

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellant	:	
	:	
v.	:	
	:	
CAITLYN N. BROWN	:	No. 798 WDA 2022
Appellee	:	

Appeal From the Order Entered June 15, 2022
In the Court of Common Pleas of Westmoreland County Criminal Division
at No(s): CP-65-CR-0001104-2020

BEFORE: BENDER, P.J.E., KUNSELMAN, J., and COLINS, J.*

MEMORANDUM BY BENDER, P.J.E.: **FILED: April 28, 2023**

The Commonwealth appeals from trial court’s June 15, 2022 order granting in part, and denying in part, Appellee’s, Caitlyn N. Brown, pretrial petition for writ of *habeas corpus*. In that order, the court dismissed Appellee’s charge of drug delivery resulting in death, 18 Pa.C.S. § 2506, and dismissed, in part, her charges of conspiracy to commit possession with intent to deliver (PWID) a controlled substance (Heroin/Fentanyl), 18 Pa.C.S. § 903(a)(1), and delivery of a controlled substance (Heroin/Fentanyl), 35 P.S. § 780-113(a)(3), as they related to the victim in this case, Richard Govora. After careful review, we affirm.

* Retired Senior Judge assigned to the Superior Court.

On April 29, 2020, the Commonwealth filed a criminal information against Appellee, charging her with the above-stated offenses. On February 17, 2022, Appellee filed a pretrial petition for writ of *habeas corpus*, arguing that the Commonwealth's evidence was not sufficient to support a *prima facie* case that she delivered narcotics to Govora and, thus, the charges pending against her should be dismissed to the extent they related to him. On April 5, 2022, the court conducted a hearing on Appellee's petition. The facts adduced at that hearing, and through the evidence presented at Appellee's preliminary hearing, were summarized by the trial court as follows:

On November 3, 2015, [former Pennsylvania State] Trooper John Zalich was dispatched to investigate an apparent drug overdose at the residence of ... Govora, located at 1112 Donohoe Road, Unity Township, Westmoreland County, Pennsylvania. Zalich arrived at approximately 4:45 p.m. and found two uniformed troopers, two emergency medicine technicians, [Appellee], family members of the deceased, and a representative from the coroner's office on the front lawn of the house. There was one marked patrol car at the location as well. Govora was deceased, lying on the floor inside his home near the front door. He had needle marks on his right arm. A preliminary urine test identified heroin and fentanyl in Govora's system. Drug paraphernalia was found throughout the house, including an empty stamp bag containing fentanyl residue. It was later determined that Govora died as a result of combined drug toxicity from heroin, fentanyl, and amphetamine.

After a search of the house was completed, Zalich and a representative from the coroner's office spoke with [Appellee] who had been seated on a patio outside of the house. [Appellee] told Zalich that she and [Govora] met at a rehabilitation facility. She said that [Govora] picked her up at a three[-]quarter house and brought her to his residence[,] where she stayed between October 31, 2015, and November 1, 2015. [Appellee] said that on November 2, 2015, [Govora] again picked her up at the three[-]quarter house and brought her to his residence on Donohoe

Road. According to [Appellee's] statement, she and [Govora] decided to get some heroin[,] but neither one of them knew a local drug source. [Appellee] looked through Facebook, identified Tyler Cook as a friend of hers from high school, and contacted him. Cook agreed to meet [Appellee] in the City of Pittsburgh. [Appellee] and [Govora] pooled their money and drove [Govora's] car into Pittsburgh to meet Cook.

When [Appellee] and [Govora] met Cook, [Appellee] got into Cook's car, gave Cook their money, and went with him to purchase heroin. [Govora] remained in his car. Cook met with a black male who sold him fifteen bags of heroin while [Appellee] was seated in Cook's car. Cook was given three bags of heroin for arranging the transaction. Cook then drove [Appellee] back to the original location where [Govora] was waiting for her in his car.

[Appellee] and [Govora] each immediately snorted a bag of heroin. They then drove to [Govora's] residence, stopping on the way to purchase needles. [Appellee] and [Govora] stayed up most of the night using the heroin that had just been purchased. According to [Appellee], after falling asleep in the early morning, she woke up in the afternoon and found [Govora] lying by the front door unresponsive.

Trial Court Order & Opinion (TCOO), 6/15/22, at 1-4 (footnote and citations to the record omitted).

