “ ... [I]f it [*sic*] was ‘Freeze’ and he said it was.” N.T. 1/10/13, p. 118. “We made arrangements to – he – I asked him if he was around [*sic*] in the beginning of the conversation, and he told me that he was and he asked me what I needed [*sic*]. I told him I had \$50 for [*sic*] – and he advised me that he wanted to meet at 69 and Market – 69th Street and Market Streets, which was in the general area where I had gotten his number from [*sic*] previously.” N.T. 1/10/13, p. 118. Officer McAleer and “Freeze” arranged that she “ ... was going to be pulling up in [a] vehicle ... and he was about midblock [*sic*], 6900 block of Market Street.” N.T. 1/10/13, pp. 118-19

“When ... [Officer McAleer] pulled up [*sic*], he [Defendant Rivers] was standing outside of the storefronts there [*sic*]. ... It’s across the street [*sic*] from the terminal, the side of the storefronts [*sic*].” N.T. 1/10/13, p. 119. Officer McAleer parked on the same side of the street as the Defendant was standing. N.T. 1/10/13, p. 119. “I pulled up [*sic*] and parked and within seconds he [Defendant Rivers] got into the vehicle.” N.T. 1/10/13, p. 120. After the Defendant entered her vehicle, Officer McAleer “ ... gave him \$50 in exchange for a clear baggie with a – filled [*sic*] with a white powdered substance.” N.T. 1/10/13, pp. 120, 159. Officer McAleer identified Commonwealth Exhibit C-6 as the ziploc bag containing a white powdered substance that she purchased from “Freeze” in exchange for \$50.¹⁹ N.T. 1/10/13, p. 121. *See* Commonwealth Exhibit C-6 (Ziploc bag containing white powdered substance received from Defendant Rivers in a hand-to-hand sale, July 3, 2012). Throughout the transaction, Defendant Rivers was seated in the vehicle next to Officer McAleer, “ ... six inches, if that [*sic*]” away

¹⁹ At trial, Officer McAleer identified the Defendant as “Freeze,” the person who in exchange for \$50 sold her the white powdered substance. N.T. 1/10/13, p. 121.

from her. N.T. 1/10/13, p. 122. Officer McAleer noticed that Defendant Rivers “ ... had very, very identifiable what looked like [*sic*] burn scars on his arms and hands.”²⁰ N.T. 1/10/13, p. 122, 140-41. “ ... In [n]arcotics, we try to focus more on the things that can’t change, things that won’t go away [*sic*] and he can’t alter, ... [C]lothes he can change, hair he can change, facial hair he can change. So I try to focus, ... between here to here, [on the features that can’t be changed,] your eyes, your facial structure, skin tone, things of that nature, scars, things that won’t go away [*sic*].” N.T. 1/10/13, p. 140.

After Defendant Rivers gave Officer McAleer the suspected cocaine “ ... and I gave him the money and I put it in my pocket expecting him to get out [*sic*] like any normal transaction. ... [h]e asked me to take him home.” N.T. 1/10/13, p. 123. The Defendant requested Officer McAleer to drive him to Barclay Square Apartments, approximately one (1) to two (2) miles from where they were in the area of 69th and Market. N.T. 1/10/13, p. 123.

Officer McAleer agreed to the Defendant’s request and drove him to the Barclay Square Apartments, about a five (5) minute car ride. N.T. 1/10/13, pp. 123-24. While they were driving, Officer McAleer “ ... asked him [Defendant Rivers] if he was like around a lot [*sic*] or in this area a lot, can I call this number whenever if I [*sic*] – whenever I need more narcotics. He told me ... that I could using [*sic*] that cell phone number, ... I just said you always around [*sic*], can I always grab from you [*sic*], that kind of thing [*sic*]. ... He said, yeah, you know [*sic*], call that number.” N.T. 1/10/13, p. 124. Officer McAleer was able to further observe Defendant Rivers’ arms as she traveled along Garrett Road to the Barclay Square Apartments. N.T. 1/10/13, pp. 152-53. Officer McAleer focused on the fact that Defendant Rivers “ [had] ... scars on his body [that] were very, very identifiable. ... they appeared to be burn marks, burn scars. ...

