

[J-12A-2026 and J-12B-2026] [MO: McCaffery, J.]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 22 MAP 2025
	:	
Appellee	:	Appeal from the Order of the
	:	Superior Court at No. 993 MDA
	:	2023 dated September 24, 2024,
v.	:	Affirming the Judgment of
	:	Sentence of the York County
	:	Court of Common Pleas, Criminal
CHARLES CLAYTON CASSELL III,	:	Division, at No. CP-67-CR-
	:	0000378-2022 dated May 1,
Appellant	:	2023.
	:	
	:	ARGUED: March 12, 2026
COMMONWEALTH OF PENNSYLVANIA,	:	No. 23 MAP 2025
	:	
Appellee	:	Appeal from the Order of the
	:	Superior Court at No. 1247 MDA
	:	2023, dated October 1, 2024,
v.	:	Affirming the Judgment of
	:	Sentence of the York County
	:	Court of Common Pleas, Criminal
JERROD AARON SCOTT,	:	Division, at No. CP-67-CR-
	:	0000858-2021 dated June 1,
Appellant	:	2023.
	:	
	:	ARGUED: March 12, 2026

CONCURRING OPINION

JUSTICE WECHT

DECIDED: October 13, 2026

Many cases that come before this Court require us to parse imprecise statutory language in order to comprehend the General Assembly’s meaning. These two cases do not fall into that category. The appeals here turn upon what it means to “deliver” a controlled substance. The General Assembly has supplied a clear mandate: “‘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.”¹

It is common for two or more people to buy and use drugs together. Often, the members of the group will hand drugs and paraphernalia to each other to partake. That is, a “transfer” of controlled substances, *i.e.*, “delivery,” may occur numerous times throughout a session of mutual drug use. If several people are using drugs together in this manner, and someone overdoses and dies, the other drug users—often addicts themselves—undoubtedly are less culpable in a moral sense than the prototypical drug dealer, who profited from this tragic form of self-destruction. But we are bound by the plain statutory language. We cannot displace or subordinate that language in service of our own perceptions of relative blameworthiness. As far as the drug-delivery-resulting-in-death (“DDRD”) statute² goes, a “delivery” is a “delivery.” The meaning of that word is clear and well-settled. The Majority undoubtedly is correct that, absent any statutory support, “joint acquisition and use” of controlled substances does not negate the “delivery” element of a DDRD charge, or of the underlying drug offense incorporated into the DDRD charge.³

¹ Section 2 of The Controlled Substance, Drug, Device and Cosmetic Act (the “Drug Act”), Act of April 14, 1972, P.L. 233, *as amended*, 35 P.S. § 780-102(b).

² 18 Pa.C.S. § 2506(a) (“A person commits a felony of the first degree if the person intentionally administers, dispenses, delivers, gives, prescribes, sells or distributes any controlled substance or counterfeit controlled substance in violation of section 13(a)(14) or (30) of the act of April 14, 1972 (P.L. 233, No. 64), known as The Controlled Substance, Drug, Device and Cosmetic Act, and another person dies as a result of using the substance.”).

³ Specifically, as relevant here, DDRD incorporates the offense of delivery or possession with intent to deliver a controlled substance under Section 13(a)(30) of the Drug Act. See 18 Pa.C.S. § 2506(a); 35 P.S. § 780-113(a)(30) (prohibiting “the manufacture, *delivery*, or possession with intent to manufacture or deliver, a controlled (continued...)”).

I agree with the Majority's thorough and detailed analysis, save for two points. First, a matter of terminology. This is somewhat tangential to the issue here, but even to identify the nature of my concern requires some explanation. The Majority frames the issue in this case as an inquiry into whether joint acquisition and use of controlled substances creates a "defense" to the element of delivery, which, "[i]n other words," asks: "is the Commonwealth required to disprove the defendant jointly acquired possession of the controlled substances with the decedent for their personal use?"⁴ The Majority later distinguishes the purported defense from an *affirmative defense*, which, the Majority states, the defendant would be required to prove.⁵ The Majority cites no authority for these propositions.