On June 15, 2022, the court issued an opinion and order granting Appellee's petition for writ of *habeas corpus* and dismissing Appellee's charge of drug delivery resulting in death, and dismissing, in part, her charges of PWID, and conspiracy to commit PWID, to the extent that those charges related to Govora. The Commonwealth filed a timely notice of appeal.¹

¹ We note that it is "well established that the Commonwealth may appeal from a trial court's order dismissing a felony charge based on a pretrial petition for [w]rit of [*h*]abeas [*c*]orpus." **Commonwealth v. Merced**, 265 A.3d 786, 790 (Pa. Super. 2021) (quoting **Commonwealth v. Karetny**, 880 A.2d 505, 513 (Pa. 2005) (citation omitted)).

On July 13, 2022, the court issued an order directing the Commonwealth to file, and serve upon the judge, a Pa.R.A.P. 1925(b) concise statement of errors complained of on appeal. The court stated in the order that “any issue not properly include in the Statement shall be deemed waived.” Order of Court, 7/13/22, at 1 (single page). The docket shows that the order was served on the Commonwealth, as well as defense counsel, on July 14, 2022. However, there is nothing in the docket or record indicating that the Commonwealth filed a Rule 1925(b) statement. On August 15, 2022, the court filed a Rule 1925(a) statement indicating that it was relying on its opinion entered in conjunction with the June 15, 2022 order ruling on Appellee’s petition for writ of *habeas corpus*.

Herein, the Commonwealth states one issue for our review:²

[I.] The [Commonwealth] submits that the ... [t]rial [c]ourt erred in finding that the Commonwealth failed to present sufficient evidence that [Appellee] delivered a controlled substance and that [Appellee] delivered a controlled substance that resulted in the death of another individual.

Commonwealth’s Brief at 1.

² We observe that the Commonwealth incorrectly labels this section of its brief as the “Statement of the Case” rather than the “Statement of Questions Involved” as Pa.R.A.P. 2116 mandates. Nevertheless, because we can discern the issue raised by the Commonwealth, we will overlook this briefing error.

Initially, we must conclude that the Commonwealth has waived its issue for our review by not complying with the trial court's order to file a Rule 1925(b) statement.³

Our jurisprudence is clear and well-settled, and firmly establishes that: Rule 1925(b) sets out a simple bright-line rule, which obligates an appellant to file and serve a Rule 1925(b) statement, when so ordered; any issues not raised in a Rule 1925(b) statement will be deemed waived; the courts lack the authority to countenance deviations from the Rule's terms; the Rule's provisions are not subject to *ad hoc* exceptions or selective enforcement; appellants and their counsel are responsible for complying with the Rule's requirements; Rule 1925 violations may be raised by the appellate court *sua sponte*, and the Rule applies notwithstanding an appellee's request not to enforce it; and, if Rule 1925 is not clear as to what is required of an appellant, on-the-record actions taken by the appellant aimed at compliance may satisfy the Rule.

Commonwealth v. Hill, 16 A.3d 484, 494 (Pa. 2011), *rejected on other grounds by Commonwealth v. Bradley*, 261 A.3d 381 (Pa. 2021).

In any event, even if not waived, we would affirm the trial court's order. "We review a decision to grant a pre-trial petition for a writ of *habeas corpus* by examining the evidence and reasonable inferences derived therefrom in a light most favorable to the Commonwealth." ***Commonwealth v. Dantzler***, 135 A.3d 1109, 1111 (Pa. Super. 2016) (citation omitted).

A pre-trial *habeas corpus* motion is the proper means for testing whether the Commonwealth has sufficient evidence to establish a *prima facie* case. To demonstrate that a *prima facie* case exists, the Commonwealth must produce evidence of every material

³ We also point out that the Commonwealth did not attach a copy of its Rule 1925(b) statement to its appellate brief as required by Pa.R.A.P. 2111(a)(11), further supporting our conclusion that it failed to file any such statement.

element of the charged offense(s) as well as the defendant's complicity therein. To meet its burden, the Commonwealth may utilize the evidence presented at the preliminary hearing and also may submit additional proof.

Id. at 1112.

Here, in Appellee's petition for writ of *habeas corpus*, she contended that the Commonwealth's evidence presented at the preliminary hearing was insufficient to demonstrate that she delivered the drugs to Govora and, therefore, the Commonwealth had failed to present a *prima facie* case regarding any of the three charges pending against her, to the extent they pertained to Govora. Those three charges read as follows:

COUNT 1: CRIMINAL CONSPIRACY
18 Pa.C.S.[§] 903(a)(1) -- Felony

The Actor, with the intent of promoting or facilitating the crime(s) of [PWID],^[4] conspired and agreed with Richard Govora, Tyler Cook and/or another, that they or one or more of them would engage in conduct constituting such crime or crimes, and in furtherance thereof one or more of them did commit the over act(s) of possessing stamp bags containing a controlled substance(s) in violation of 35 P.S. [§] 780-113(a)(3).