²⁰ At trial, Officer McAleer noticed that Defendant Rivers “ ... he’s got [*sic*] a full-grown beard today. He did not have that on July 3 [, 2012].” N.T. 1/10/13, p. 122.

on his arms and head.” N.T. 1/10/13, pp. 140-41, 152. That evening, “[i]t was hot out. ... [i]t was summertime. ... ” N.T. 1/10/13, p. 152. Officer McAleer did not recall the “ ... exact T-shirt he had on [*sic*]. ... [but the Defendant’s] forearms were definitely out [*sic*]. N.T. 1/10/13, p. 152. Officer McAleer authenticated and identified Commonwealth Exhibit C-7 and Commonwealth Exhibit C-8 as photographs showing the scarring on Defendant Rivers’ arms as being a fair and accurate depiction of how his arms appeared on July 3, 2012.²¹ N.T. 1/10/13, p. 155. See Commonwealth Exhibit C-7 (Photograph of Defendant Rivers’ arm) and Commonwealth Exhibit C-8 (Photograph of Defendant Rivers’ arm).²²

Upon their arrival at the Barclay Square Apartments, Defendant Rivers asked that he be dropped off “ ... midway through the lot [*sic*] and he got out and walked through – like between [*sic*] B and C Building [*sic*] of the apartments.” N.T. 1/10/13, p. 125. Officer McAleer attempted to watch which apartment building Defendant Rivers went into but “ ... I couldn’t tell which apartment [*sic*] at that time he was going to [*sic*]. He walked between the two buildings and I lost sight [*sic*]. ... I saw that he walked between Buildings B and C.” N.T. 1/10/13, pp. 125, 160.

Following her purchase of cocaine from him and her dropping the Defendant off at Barclay Square Apartment, Officer McAleer “ ... immediately called [Officer Bernhardt] and let him know everything was okay, everything went smooth [*sic*]. ... I told Officer Bernhardt what [*sic*] the conversation between myself and the Defendant in the car [*sic*], that he asked me to

²¹ By Stipulation of Counsel, it was established that Commonwealth Exhibit C-7 and Commonwealth Exhibit C-8 were photographs of Defendant Rivers’ left and right arms and that these pictures were fair and accurate depictions of how the Defendant’s arms appeared at trial on January 10, 2013. N.T. 1/10/13, pp. 153-54. Without objection, Commonwealth Exhibit C-7 and Commonwealth Exhibit C-8 were further authenticated by Officer McAleer and admitted into evidence. N.T. 1/10/13, p. 155. See Commonwealth Exhibit C-7 (Photograph of Defendant Rivers’ arm) and Commonwealth Exhibit C-8 (Photograph of Defendant Rivers’ arm).

²² Absent defense opposition, Commonwealth Exhibit C-7 (Photograph of Defendant Rivers’ arm) and Commonwealth Exhibit C-8 (Photograph of Defendant Rivers’ arm) were published to the jury. N.T. 1/10/13, p. 156.

drive him home and, ... just let him know exactly what was going on because he was in another car. He didn't know where I was going or what I was doing." N.T. 1/10/13, p. 126.

After taking Defendant Rivers to the Barclay Square Apartments, Officer McAleer returned to the Upper Darby Police Station and field tested the "bag" that she purchased from the Defendant. N.T.1/10/13, p. 126. *See* Commonwealth Exhibit C-6 (Ziploc bag containing white powdered substance bought from Defendant, July 3, 2012). "... [O]nce I had a chance to look at it [*sic*] and take it out of my pocket and examine it further, it's a fairly small bag and – for \$50 worth of cocaine so I realized that he [*sic*] – it was light. It was – he ripped me off [*sic*], essentially, for \$50 worth of cocaine." N.T. 1/10/13, p. 127.

Once more using the telephone number (484 470-3034) he previously provided her, Officer McAleer again contacted Defendant Rivers. N.T. 1/10/13, pp.127-28, 167. Officer McAleer "... told ... him [Defendant Rivers] that he ripped me off [*sic*] and he owes me on the next one [*sic*], that kind of thing [*sic*]. And he agreed [*sic*] and kind of gave me the all right [*sic*]. ..." N.T. 1/10/13, pp. 127. Officer McAleer identified the voice on the other end of the phone as the same voice as the person who identified himself to her as "Freeze" when she met him on July 3, 2012. N.T. 1/10/13, p. 128. Officer McAleer did not otherwise discuss during this phone call with Defendant Rivers subsequent drug transactions. N.T. 1/10/13, pp. 127, 167-68, 170-71.