The Majority's comments implicate some nuances of Pennsylvania law. It is true that, "[t]raditionally, the defendant had the burden to prove affirmative defenses . . . by a preponderance of the evidence."⁶ However, in 1974, this Court "re-examined and discarded the historical view."⁷ In *Commonwealth v. Rose*, this Court discerned a developing trend toward requiring a defendant to produce some evidence placing an affirmative defense at issue, at which point the burden shifts to the Commonwealth to

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") (emphasis added); *see also Commonwealth v. Peck*, 242 A.3d 1274, 1281 (Pa. 2020) ("[A] violation of one of the specifically referenced provisions of the Drug Act is an element of the crime of DDRD.").

⁴ Maj. Op. at 13.

⁵ *Id.* at 26 n.22 ("Neither Cassell nor Scott assert joint acquisition and use is an **affirmative defense** for which the defendant would bear the burden of proof.") (emphasis in original).

⁶ *Commonwealth v. Mouzon*, 53 A.3d 738, 741 (Pa. 2012).

⁷ *Id.* (discussing *Commonwealth v. Rose*, 321 A.2d 880 (Pa. 1974)).

disprove that defense beyond a reasonable doubt.⁸ *Rose* noted some support for this trend in then-recent United States Supreme Court decisions, but it principally attributed this Court's course-change to the fact that, "[i]n any criminal prosecution, the Commonwealth has an unshifting burden to prove beyond a reasonable doubt all elements of the crime."⁹

Notably, and contrary to *Rose*'s prediction about emerging federal law, subsequent decisions of the United States Supreme Court made clear that, for federal constitutional purposes, "due process permits States to place a burden on the defendant to prove an affirmative defense by a preponderance of the evidence, so long as the defendant is not thereby required to negate an element of the offense."¹⁰ As a federal constitutional matter, then, it is permissible for the legislature to place the burden to prove certain affirmative defenses upon the defendant, and some statutory defenses do so expressly.¹¹ Other statutes are silent as to the burden of proof.¹² Adding to the complexity, *Rose*

⁸ *Rose*, 321 A.2d at 883-84; see *Mouzon*, 53 A.3d at 741-42 (discussing *Rose*). This paradigm remains for, e.g., self-defense. See *Commonwealth v. Torres*, 766 A.2d 342, 345 (Pa. 2001) ("When a defendant raises the issue of self-defense, the Commonwealth bears the burden to disprove such a defense beyond a reasonable doubt."); see also *id.* (referring to self-defense as an "affirmative defense").

⁹ *Rose*, 321 A.2d at 884; see also *Mouzon*, 53 A.3d at 742 ("The *Rose* Court attributed this break from precedent to the never-shifting burden of the Commonwealth to prove the elements of a crime beyond a reasonable doubt.").

¹⁰ *Mouzon*, 53 A.3d at 743 (discussing *Dixon v. United States*, 548 U.S. 1 (2006) (duress); *Martin v. Ohio*, 480 U.S. 228 (1987) (self-defense); *Patterson v. New York*, 432 U.S. 197 (1977) (extreme emotional disturbance)).

¹¹ See, e.g., 18 Pa.C.S. § 315(a) (insanity) ("The mental soundness of an actor engaged in conduct charged to constitute an offense shall only be a defense to the charged offense when the actor proves by a preponderance of evidence that the actor was legally insane at the time of the commission of the offense.") (emphasis added).

¹² See, e.g., 18 Pa.C.S. § 309 (duress) ("It is a defense that the actor engaged in the conduct charged to constitute an offense because he was coerced to do so by the use of, (continued...)")

remains good law in Pennsylvania as a general matter.¹³ Thus, it is not entirely accurate for the Majority to suggest that, if the purported defense at issue in these appeals were classified as an “affirmative defense,” then the “defendant would bear the burden of proof.”¹⁴ At the very least, that is not the whole story. Indeed, in light of these nuances of Pennsylvania law, the Majority’s various comments about the significance of a “defense” as triggering a particular burden to prove (or disprove) a relevant fact warrants further elaboration, or at least a citation to some authority.¹⁵ The matter is more complicated than the Majority suggests.