COUNT 2: DELIVERY OF A CONTROLLED SUBSTANCE
35 P.S. [§] 780-113(a)(3) -- Felony

The Actor, not being registered under the Controlled Substance, Drug, Device and Cosmetic Act, Act of April 14, 1972, nor a

⁴ PWID is defined as follows:

(30) Except as authorized by this act, the manufacture, delivery, or possession with intent to manufacture or deliver, a controlled substance by a person not registered under this act, or a practitioner not registered or licensed by the appropriate State board, or knowingly creating, delivering or possessing with intent to deliver, a counterfeit controlled substance.

35 P.S. § 780-113(a)(30).

practitioner registered or licensed by the appropriate State Board, delivered[,] possessed with intent to deliver[,] and did deliver a controlled substance ... to Richard Govora and/or Tyler Cook, in violation of Section 13(a)(30) of the Controlled Substance, Drug, Device and Cosmetic Act, ... 35 P.S. [§] 780-113(a)(30).

COUNT 3: DRUG DELIVERY RESULTING IN DEATH
18 Pa.C.S.[§] 2506(a) -- Felony 1

The Actor committed a felony of the first degree when said Actor did intentionally administer, dispense, deliver, give, prescribe, sell or distribute 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, namely Richard Govora, died as a result of using the substance, in violation of Section 2506(a) of the Pennsylvania Crimes Code.

Criminal Information, 4/29/20, at 1 (single page; emphasis in original).

Again, Appellee specifically challenged whether the Commonwealth's evidence presented a *prima facie* case that she "delivered" drugs to Govora, a critical element of each of the three offenses with which Appellee was charged.⁵ As the trial court observed, "none of the operative words of

⁵ We recognize, as did the trial court, that for the offense of drug delivery resulting in death under section 2506, one can deliver drugs, or "administer, dispense, ... give, prescribe, sell or distribute" the drugs. Here, the facts do not support that Appellee administered or prescribed the narcotics to Govora. **See** 35 P.S. § 780-102(b) (stating that "[a]dminister" means the direct application of a controlled substance, other drug or device, whether by injection, inhalation, ingestion, or any other means, to the body of a patient or research subject"); **see** TCOO at 17 n.9 (declining to "address the meaning or implications of the term 'prescribes' inasmuch as there is no suggestion in the evidence that [Appellee's] conduct in this case constitutes prescribing a controlled substance to the victim). We also agree with the trial court that, "[a]ll of the relevant phrases in [s]ection 2506(a) (such as 'administers,' 'dispenses,' 'delivers,' 'gives,' 'sells,' or 'distributes') each impl[ies,] to differing extents and in varied ways[,] an act of conveying possession from one person to another." TCOO at 17; **see also id.** ("Give" means, *inter alia*, (Footnote Continued Next Page)

[s]ection 2506 are included in the general definitions set forth in 1 Pa.C.S. § 1991 or in the more specific definitions under the Pennsylvania Crimes Code, 18 Pa.C.S. § 103....” TCOO at 16. However, the Controlled Substance, Drug, Device, and Cosmetic Act defines “delivery” as “the actual, constructive, or attempted transfer from one person to another of a controlled substance, other drug, device or cosmetic whether or not there is an agency relationship.” 35 P.S. § 780–102. This Court has explained that,

[“f]or a defendant to be liable ... for the delivery of a controlled substance there must be evidence that he knowingly made an actual, constructive, or attempted transfer of a controlled substance to another person without the legal authority to do so.” **Commonwealth v. Murphy**, ... 844 A.2d 1228, 1234 ([Pa.] 2004) (citation omitted). “A defendant actually transfers drugs whenever he physically conveys drugs to another person.” **Id.** However, [s]ection 780-113(a)(30) does not require the Commonwealth “to establish that an exchange of money took place,” nor does it “require that the defendant transfer the drug[(s)] to a law enforcement officer; all that is necessary is that