For purposes of arranging another purchase of cocaine from him, on August 16, 2012, Officer McAleer contacted the Defendant once again using the telephone number (484 470-3034) he past provided her. N.T. 1/10/13, pp. 170-71, 194-95. The same male answered the phone. N.T. 1/10/13, p. 129. "I asked him if he was around. He told me he was. He asked me what I needed [*sic*]. I told him \$60 – I had \$60 worth [*sic*]. And he told me that he was in the

area of the Brandon House, which is a bar maybe a block away from the same 69 and Market area [*sic*]. N.T. 1/10/13, p. 129. “Freeze” (Defendant Rivers) agreed to sell a quantity of cocaine for sixty dollars (\$60.00) to Officer McAleer later that day (August 16, 2012) at approximately 7:30 p.m. in the 69th and Market Streets vicinity. N.T. 1/10/13, pp. 129, 188.

Officer McAleer went to the area of Brandon House Pub located at Long Lane and Fairfield and waited until she observed the Defendant. N.T. 1/10/13, pp. 177-79. “ ... [T]hen we proceeded to the designated location.” N.T. 1/10/13, p. 178. Initially parked nearby, once the Defendant was observed and began walking from the Brandon House Pub towards 69th and Market Streets, Officers McAleer and Bernhardt followed Defendant Rivers in an undercover vehicle approximately a block and a half, for a minute and a half (1½) to two (2) minutes. N.T. 1/10/13, pp. 175, 178.

Using the description Officer McAleer provided, “[h]e [Defendant Rivers] was taken into custody ... [while] ... walking towards the designated location of 69 and Market [*sic*].” N.T. 1/10/13, pp. 131, 174-75, 183. Officer McAleer watched the Defendant being arrested.²³ N.T. 1/10/13, pp. 131, 179. The person taken into custody was the same person who sold Officer McAleer cocaine on July 3, 2012, and with whom she had earlier arranged to meet that day (August 16, 2012) to consummate another drug transaction. N.T. 1/10/13, p. 132.

With Defendant Rivers taken into custody, Officer McAleer and Officer Bernhardt returned to the Upper Darby Police Station. N.T. 1/10/13, p. 132. The TNT officers (Officer Kenny and Officer George) turned over to Officer McAleer at the station the evidence taken from the Defendant’s person, *inter alia*, “ ... a clear baggie filled with ... a white powdered substance” N.T. 1/10/13, pp. 132, 179. Officer McAleer identified the “clear baggie,”

²³ At trial, Officer McAleer identified Defendant Rivers as the same person that the TNT officers took into custody. N.T. 1/10/13, pp. 131-32.

Commonwealth Exhibit C-1, as the ziploc bag containing a white powdered substance “ ... that was located on the Defendant at the time of arrest [*sic*].” N.T. 1/10/13, p. 133. See Commonwealth Exhibit C-1 (Ziploc bag containing a white powdered substance recovered from Defendant Rivers, August 16, 2012). Officer McAleer field tested the substance in the “clear baggie” using a “Narco” field test kit. N.T. 1/10/13, pp. 134, 171-72. She further identified Commonwealth Exhibit C-2 as a field test kit for cocaine that was similar to and/or the same as the one used by the Upper Darby Police Department and that which she utilized to field test Commonwealth Exhibit C-1. N.T. 1/10/13, p. 135. See Commonwealth Exhibit C-2 (Narco test kit). See also Commonwealth Exhibit C-1 (Ziploc bag containing white powdered substance recovered from Defendant Rivers, August 16, 2012).

