Recent Development

CRIMINAL PROCEDURE—PROBABLE CAUSE—Entrapment standard of probable cause to suspect is rejected in favor of a subjective approach which focuses upon the predispositon to commit.—*Hardin v. State*, 358 N.E.2d 134 (Ind. 1976).

The genesis of entrapment probable cause is found in a holding of the Indiana Supreme Court in which the court stated that when the defense of entrapment is evoked, the burden is placed upon the state "of proving that it had probable cause of suspecting that the appellant was engaged in illegal conduct."[1] Re-examining the area of entrapment defense, the court, in *Hardin v. State*,[2] concluded that the procedural standard of probable cause to suspect[3] "has proven more difficult in its application than originally believed and no longer should be an additional burden upon law enforcement officials as they combat the trafficking in drugs."[4] Analyzing the problems with Indiana's previous entrapment standard of proof, the Indiana Supreme Court determined that courts, even while requiring proof of probable cause to suspect, have also considered the accused's predisposition to commit the crime with which he is charged. Focusing upon this latter consideration, the court enunciated a two-part inquiry which it deems appropriate when the defense of entrapment is raised: "(1) Did police officers or their informants initiate and actively participate in the criminal activity; and (2) [I]s there evidence that the accused was predisposed to commit the crime so that the proscribed activity was not solely the idea of the police officials?"[5]

Hardin thus moves from the "objective" approach to the "subjective" approach regarding entrapment. The defense of entrapment is available in Indiana to an accused who has been instigated, induced, or lured to commit a crime which he had no independent intention or desire to commit, and who is thereafter prosecuted for that crime.[6]

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[1]Walker v. State, 255 Ind. 65, 71, 262 N.E.2d 641, 645 (1970).

[2]358 N.E.2d 134 (Ind. 1976).

[3]Probable cause to suspect that the accused was engaged in illegal conduct and was already predisposed to commit the crime. *See* Smith v. State, 258 Ind. 415, 281 N.E.2d 803 (1972); Walker v. State, 255 Ind. 65, 262 N.E.2d 641 (1970).

[4]358 N.E.2d at 135.

[5]*Id.* at 136.

[6]Minton v. State, 247 Ind. 307, 214 N.E.2d 380 (1966); Fischer v. State, 312 N.E.2d 904 (Ind. Ct. App. 1974); May v. State, 154 Ind. App. 75, 289 N.E.2d 135 (1972).

This understanding of what constitutes entrapment is consonant with the "subjective approach" to the defense of entrapment which was discussed by the United States Supreme Court in *United States v. Russell.*[7]

Under the subjective approach, the intent of the accused is dispositive. Sound public policy estops the state from prosecuting an accused when the criminal design is formulated not in the mind of the accused but in the mind of government officials.[8] The defense of entrapment provides a means of distinguishing between trapping the unwary innocent and trapping the unwary criminal. When the state, through deception, implants criminal intent in the mind of an otherwise innocent individual, the defense of entrapment should be raised.[9] Once the defense is raised, however, the standard of proof imposed upon the state differs according to the approach, objective or subjective, followed in the jurisdiction in which the crime was committed.

Indiana has, in the past, incorporated certain aspects of the "objective approach."[10] The effect of placing a focus upon the probable cause to suspect was to impose a heavy burden upon the state. If probable cause for "baiting the trap" is not present, the "work product" or evidence obtained by the police cannot be utilized.[11] The court in *Smith* wrote that the probable cause component "furthers the public interest, . . . is simple in its requirements and application and its rigid enforcement would not thwart the reasonable and logical efforts of law enforcement officers."[12] Yet, five years later the Indiana Supreme Court has doubled back, concluding in *Hardin* that the standard is difficult to apply.[13]

A real question could be raised as to whether *Hardin* does represent a departure from previous Indiana judicial holdings, or whether *Hardin* merely educes the purified "subjective approach" as a result of evolutionary process. Several judicial opinions handed down during 1976 indicate that Indiana's move toward the holding in

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[7]411 U.S. 423 (1973). *See also* Sherman v. United States, 356 U.S. 369 (1958); Sorrells v. United States, 287 U.S. 435 (1932).

[8]Sorrells v. United States, 287 U.S. at 445, *cited in* Gray v. State, 249 Ind. 629, 633, 231 N.E.2d 793, 796 (1967).