Turning to the substance of these appeals, I disagree with the Majority’s discussion of “constructive” transfer and its application of that concept to the facts of these appeals. Early in its opinion, the Majority correctly quotes from this Court’s decision in *Commonwealth v. Murphy*, which fleshed out the relevant terms in the statutory definition of “delivery.”¹⁶ *Murphy* explained that a “defendant actually transfers drugs whenever he

or a threat to use, unlawful force against his person or the person of another, which a person of reasonable firmness in his situation would have been unable to resist.”).

¹³ Indeed, in light of the intersection between constitutional principles, statutory requirements (or statutory silence), and case law pointing in different directions, the Criminal Jury Instructions Subcommittee has described the assignment of burdens of proof for defenses as a “matter of considerable complexity”; the subcommittee felt it necessary to provide a lengthy “general research study” on the topic embedded within the suggested criminal jury instructions. See Pennsylvania Suggested Standard Criminal Jury Instructions, § 8.00, Information for The Court on The Burden of Proof (4th ed., Revised September 2024). Helpfully, at the end of that research study, the subcommittee provided a chart of statutory defenses, organized by defenses as to which a statute expressly assigns a burden of proof, defenses as to which a court has assigned the burden of proof, and defenses as to which the burden has not yet been established.

¹⁴ Maj. Op. at 26 n.22.

¹⁵ See *id.* at 13, 26, 27.

¹⁶ See *id.* at 14 (discussing *Commonwealth v. Murphy*, 844 A.2d 1228, 1234 (Pa. 2004)).

physically conveys drugs to another person,” and he “constructively transfers drugs when he directs another person to convey drugs under his control to a third person or entity.”¹⁷ Including constructive transfer within the definition of “delivery” thus allows law enforcement to, for instance, target a higher level actor within a criminal organization, one who may not handle drugs or money personally, but who directs an underling to conduct a drug transaction. Although the underling “actually” transfers the drugs, the actor who gave the order “constructively” transferred them, and accordingly is no less responsible for the “delivery.”

The Majority recognizes that constructive transfer is directed toward this sort of scenario.¹⁸ However, the Majority then does something very different with the concept of constructive transfer. Citing to a 1977 decision of the United States Court of Appeals for the Second Circuit, the Majority claims that “an individual also may constructively deliver drugs to another when they intentionally facilitate the sale,” or, stated otherwise, “serve[s] ‘as a link in the chain of distribution’” by, for example, “providing the funds for the drugs, or the transportation to the dealer.”¹⁹ When the Majority later applies this new standard to the facts of Cassell’s case, it additionally borrows some language from the Supreme Court of California, referring to Cassell’s “active role in instigating, financing, arranging [and] carrying-out the drug transaction” as sufficient grounds for finding constructive transfer.²⁰

¹⁷ *Murphy*, 844 A.2d at 1234.

¹⁸ Maj. Op. at 25 (“Drug dealers constructively transfer narcotics to a buyer if they direct an underling to conduct the sale, although the dealer never handles the drugs or the money.”).

¹⁹ *Id.* (quoting *United States v. Swiderski*, 548 F.2d 445, 450 (2d Cir. 1977)).

²⁰ *Id.* at 28-29 (quoting *People v. Edwards*, 702 P.2d 555, 559 n.5 (Ca. 1985)).

None of this “facilitation” or “link in the chain” reasoning has any basis in existing Pennsylvania law. The Majority certainly cites none. A half-century-old Second Circuit decision and a footnote from a 1985 California Supreme Court opinion cannot and should not supersede this Court’s discussion in *Murphy*, which gave constructive transfer a far narrower meaning. I fear that the Majority’s reasoning could be extended to encompass a much broader range of conduct than the General Assembly chose to address. Giving someone a ride to a drug dealer’s house is not a constructive transfer of a controlled substance. Neither is contributing money for the purchase. Yet, these are the primary facts that the Majority cites to demonstrate constructive transfer in Cassell’s case—that he “provided the funds and transportation to acquire the drugs that Smith used—the same drugs that later caused her death.”²¹ On the Majority’s reasoning, it is conceivable that, for example, exasperated parents who give their drug-addicted child fifty dollars suspecting that the money will be used to buy drugs—an unfortunately common occurrence—might be alleged to have constructively transferred a controlled substance.