Officer McAleer got a “ ... like a light blue, weak reaction” on her field test when she tested the white powdered substance recovered. N.T. 1/10/13, pp. 135. She did not know if she waited long enough for the test kit reaction to fully and accurately complete. N.T. 1/10/13, pp. 135-36. “ ... [T]he reaction I received seemed normal at the time. I mean it could just be the weak reaction [*sic*].”²⁴ N.T. 1/10/13, p. 137. Officer McAleer later learned in the usual course of the police department’s business that the items purchased and/or recovered from the Defendant on both July 3 and August 16, 2012, were submitted for analysis to the Pennsylvania State Police Lima Regional Laboratory. N.T. 1/10/13, p.172, 207-10. Officer McAleer

²⁴ Officer Bernhardt also identified Commonwealth Exhibit C-2 as similar to the Narco Test Kits used by the Upper Darby Police Department for field testing controlled substances. N.T. 1/10/13, pp. 74-75. See Commonwealth Exhibit C-2 (Narco Test Kit). He noted that “[t]his is a three- part test which, left to right, 1, 2, 3, A, B, C [*sic*], you would – in this case, a powdered substance would go into this. You would crack the 1, shake it a little, followed by 2, continue to shake, 3, continue to shake, and the colors would change [*sic*]. And in this [*sic*], a blue indication is the presence of a controlled substance, in this case, cocaine. ... [O]n numerous occasions, [Officer Bernhardt has] gotten a real faint bluish color, which is an indication to me from my training and experience on the [N]arco test kits that there is a presence of cocaine in that sample that I put in there [*sic*].” N.T. 1/10/13, pp. 75-76. Officer Bernhardt acknowledged that “ ... it has happened, yes ... ” that after field testing a substance and receiving what he believed to be a positive reaction, the crime lab forensic analysis showed that the item did not contain any controlled substance(s). N.T. 1/10/13, p. 76.

subsequently came to understand from the Lima Regional Laboratory that the ziploc bag containing a white powdered substance recovered from Defendant Rivers' person on August 16 was found not to contain any controlled substance. N.T. 1/10/13, pp. 137, 172-73. See Commonwealth Exhibit C-1 (Ziploc bag containing a white powdered substance recovered from Defendant Rivers, August 16, 2012). See also Commonwealth Exhibit C-9 (Lab Report L12-04840-1).

Kristen Victoria Staines as of trial was employed by the Pennsylvania State Police as a forensic scientist²⁵ at the Lima Regional Laboratory and had been so employed since September 2011. N.T. 1/10/13, pp. 199-201. Without objection, Ms. Staines was recognized to be an expert in the field of drug analysis and identification. N.T. 1/10/13, pp. 200-04.

Ms. Staines reviewed and examined evidence forwarded by the Upper Darby Police Department²⁶ in relation to Defendant Rivers, Incident No. 12-25673, and resultantly, *inter alia*, generated a report dated October 23, 2012. See Commonwealth Exhibit C-9 (Lab Report L12-04840-1). N.T. 1/10/13, pp. 205-06. Ms. Staines testified, *inter alia*, that she received for analysis a sealed envelope containing two (2) manila envelopes each with a clear ziploc bag. One manila envelope she received contained a ziploc bag with ice cream cone designs containing a white powder substance and was assigned the designation, Item 1.1. She placed, on Item 1.1, her initials, KVS, the police incident number, 12-25673, and the date the item was recovered,

²⁵ As a forensic scientist, Ms. Staines' duties and responsibilities, *inter alia*, including receiving and analyzing evidence to determine if it contained a controlled substance and generating a report based on those findings. N.T. 1/10/13, p. 200.

²⁶ The items purchased and seized from the Defendant were submitted by Kevin P. Dinan of the Upper Darby Police Department to the Pennsylvania State Police, Bureau of Forensic Services, Lima Regional Laboratory on September 26, 2012, for drug analysis in a sealed envelope containing the following: One (1) manila envelope containing one (1) clear ziplock [*sic*] bag with ice cream cone designs containing a white powder (Item 1.1) Commonwealth Exhibit C-6 (Ziploc bag containing white substance bought from Defendant Rivers, July 3, 2012); and One (1) manila envelope containing one (1) clear ziplock [*sic*] bag with white powder (Item 1.2) Commonwealth Exhibit C-1 (Ziploc bag containing white substance recovered from Defendant Rivers, August 16, 2012). N.T. 1/10/13, pp. 207-10.