[9]United States v. Russell, 411 U.S. at 436.

[10]The "objective approach," focusing upon police conduct, has been discussed in the dissenting opinions of United States v. Russell, 411 U.S. at 436-39 (Douglas, J.), 439-50 (Stewart, J.), and concurring opinion of Sherman v. United States, 356 U.S. at 378-88 (Frankfurter, J.).

[11]Smith v. State, 258 Ind. 415, 281 N.E.2d 803 (1972).

[12]*Id.* at 419, 281 N.E.2d at 806.

[13]358 N.E.2d at 135.

Hardin was more gradual than the citations in the *Hardin* decision would admit. *Thomas v. State*[14] established that if the police do not initiate a transaction against any particular suspect, the requirement that probable cause must be proven should be considered *in conjunction with* the defendant's predisposition to commit the crime charged.

The Indiana Supreme Court in *Thomas* did not patently abolish the probable cause to suspect rule, but the latent effect was to severely cripple it. *Thomas* suggested that probable cause to suspect a defendant of illegal activity is irrelevant where the defendant, caught in a transaction initiated by the State, has the predisposition to commit the crime charged.[15] In both *Shipp v. State*[16] and *Riding v. State*,[17] the probable cause requirement was not termed irrelevant, but each case was affirmed on the grounds that the state *had probable cause to suspect* the defendant *because the evidence showed a predisposition* to commit the crime. This melding of the two separate requirements provides some judicial history for the *Hardin* decision. Thus, *Hardin* may have pulled the chair from under the entrapment probable cause rule, but it can be argued that the rule was already balancing on one leg.

Moreover, as the supreme court points out in *Hardin*, there is legislative guidance on the subject of entrapment. Indiana's new Penal Code, which becomes effective July 1, 1977, establishes the same criteria for an entrapment defense as were spelled out in *Hardin*.[18] Justice Hunter, writing the majority opinion in *Hardin*, acknowledged the fact that "courts in Indiana have directed the second portion of their inquiry to the accused's predisposition to commit the crime with which he is charged."[19] The majority coupled this direction with "the legislative choice of the subjective approach" and

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[14]345 N.E.2d 835 (Ind. 1976).

[15]*Id.* at 837.

[16]350 N.E.2d 619 (Ind. 1976).

[17]350 N.E.2d 629 (Ind. 1976).

[18]IND. CODE § 35-41-3-9 (Burns Supp. 1976) provides in pertinent part:

(a) It is a defense that:

(1) the prohibited conduct of the person was the product of a public servant using persuasion or other means likely to cause the person to engage in the conduct; and

(2) the person was not predisposed to commit the offense.

(b) Conduct merely affording a person an opportunity to commit the offense does not constitute entrapment.

For a discussion of this section, see Kerr, *Foreword: Indiana's Bicentennial Criminal Code, 1976 Survey of Recent Developments in Indiana Law*, 10 IND. L. REV. 1, 8-9 (1976).

[19]358 N.E.2d at 136.

adopted the majority view of *Sorrells v. United States*[20] and *Sherman v. United States.*[21]

Justice De Bruler, concurring in result, complained that "[t]he case before us provides no basis for discarding . . . [entrapment probable cause] . . . [for] [t]he State clearly met that burden in the trial court in this case."[22] Justice De Bruler further expressed concern about the future of the defense of entrapment in Indiana, and questioned exactly what burden is left for the state. The defense of entrapment is "void of substance" if "any degree of concurrence by the accused in criminal design at the time it was first laid before the accused is sufficient to rebut the defense."[23]

While it is true that the abolition of the probable cause to suspect standard eases the difficulty of rebutting an entrapment defense, it is probably premature to grieve the demise of the defense itself. Even if the majority in *Hardin* were heralding what Justice De Bruler characterized as a mere showing "that the accused was not totally innocent . . . toward the proposition offered by the police,"[24] the burden presumably remains upon the state to make that showing.[25]

A more noxious and more probable result from *Hardin* may derive from its inappropriate application to entrapment defenses raised in trials held prior to *Hardin.* Judge Hoffman, writing for the majority in *Davila v. State,*[26] a recent Third District Court of Appeals decision, referred to *Hardin* and concluded that "[p]robable cause to suspect the accused in an entrapment case was *formerly required* in Indiana . . . ."[27] Judge Staton, concurring in the result, properly pointed out that the majority is essentially applying *Hardin* retroactively, and that such application is not only wrong, but also unnecessary, since the facts supported a probable cause to suspect.[28]

Two aspects of the *Hardin* decision may have induced the misunderstanding of its application. First, the majority in *Hardin* referred to the legislative guidance as support for its holding. However, even the legislature is prohibited from creating a law ex

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[20]287 U.S. 435 (1932).