to make a present of; to grant or bestow by formal action; to accord or yield to another; to put into the possession of another for his or her use; ... to transfer from one’s authority or custody; to execute and deliver; to convey to another; ... to yield possession of by way of exchange; to dispose of for a price; to deliver by some bodily action[.]” (citing Merriam-Webster Dictionary, <https://www.merriam-webster.com/dictionary/give> (May 25, 2022)); **id.** (“‘Sell’ means, *inter alia*, to deliver or give up in violation of duty, trust, or loyalty and especially for personal gain; to give up (property) to another for something of value (such as money); to offer for sale...[.]”) (citing Merriam-Webster Dictionary, <https://www.merriam-webster.com/dictionary/sell> (May 25, 2022)). **See also** 35 P.S. § 780-102(b) (stating that “[d]ispense’ means to deliver a controlled substance, other drug or device to an ultimate user or research subject by or pursuant to the lawful order of a practitioner, including the prescribing, administering, packaging, labeling, or compounding necessary to prepare such item for that delivery”; stating that “‘distribute’ means to deliver other than by administering or dispensing a controlled substance, other drug, device or cosmetic”).

the transfer be between two people.” ***Commonwealth v. Metzger***, ... 372 A.2d 20, 22 ([Pa. Super.] 1977)

Commonwealth v. Ellison, 213 A.3d 312, 319 (Pa. Super. 2019).

We agree with the trial court that the plain meaning of “delivery” as used in section 2506, and in the statutory provisions defining PWID and delivery of a controlled substance, are “clear and unambiguous for the purpose of reaching a resolution of this case.” TCOO at 17. As our Supreme Court has declared,

[w]hen the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit. Moreover, we should not insert words into [a statute] that are plainly not there. Only in instances of ambiguous statutory language may courts consider statutory factors to discern legislative intent. Additionally, [w]ords and phrases shall be construed according to rules of grammar and according to their common and approved usage, though technical words and phrases and such others as have acquired a peculiar and appropriate meaning or are defined in [the Statutory Construction Act] shall be construed according to such peculiar and appropriate meaning or definition. We also presume that the General Assembly does not intend a result that is absurd, impossible of execution or unreasonable, and that the General Assembly intends the entire statute to be effective and certain.

Commonwealth v. Coleman, 285 A.3d 599, 605 (Pa. 2022) (internal quotation marks and citations omitted).

Turning to the present case, in Appellee’s petition for writ of *habeas corpus*, she averred that she could not have delivered drugs to Govora because the two were ‘joint purchasers’ of the narcotics that ultimately led to his death. Appellee insisted that “Pennsylvania’s Controlled Substances Act does not set forth any language that would suggest that joint purchasers of

controlled substances, more specifically a relatively minimal amount of heroin, who intend to share or do the drugs between themselves as users may be charged with anything more than simple possession.” Petition for *Habeas Corpus*, 2/17/22, at 3 ¶ 13 (unpaginated). Appellee further posited “that if prosecutors can bring felony distribution charges against any person who shares a small quantity of drugs with a friend, even if the two friends buy the drugs together and use them only amongst themselves, this practice would divert punishment from traffickers to addicts, who contribute to the drug trade only as end users and who already suffer disproportionately from its dangerous effects.” *Id.* at ¶ 15 (citation omitted).

The trial court ultimately agreed with Appellee. After discussing how this issue was handled in numerous cases from other jurisdictions, **see** TCOO at 6-13, the court set forth the following legal conclusions:

First, proof of a delivery among co-purchasers is lacking where the evidence shows that two or more people were acting jointly and with equal participation in arranging and carrying out a purchase of a controlled substance which was then shared only among the co-purchasers. (It is reasonable and sensible to conclude that a person cannot deliver something to another person who is already in possession of it[,], whether that possession be direct, joint, or constructive.) In making a determination of whether there was joint and equal participation in the acquisition of the controlled substance, “factors to be considered are whether the relationship of the parties is commercial or personal, the statements and conduct of the parties, the degree of control exercised by one over the other, whether the parties traveled and purchased the drugs together, the quantity of the drugs involved, and whether one party had sole possession of the controlled dangerous substance for any significant length of time.” [***State v. Morrison***, 902 A.2d [860,] 870 [N.J. 2006)].