“7/3/12.” N.T. 1/10/13, pp. 207-11, 218-19. *See* Commonwealth Exhibit C-6 (Ziploc bag containing white substance bought from Defendant Rivers, July 3, 2012). Ms. Staines further testified that presumptive testing (color test) and confirmatory testing (gas chromatograph and mass spectroscopy) was done on Item 1.1. She concluded that “...[t]he powder in item 1.1 weighed twenty-one hundredths of a gram (0.21g) and contained cocaine (Schedule II).” Commonwealth Exhibit C-9 (Lab Report L12-04840-1). N.T. 1/10/13, pp. 212-15, 217. *See also* Commonwealth Exhibit C-6 (Ziploc bag containing white substance bought from Defendant Rivers, July 3, 2012). The other manila envelope with a second ziploc bag containing a white powder substance was assigned the designation, Item 1.2. Ms. Staines noted on this bag, Item 1.2, her initials, KVS, the police incident number, 12-25673 and the date the item was recovered, “8/16/12.” N.T. 1/10/13, p. 212. *See* Commonwealth Exhibit C-1 (Ziploc bag containing white substance recovered from Defendant Rivers, August 16, 2012). As to item 1.2, after presumptive testing (color test), IR-FTIR testing (laser),²⁷ and confirmatory testing (gas chromatograph and mass spectroscopy), Ms. Staines concluded that “... [n]o controlled substances were detected in item 1.2.” Commonwealth Exhibit C-9 (Lab Report L12-04840-1).²⁸ N.T. 1/10/13, pp. 215-17, 222. *See* Commonwealth Exhibit C-1 (Ziploc bag containing white substance recovered August 16, 2012).

As detailed above, the test for determining the legal sufficiency of this evidence is whether viewing such in the light most favorable to the Commonwealth and drawing all proper inferences in favor of the prosecution as verdict winner, a reasonable jury could have found that

²⁷ Based on IR-FTIR testing (laser), the white powder substance at Item 1.2 was identified as seventy hundredths of a gram (0.70) of sodium bicarbonate (baking soda), a non-controlled substance. N.T. 1/10/13, pp. 215-17. *See* Commonwealth Exhibit C-1 (Ziploc bag containing white substance recovered from Defendant Rivers, August 16, 2012).

²⁸ All the opinions and conclusions offered by Ms. Staines per her Lab Report, L12-04840-1 (October 23, 2012) (Commonwealth Exhibit C-9) were to a reasonable degree of scientific certainty. N.T. 1/10/13, p. 217.

each requisite element of the challenged conviction, Criminal Attempt – Delivery of a Non-Controlled Substance, has been established beyond a reasonable doubt. *Commonwealth v. Parker supra* 957 A.2d at 317 citing *Commonwealth v. Riley supra* 434 Pa.Super. at 417, 643 A.2d at 1091. Hence, all of the evidence testified to by Officers Timothy Bernhardt, Sean Kenny and Christine McAleer, and Pennsylvania State Police Forensic Scientist Kristen Staines as advantageous to the Commonwealth must be accepted. *Id.*

After utilizing the telephone number (484 470-3034) he provided to arrange, meet and purchase from the Defendant a quantity of cocaine on July 3, 2012, Officer McAleer again using the same contact number (484 470-3034) called Defendant Rivers on August 16, 2012, to once more buy from him a quantity of cocaine. N.T. 1/10/13, pp. 113-15, 122, 129-31, 140-41, 152. *See also* Commonwealth Exhibits C-6 (Ziploc bag containing white powdered substance bought from Defendant Rivers, July 3, 2012); C-9 (Lab Report L12-04840-1); and C-3 (Cell phone recovered from Defendant Rivers, August 16, 2012). In response to her telephone call, the Defendant readily agreed to sell Officer McAleer sixty (\$60.00) dollars worth of cocaine. N.T. 1/10/13, pp. 129, 170-71, 194-95. To effectuate his illicit sale, Defendant Rivers arranged with the officer to meet her at approximately 7:30 p.m. that same evening in the vicinity of 69th and Market Streets, a location near the bar he was seemingly patronizing when he spoke to Officer McAleer. N.T. 1/10/13, pp. 129-31. Wholly consistent with that which he advised Officer McAleer during their telephone discussion, the Defendant was observed by police surveillance walking from the nearby bar toward 69th and Market Streets, the site he set to meet the officer and sell her cocaine. N.T. 1/10/13, pp. 64, 129-31, 173-74. When approached by fully uniformed Tactical Narcotic Team officers and being advised he was being taken into custody, Defendant Rivers did not at first comply with police commands to make his hands visible, but