A stronger (and from a precedent-setting perspective, more prudent) analysis would find that, in Cassell’s case, the evidence was sufficient because, viewed in the light most favorable to the Commonwealth as verdict-winner, it is reasonable to infer that

²¹ *Id.* at 28. The Majority’s discussion of Scott’s appeal is more opaque. The Majority notes that “Scott obtained the drugs from his dealer and *physically transferred* them to Wandell, who was acting as Savage’s agent.” *Id.* at 29 (emphasis added). Physical transfer is sufficient to prove *actual* transfer. Yet, the Majority then concludes that “the evidence was sufficient to prove Scott (*constructively*) delivered the drugs to Savage, which resulted in his death.” *Id.* (emphasis added). Given the physical conveyance that the Majority references, it is unclear why the Majority would resort to the suggestion that Scott engaged in a constructive transfer in order to find “delivery.” The DDRD statute does not require that the defendant deliver a controlled substance directly to the person who dies, with no others in between. Rather, the statute requires that the defendant commit an act that constitutes a specified violation of the Drug Act, *i.e.*, delivery, “and another person dies as a result of using the substance.” 18 Pa.C.S. § 2506(a). The fact that Scott physically transferred the drugs to Wandell does not absolve him of Savage’s death under the plain language of the DDRD statute.

Cassell physically conveyed the fentanyl to Smith while the two were using.²² Thus, there was an “actual” transfer of a controlled substance and, in turn, “delivery.” Many of the same facts that the Majority highlights give rise to this inference. Cassell’s text messages demonstrated that Cassell set up the sale and purchased the fentanyl, with his money, from his drug dealer. From the fact that Smith then used the fentanyl in Cassell’s presence, one reasonably can infer that Cassell physically conveyed it to her. This conclusion is further supported by Cassell’s acknowledgement, during his interview with investigators, that he “let” Smith use “as much as she wants.”²³ The resolution of this appeal can, and should, thus turn upon the straightforward concept of actual transfer. There is no need to pursue a problematic expansion of the concept of constructive transfer.

As a final note, I share the Superior Court’s view that, although it is foreclosed by the plain language of the relevant statutes, the appellants’ argument in these appeals has a certain “commonsense appeal.”²⁴ Unfortunately, the statutory law of this Commonwealth sometimes lacks common sense. The General Assembly does not violate the Constitution when it violates common sense. It is undoubtedly true that the DDRD statute was meant to target drug dealers, not drug users. As a policy matter, few

²² See *Commonwealth v. Peters*, 355 A.3d 1270, 1279 (Pa. 2026) (quoting *Commonwealth v. Chisebwe*, 310 A.3d 262, 267 (Pa. 2024)) (“In conducting sufficiency review, we consider whether the evidence introduced at trial and all reasonable inferences derived therefrom, viewed in the light most favorable to the Commonwealth as verdict winner, are sufficient to establish the elements of the offense beyond a reasonable doubt.”).

²³ Commonwealth’s Trial Exhibit 34, Transcript of Recorded Interview, at 14 (Cassell stating: “But she used more than I did. Because I always let her – if we are doing stuff, I let her take as much as she wants.”).

²⁴ *Commonwealth v. Scott*, 325 A.3d 844, 852 (Pa. Super. 2024).

would disagree that “drug dealers should be punished more harshly than drug users.”²⁵ Yet, the use of the DDRD statute in these cases places common drug users on the same plane of culpability as drug dealers. This is a situation in which the spirit of the law is in considerable tension with its text. Yet, it is the latter that binds us. Where, as here, the applicable statutory language is crystal clear, “the letter of it is not to be disregarded under the pretext of pursuing its spirit.”²⁶

I concur in the result.

Chief Justice Todd joins this concurring opinion.

²⁵ Maj. Op. at 29.

²⁶ 1 Pa.C.S. § 1921(b).