Next, the decision of whether a defendant's act of delivering, distributing, or gifting a controlled substance to another is a "link in the chain" of drug distribution or whether it is a part of a joint constructive purchase of the substance is not dependent on the exchange of money or anything else of value between the defendant and the subsequent user/purchaser. **Commonwealth v. Busbey**, No. 186 MDA 2019, 2020 WL 865044, at *7 (Pa. Super. [filed] Feb[.] 21, 2020)[](nonprecedential decision); [**Commonwealth v.**] **Carillo**, [131 N.E.3d 812, 833 (Mass. 2019) (finding that drugs were not jointly acquired and possessed where "the defendant knew the supplier, negotiated prices, traveled alone to obtain the heroin, and determined whether he would share the heroin"; these facts show defendant was a "middle man" and a link in the chain between the supplier and buyer, who facilitated the sale of drugs to the buyer)]. There is no requirement that the Commonwealth prove that a payment of any sort was made in exchange for the drugs in order to establish that the transaction was an unlawful delivery, distribution, or gift (although this fact may be taken into account along with other factors in assessing whether there was a joint acquisition of the substance or a delivery of the substance from the defendant to the user/purchaser). Finally, the extent to which a defendant is in sole possession of a drug or has acted independently to purchase a drug so that any subsequent delivery, distribution, or gift of it to another is a criminal event is fact specific and must be assessed on a case-by-case basis.

Id. at 13-14.

After summarizing its legal conclusions, the court then recognized that "the Commonwealth's evidence shows that [Appellee] initially had actual possession of the heroin which allegedly caused [Govora's] death." **Id.** at 18. From there, the court discerned that the pertinent question in deciding if the Commonwealth's evidence constituted *prima facie* proof that Appellee had delivered those drugs to Govora was "whether [Govora] also had jointly acquired that same heroin or constructively possessed it from the outset." **Id.** The court reasoned that a determination on this issue was vital because,

“[w]here possession was jointly acquired at the outset by both a defendant and another user/possessor who were equal participants in the purchase, it follows *a fortiori* that there can be no conveyance of possession between the two as both already equally possessed the drug in question.” ***Id.***

In assessing whether Govora jointly possessed the heroin with Appellee from the moment she first possessed it, the trial court recognized that,

[u]nder the law of this Commonwealth, possession can be established “by proving actual possession, constructive possession, or joint constructive possession.” ***Commonwealth v. Parrish***, 191 A.3d 31, 36 (Pa. Super. 2018)[](citation omitted). Constructive possession has been defined as “conscious dominion, meaning that the defendant has the power to control the contraband and the intent to exercise that control... [C]onstructive possession may be established by the totality of the circumstances. It is well[-]established that, as with any other element of a crime, constructive possession may be proven by circumstantial evidence.” [***Id.***] at 36-37; ***Commonwealth v. Porter***, No. 1729 EDA 2021, 2022 WL 2047125, at *2-3 (Pa. Super. [filed] June 7, 2022)[](non-precedential decision). Further, the “fact that another person also has control and access does not negate the defendant’s constructive possession. ***Commonwealth v. McClellan***, 178 A.3d 874, 878-79 (Pa. Super. 2018); ***Commonwealth v. Bergen***, 142 A.3d 847, 851-52 (Pa. Super. 2016); ***Commonwealth v. Hopkins***, 67 A.3d 817, 820-21 (Pa. Super. 2013).” ***Commonwealth v. Fortunato***, No. 1378 WDA 2021, 2022 WL 1698446, at * 4 (Pa. Super. [filed] May 27, 2022)[](non-precedential decision).

Id.

The trial court then concluded that, here, the evidence demonstrated that Govora jointly possessed the heroin with Appellee from the outset of her actual possession of it. The court explained:

A review of the evidence presented by the Commonwealth, read in the light most favorable to the prosecution, shows that [Govora] and [Appellee] jointly acquired heroin and were both in possession of it, either by actual possession or constructive possession. [Appellee] and the victim were at [Govora's] residence when they both decided to purchase heroin. [Appellee] identified one of her friends, Cook, as a potential source of the drug and made contact with him while at [Govora's] house. After Cook agreed to sell heroin to [Appellee], [Govora] and [Appellee] pooled their money together to make the drug purchase. [Govora] then drove himself and [Appellee] to meet with Cook. [Appellee] went with Cook in Cook's car to conduct the heroin purchase with an unidentified male. Cook was given three bags of heroin as payment for arranging the transaction.¹³ [Appellee] and Cook returned to [Govora,] who was waiting for them in his car. Before driving away, [Appellee] and [Govora] each ingested a bag of heroin. [Govora] then drove himself and [Appellee] back to his residence to consume the drugs, stopping on the way to purchase needles.