instead continued to quickly reach toward and shove something into his pants' waistband. N.T. 1/10/13, pp. 95, 98-99. Immediately checking the waistband area of the Defendant's pants once he was secured, the TNT officers recovered a small, one (1) inch by one (1) inch, clear ziploc bag containing white powder. N.T. 1/10/13, pp. 101, 107. *See also* Commonwealth Exhibit C-1 (Ziploc bag containing white powder recovered from Defendant Rivers, August 16, 2012). After examining the plastic bag then seized from the Defendant and with the knowledge that subsequent laboratory analysis of this item revealed that it contained .7 grams of baking soda, the prosecution's drug expert characterized it as a "beat bag," a bag of ersatz cocaine that one would try to pawn off as the controlled substance, cocaine. N.T. 1/10/13, pp. 67-72. *See also* Commonwealth Exhibits C-1 (Ziploc bag containing white powder recovered from Defendant Rivers, August 16, 2012) and C-9 (Lab Report L12-04840-1).

The Defendant's sufficiency claim challenging his attempted non-controlled substance delivery conviction as lacking proof of the "substantial step" requisite necessary to sustain a criminal attempt charge must fail when viewed against the evidence described above. Unsolicited, Defendant Rivers gave his telephone number to Officer McAleer so she could contact him to purchase illicit substances. The Defendant engaged in telephone discussion with the officer solely for the purpose of arranging a drug transaction. *Commonwealth v. Moss supra* 852 A.2d at 383. Defendant Rivers set a time and location for the drug sale during this telephone conversation. *Id.* In this same telephone call, the Defendant also agreed on the price at which he would sell Officer McAleer the illegal substance. Per his arrangements, Defendant Rivers was proceeding toward and was in near proximity to the site he set for his illicit transaction when arrested. *Id.* Immediately after being taken into custody, Defendant Rivers was found to be in possession of bagged, pseudo cocaine consistent in packaging, size, shape, and coloration with

that of the controlled substance, cocaine. *Commonwealth v. Parker supra* 957 A.2d at 317-18. Defendant Rivers had obviously undertaken preparation efforts to bag his mock cocaine. *Id.* at 318. Focusing on these acts that the Defendant affirmatively did rather than the only remaining act of his actually selling the ersatz cocaine to Officer McAleer necessary to the completed delivery offense, the evidence at bar certainly reveals that Defendant Rivers committed the requisite “substantial step” and had the firm intention to perpetrate the crime of delivering a non-controlled substance. *Commonwealth v. Moss supra* 852 A.2d at 383 *citing Commonwealth v. Zingarelli supra* 839 A.2d at 1069 *quoting Commonwealth v. Gilliam supra* 273 Pa.Super. at 589-90, 417 A.2d at 1205. See also Pa.SSJI (Crim) 12.901A. Paraphrasing the Superior Court, it is readily apparent Defendant Rivers cannot escape the consequences of his actions simply because he chose the wrong consumer. *Commonwealth v. Irby supra* 700 A.2d at 465.

The Court erred when it permitted the Commonwealth to introduce photographs of Mr. Rivers’s [sic] arms for identification purposes since defense counsel was not given prior notice that they would be used.

By his final complaint on appeal, Defendant Rivers maintains that it was error for this court to permit the prosecution’s introduction into evidence of the photographs (Commonwealth Exhibits C-7 and C-8) depicting his uniquely scarred arms because defense counsel was not afforded prior notice of any such intentions by the Commonwealth. Even upon a cursory review of the salient record, it is readily apparent that the Defendant has for appellate review waived this claim.

Pennsylvania courts have long held and it is well-settled that failure to raise a contemporaneous objection before the trial court waives any such claim on appeal. *Commonwealth v. Thoeun Tha*, 64 A.3d 704, 713 (Pa.Super. 2013) *citing Commonwealth v.*

Pearson, 454 Pa.Super. 313, 321, 685 A.2d 551, 555 (1996) *citing* Pa.R.A.P. 302(a) and *Commonwealth v. Burkholder*, 528 Pa. 119, 124, 595 A.2d 59, 62 (1991).

During the trial testimony of Officer McAleer, the prosecution made an oral motion to have Defendant Rivers display in person for the jury his left and right arms so the jurors could view certain scarring about his arms. N.T. 1/10/13, p. 141. The Commonwealth's application came following the *unopposed* testimony of Officers Bernhardt, George, and McAleer that the Defendant's arms were disfigured with unique scarring. N.T. 1/10/13, pp. 77, 105, 140-41. Defense counsel objected to the in person showing of the Defendant's arm, *inter alia*, on the basis of an alleged discovery violation.²⁹ N.T. 1/10/13, pp. 142-48. Given the hour, the court recessed to consider and then rule on the objection as well as to determine in conjunction with the sheriff's office how best to proceed logistically, if the objection was overruled.³⁰ N.T. 1/10/13, pp. 146, 149.

During the recess, a stipulation was reached between the prosecution and the Defendant's lawyer rendering any defense objections raised prior to the Commonwealth's application for an in person showing of Defendant's Rivers' arms moot. Per counsel's understanding, the

²⁹ Defense counsel also objected to the Commonwealth's application to have the Defendant "... roll up his sleeves for the members of the jury ..." on the basis of its relevance and 5th Amendment privilege. Given the Defendant's challenge to the identification of the person with whom the officer met on July 3 and the officer's testimony that the person she purchased cocaine from on that day had notable scarring that she described as burn-like, the court concluded that the Commonwealth's motion sought relevant evidence. As it related to any 5th Amendment concerns, the court observed that a request to have the Defendant "roll up his sleeves" is certainly not a communicative, testimonial demand. Accordingly, the court overruled the relevance and 5th Amendment challenges. N.T. 1/10/13, pp. 141-46. *See Commonwealth v. Glover*, 265 Pa.Super. 19, 25, 401 A.2d 779, 782 (1979).

³⁰ The court needed to consult with the sheriff's office to see in what fashion they would permit the incarcerated Defendant to expose his arms in such close proximity to the jury, realizing that security concerns would prohibit the Defendant from moving around the courtroom wholly unfettered. Moreover, the court noted: "... I would think from [the Commonwealth's] viewpoint, a simple exposing of the sleeves from the counsel table is going to do you absolutely no good because I don't know how many jurors are going to be able to perceive anything ... from where they are versus where [the Defendant] is. I think, gentlemen, what we have to do, ... [is] consult with the sheriffs to see in what fashion this can be done in a way that comports with their understandable concerns. ... I hope you can appreciate the logistics here." N.T. 1/10/13, pp. 145-46.

prosecution abandoned its request to have the Defendant display for the jury his arms. Rather, pictures of his arms were taken and these photographs were to be shown to the jury in lieu of the Commonwealth's previously requested in person showing. N.T. 1/10/13, pp. 151-56.

After the recess, Officer McAleer resumed the witness stand. In response to prosecution questions, she continued, *absent objection*, to describe her observations of the Defendant's scarred arms as she sat next to him in her vehicle on July 3, 2012, and drove him to the Barclay Square Apartments. N.T. 1/10/13, pp. 152-53. The following exchange then occurred of record, in the presence of the jury, between the court, the Commonwealth, and defense counsel with respect to the agreement reached and the photographs that were taken of Defendant Rivers' arms during the recess.

MR. DIROSATO: Your Honor, I do ask that these be marked for identification purposes Commonwealth's Exhibit C-7 and C-8.

THE COURT: Please.

MR. DIROSATO: The record should reflect I'm showing them to Defense Counsel.

MR. GEBHART: Thank you.

MR. DIROSATO: Your Honor, I think it's appropriate at this time to inform the members of the jury [*sic*] the stipulation entered into by the Commonwealth and Counsel on behalf of the Defendant that C-7 and C-8, for purposes of authentication, would be described as photographs of the Defendant Rasheen Rivers' left and right arms, that these photographs are fair and accurate depictions of how Mr. Rivers' arms appear today on January 10, 2013.

THE COURT: That's agreed?

MR. GEBHART: That is agreed, Your Honor.

...

MR. DIROSATO: Permission to approach the witness, Your Honor?

THE COURT: Please.

BY MR. DIROSATO:

Q. Officer McAleer, I'm going to show you what's been marked for identification purposes Commonwealth's Exhibit C-7 and C-8. Can you take a moment to review those? Officer McAleer having reviewed Commonwealth Exhibit C-7 and C-8, are those the scarring that you described of how [*sic*] Mr. Rivers' arms appear [*sic*] to you on July 3, 2012?