¹³ The record is sparse regarding when this delivery to Cook took place; however, because [Govora] and [Appellee] are charged by the Commonwealth as co-conspirators in making the delivery to Cook, it can be inferred that the delivery to Cook took place in [Govora's] presence after [Appellee] and Cook returned to [Govora's] car or with [Govora's] participation and approval during the time after the drug purchase when [Appellee] and Cook were driving back to meet with [Govora].

Taking into consideration the factors outlined in *Morrison* to determine joint acquisition, the evidence shows that the relationship between [Appellee] and [Govora] was personal in nature, not commercial; that [Appellee] and [Govora] were equal in status with [Appellee] having no undue influence or control over [Govora];¹⁴ that [Appellee] and [Govora] traveled together to make the drug purchase in [Govora's] car with [Govora] driving; that the two pooled their money together to make the purchase; that the total quantity of heroin amounted to fifteen bags (minus three given to Cook); and that [Appellee] and [Govora] shared the heroin as soon as [Appellee] returned to [Govora's] car. This evidence taken as a whole points to the conclusion that [Appellee] and [Govora] acted as equals and in concert to purchase drugs from Cook.

The only factor militating against a finding of joint acquisition is that [Appellee] went alone with Cook to complete the purchase and was in sole possession of the heroin for the period of time it took to complete the purchase and drive back to meet the waiting [Govora]. In that regard, this [c]ourt agrees with **Weldon [v. United States]**, 840 F.3d 865 (7th Cir. 2016) (finding that Weldon and his friends were “participants in the same transaction” where they pooled money to buy heroin, drove together to meet a dealer, Weldon walked to the dealer’s car and gave him the money in exchange for the drugs, and then the friends shared the drugs),] and finds that “literal simultaneous possession” is not required so long as the evidence shows that the two were equal partners in effectuating the drug purchase. The amount of time in this case in which [Appellee] was in sole possession of the heroin was transitory at most and, when placed in context with the other factors, not sufficient to defeat a finding that [Govora] and [Appellee] jointly acquired the heroin which resulted in [Govora’s] death.

The Commonwealth’s evidence, read in the light most favorable to the Commonwealth, establishes that [Appellee] and [Govora] had joint constructive possession of the heroin purchased from Cook at the outset[,], as they had acted together to jointly acquire it. Both of them had the authority and ability to exercise control over the drug. Both demonstrated an intent to control access and use of it. Inasmuch as [Govora] already had possession of the heroin, [Appellee] cannot be charged with delivering it to him. Those charges which require proof of delivery to [Govora], therefore, must be dismissed.

TCOO at 18-21 (some footnotes omitted).

Now, on appeal, the Commonwealth insists “that the trial court erred by inserting additional requirements and exceptions that are not present within the plain meaning of the statutory definition of delivery.” Commonwealth’s Brief at 8. More specifically, the Commonwealth maintains that “nothing within the statute itself ... permits or inferences an exception to those delivering controlled substances to individuals with whom they have pooled their money, or to evaluate the nature of the relationship between the

parties.” **Id.** at 10. It stresses that “the term delivery is not vague[,]” **id.** at 11, and it compares the present case to this Court’s unpublished decision in **Commonwealth v. Busbey**, No. 186 MDA 2019 (Pa. Super. filed Feb. 21, 2020) (unpublished memorandum). There,

[Busbey], the victim, and Wentz collected money in order to go to Baltimore to purchase heroin. The victim remained at Wentz’s house in Hanover, Pennsylvania, while [Busbey] drove Wentz to Baltimore, Maryland. In Baltimore, Wentz purchased three grams of heroin, which [Busbey] and Wentz understood to be of high quality.

Upon returning to Wentz’s residence in Hanover in the late evening of July 19th, Wentz divided up the heroin, and [Busbey], the victim, and Wentz each used heroin intravenously.

Id. at *1 (citations to the record omitted). Ultimately, the victim overdosed on the heroin and died. **Id.** Busbey was tried and convicted of, *inter alia*, drug delivery resulting in death. **Id.** at *2.