A. Yes, that's correct.

MR. DIROSATO: **Your Honor, I make a Motion to move C-7 and C-8 into evidence.**

THE COURT: **Any objection to the admission of C-7, C-8?**

MR. GEBHART: **No objection, Your Honor.**

THE COURT: **Without objection, they're admitted.**

MR. DIROSATO: **I would make a Motion to Publish to the members of the jury, Your Honor, Commonwealth's Exhibit C-7 and C-8.**

THE COURT: **Any objections?**

MR. GEBHART: **No, Your Honor.**

THE COURT: **Without objection. ...**

...

THE COURT: ... The record will reflect that the items have been now published to the jury. ...

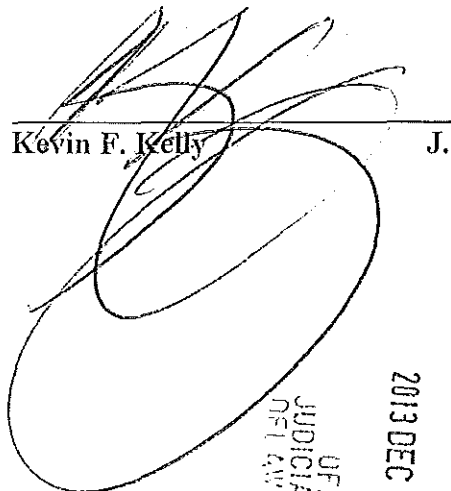
The above cited case record clearly demonstrates that it was not error for this court to admit into evidence at the Commonwealth's request the photographs of the Defendant's arms depicting their scarring. *See* Commonwealth Exhibits C-7 and C-8. Well prior to the prosecution moving for the Defendant to display in person for jury his arms, the Commonwealth had elicited from three (3) different police witnesses testimony about Defendant' Rivers' arms being scarred and disfigured, absent any defense opposition. N.T. 1/10/13, pp. 77, 105, 140-41. Even subsequent to its application for the Defendant to display his arms in person to the jury, the Commonwealth continued to present police witness testimony regarding the scarring about Defendant Rivers' arms, without defense objection. N.T. 1/10/13, pp. 151-53. While defense counsel did object to the prosecution's application that there be an in person showing of the Defendant's arms, this request was discontinued by the Commonwealth, and the Defendant was neither directed nor did he present his arms in person to the jury. N.T. 1/10/13, pp. 141-49, 151-57. Instead, by stipulation of counsel, the now challenged photographs of Defendant Rivers' arms were used. N.T. 1/10/13, p. 151-56. The Commonwealth showed these photographs to the Defendant's lawyer before presenting them to its witness, Officer McAleer. No objection was raised. N.T. 1/10/13, p. 153. The prosecution offered the stipulation of record relevant to this pictures' authentication which was readily acknowledged and agreed to by defense counsel. N.T. 1/10/13, pp. 153-54. When the photographs were presented to Officer McAleer for identification by the Commonwealth there was no defense opposition noted. N.T. 1/10/13, p. 155. Immediately subsequent to such a motion of the prosecution, the court inquired directly of the Defendant's lawyer whether there was any objection to the photographs' admission to which the defense counsel replied, "No objection, Your Honor." N.T. 1/10/13, p. 155. Similarly, just after the Commonwealth's application that the pictures be published to the jury, the court asked

of the Defendant's attorney if there was any objection and again was unambiguously advised, "No." N.T. 1/10/13, pp. 155-56. On such a record, it cannot be reasonably or otherwise maintained that this court erred in permitting the admission of Commonwealth Exhibits C-7 and C-8, the photographs of Defendant Rivers' arms.

Defense counsel offered no opposition to the prosecution's police witnesses testifying about the Defendant's arms being disfigured with scarring. He stipulated to the authentication of the now challenged pictures. The attorney for the Defendant permitted the photographs to be identified, admitted into evidence, and published to the jury, all without objection. Any appellate challenge to the of record introduction of these photographs has most certainly been waived.

For all the aforementioned reasons, Judgment of Sentence should be affirmed.

BY THE COURT:


Kevin F. Kelly J.

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