On appeal, Busbey argued that “the evidence was insufficient to show that she delivered heroin to the victim as required for the drug delivery resulting in death ... offense[.]” **Id.** at *7. We disagreed, noting the definition of ‘delivery’ and stressing that, “[a] defendant actually transfers drugs whenever he physically conveys drugs to another person.” **Id.** (quoting **Commonwealth v. Ellison**, 213 A.3d 312, 319 (Pa. Super. 2019)). “An exchange of money is not required to find that a delivery of a controlled substance occurred.” **Id.** (citing **Ellison, supra**). The **Busbey** panel then concluded that,

[t]he Commonwealth ... presented sufficient evidence to show that [Busbey] was an accomplice to Wentz’s delivery of heroin to the

victim. An individual may face liability as an accomplice to the commission of a criminal offense when “with the intent of promoting or facilitating the commission of the offense, he ... solicits such other person to commit it; or ... aids or agrees or attempts to aid such other person in planning or committing it.” 18 Pa.C.S. § 306(c)(1). The Commonwealth demonstrated that, after [Busbey], Wentz, and the victim collected money to purchase drugs, [Busbey] then drove Wentz to Baltimore where Wentz purchased three grams of heroin, a controlled substance. [Busbey] and Wentz then drove back to Hanover where the victim was waiting, and Wentz divided the heroin and gave the victim his share of the heroin. This evidence clearly shows that Wentz purchased heroin in Baltimore and conveyed it to the victim, and that [Busbey] aided in the delivery of the heroin by driving Wentz to Baltimore and back with the intention of facilitating the drug purchase. It is irrelevant to our analysis that neither [Busbey] nor Wentz profited from the conveyance of heroin to the victim because the exchange of money is not a prerequisite to the delivery of a controlled substance. **Ellison**, 213 A.3d at 319.

Id.

The Commonwealth does not explain how **Busbey** supports its position that Appellee delivered the drugs to Govora. **Busbey** is also a non-precedential decision and, thus, we are not bound by it. **See Liberty Mut. Ins. Co. v. Domtar Paper Co.**, 77 A.3d 1282, 1286 (Pa. Super. 2013).

In any event, we find **Busbey** distinguishable because, unlike the victim in that case, here, Govora not only paid for the heroin, but he also drove Appellee to Pittsburgh to acquire it. He then waited in his vehicle while Appellee gave their money to Cook and went with him to retrieve the drugs. Immediately upon Appellee’s return, Govora snorted the heroin with her. He then drove her back to his residence, where he and Appellee continued to do the drugs together for the remainder of the night. These facts show that Govora’s role was more akin to Busbey’s, who was an accomplice to the drug

buy. Govora clearly participated in Appellee's purchase of heroin by his above-discussed conduct. Thus, as Busbey was guilty of delivering the drugs to the victim, in this case, Govora essentially 'delivered' the drugs to himself by participating in planning, funding, and acquiring the heroin that ultimately led to his death. As such, Appellee cannot be charged with delivering drugs to Govora because, as the trial court reasoned, individuals who jointly acquire and possess narcotics cannot deliver them to each other. Logically, and legally, one cannot transfer possession of drugs to another who is **already in possession** of those drugs, whether actually, jointly, or constructively.

We recognize, as did the trial court, that Govora was not present when the exchange of money for drugs occurred. However, that fact is not automatically dispositive of whether Govora constructively possessed the drugs jointly with Appellee at the moment she obtained them. Our decision in **Commonwealth v. Carr**, 227 A.3d 11 (Pa. Super. 2020), is instructive. There, Carr was incarcerated when he repeatedly directed his minor girlfriend, J.S., to sell drugs to a woman named Olivia Askins. **Id.** at 20. J.S. complied with Carr's instructions, selling drugs to Askins on multiple occasions. **Id.** After one of those sales, Askins overdosed and died. **Id.** Carr was ultimately tried and convicted of, *inter alia*, drug delivery resulting in death. **Id.** at 13.

On appeal, Carr challenged the sufficiency of the evidence to sustain his conviction, arguing that because he was in prison at the time of the drug sales, he could not have been in possession of the drugs to deliver them to Askins. **Id.** at 19. We disagreed, concluding that "[a]lthough [Carr] did not physically

handle the drugs, he was in complete control of the drug transactions.” **Id.** at 20. In support, we pointed to the evidence of Carr’s recorded phone calls to J.S. in which Carr “detailed the drug transactions that J.S. was to perform on Carr’s behalf.” **Id.** J.S. also testified that all the drugs she sold to Askins belonged to Carr. **Id.** Because “in instructing J.S., [Carr] controlled the entire drug sales operation[,]” we found sufficient evidence to show he “had the ability to exercise conscious dominion over the substance, the power to control the contraband, and the intent to exercise such control [was] sufficient to prove that he had constructive possession of the drugs.” **Id.** at 21.

Presently, we likewise conclude that, although Govora did not physically possess the drugs at the same moment as Appellee, he jointly constructively possessed the drugs with Appellee from the moment she purchased them. Again, Govora picked up Appellee and brought her to his home, where the two agreed together to purchase heroin. Govora and Appellee combined their money to purchase the drugs, and Govora drove Appellee to Pittsburgh to complete the buy. Govora waited for Appellee while she briefly left with Cook to get the drugs. When she returned, the two immediately snorted heroin before Govora drove them both back to his residence, stopping on the way to purchase syringes. Appellee stayed at Govora’s home again that night, with both using the heroin they had just purchased. As the trial court points out, these facts indicate that Appellee “was entirely dependent upon [Govora] for transportation and shelter” during the drug transaction and their use of the drugs. TCOO at 20 n.14.

In sum, Govora facilitated the drug transaction that ultimately led to his death by agreeing to it, paying for it, and transporting Appellee to and from Pittsburgh to complete it. Therefore, like the appellant in **Carr**, Govora had the ability to exercise conscious dominion over the drugs, the power to control that contraband, and the intent to exercise such control. Because these facts are sufficient to establish that Govora jointly constructively possessed the drugs **before** Appellee gave them to him, we agree with the trial court that Appellee could not have delivered those drugs to Govora.

Finally, we note our agreement with Appellee that the Third Circuit's decision in **Commonwealth v. Semler**, 858 Fed. Appx. 533 (3rd Cir. 2020), is similar to the facts at hand and, therefore, persuasive. As Appellee explains:

In **Semler**, two friends who met at a drug rehabilitation program decided to get high. Defendant, Semler, said she knew of someone who they could buy drugs from, but the decedent, Werstler, would need to provide transportation. **Id.** at 534. Werstler asked for Semler to front her ten dollars worth of heroin and Semler agreed. **Id.** Testimony at trial indicated that either Semler or Werstler purchased the drugs. **Id.** The group then drove to a KFC restaurant, went in the restroom and Semler proceeded to hand out drugs to Werstler and another woman. **Id.** Werstler overdosed and was left in the bathroom by her friends and later died. **Id.** at 535. Semler was found guilty of drug delivery resulting in death and later appealed. **Id.** The **Semler** Court reiterated the holding in [**United States v.**] **Swiderksi**, [548 F.2d 445 (2nd Cir. 1977),] wherein it was stated that the definition of "distribute" under the Controlled Substances Act does not cover individuals who jointly and simultaneously acquire possession of a small amount of a controlled substance solely for

their personal use.^[6] *Id.* at 539 [(citing *Swiderski*, 548 F.2d at 450-54)]. The Court vacated Semler's conviction and remanded the case for a new trial so the jury could be instructed on the correct legal standard. *Id.* at 541.

Appellee's Brief at 12-13 (spelling of Werstler corrected throughout).

We agree with Appellee that *Semler* is more in line with the present facts than *Busbey*. Like Semler's and Werstler's collaboration to jointly acquire drugs that resulted in Werstler's death, here, Govora and Appellee jointly and simultaneously acquired possession of a small amount of heroin for their shared, personal use, which unfortunately killed Govora. We are persuaded by *Semler's* rationale to agree with the trial court that this joint acquisition and possession of the heroin precludes a finding that Appellee delivered the drugs to Govora. Consequently, even if preserved, we would reject the Commonwealth's challenge to the court's dismissal of Appellee's charge of delivery resulting in death, as well as its dismissal, in part, of her charges of conspiracy to commit PWID and delivery as they related to Govora.

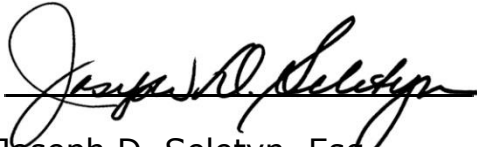
Order affirmed.

Judge Kunselman concurs in the result.

Judge Colins files a concurring and dissenting statement.

⁶ The Controlled Substances Act, 21 U.S.C. § 841, defines "distribute" as "to deliver," and defines "deliver" as "the actual, constructive, or attempted transfer of a controlled substance ... whether or not there exists an agency relationship." 21 U.S.C. § 802(8). Thus, the federal definition of "distribute" and Pennsylvania's definition of "delivery" are essentially identical.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn". The signature is written in a cursive style with a horizontal line drawn through the middle of the text.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 4/28/2023