[21]356 U.S. 369 (1958).

[22]358 N.E.2d at 137.

[23]*Id.*

[24]*Id.*

[25]Justice De Bruler's fear may be justified. In Davila v. State 360 N.E.2d 283 (Ind. Ct. App. 1977), Judge Hoffman stated: "Properly raised the defense of entrapment must resolve these two issues by showing the general innocence of the accused in the absence of police interference." *Id.* at 286.

[26]*Id.* at 283.

[27]*Id.* at 285 (emphasis added).

[28]*Id.* 287.

post facto;[29] and the entrapment portion of the Penal Code does not purport to take effect until July 1, 1977, when it may properly be applied only to prosecutions of crimes occurring after that date. The *Hardin* decision's present tense abolition of the probable cause to suspect rule was handed down on December 30, 1976, a full six months before the effective date of the Penal Code. Yet, the reference to the Penal Code was an overt invitation to apply the Penal Code in advance of its operative date.

Second, both of the concurring opinions argue that since the probable cause to suspect burden was met in *Hardin*, there exists no "good and sufficient" reason to discard precedent.[30] The implicit inference to be garnered from such statement is that *Hardin* "here and now" abolishes the probable cause to suspect standard of entrapment.

Even if immediate rejection of the entrapment probable cause standard had been the intent of the court, it is questionable whether such an effect is constitutional when it would operate to the detriment of an accused. In *Marks v. United States*,[31] the United States Supreme Court held that the due process clause of the fifth amendment precludes retroactive application of new criminal law standards to the extent that those standards may impose criminal liability for conduct not punishable under earlier standards.[32] Judge Staton explained in *Davila v. State*[33] that the "new" standard would make no difference in the outcome of either *Hardin* or *Davila*, because of the particular fact situations. However, the majority in each of those decisions, and to some extent the concurring judges in *Hardin*, seem to have accepted the ability of a court to retroactively apply new standards. Yet, in light of *Marks v. United States*,[34] Judge Staton's reaction to *Hardin* is well taken.

It is apparent that when a defendant relies upon the existence of a "probable cause to suspect" entrapment rule, the defendant may be harmed if the rule is changed while the game is in progress. Defense trial strategy may dictate that emphasis be placed upon the lack of probable cause aspect rather than the predisposition aspect of the entrapment defense. If, after the parties have played their cards, trump is changed, one can hardly maintain that the game was fair. If

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[29]U.S. CONST. art. I, § 9, cl. 3 and § 10, cl. 1.

[30]358 N.E.2d at 137.

[31]97 S. Ct. 990 (1977).

[32]The court reaffirmed the position taken in Hamling v. United States, 418 U.S. 87 (1974), that "any constitutional principle enunciated in [a decision] which would serve to *benefit* petitioners *must be applied* in their case." 45 U.S.L.W. at 4235, *quoting* 418 U.S. at 102 (emphasis added).

[33]360 N.E.2d 283 (Ind. Ct. App. 1977).

[34]97 S. Ct. 990 (1977).

a state legislature is barred from changing trump after the cards have been dealt, it should follow that a state supreme court is barred by the due process clause from achieving precisely the same result by judicial construction.[35]

One rebuttal which might be forwarded to oppose the thesis that *Hardin* creates an ex post facto judicial rule of criminal procedure would be that the basic rule, the due process clause, is the same; the court is merely exercising its prerogative to interpret it; and, in fact, it has been in the process of re-interpreting it for some time.[36] However, this argument does not alleviate the seeming necessity to "warn" an accused in advance of trial[37] that the game rules have been changed. *Thomas*, *Shipp*, and *Riding* were not explicit enunciations of the abolishment of the probable cause to suspect standard.

Whether the eventual abolition of the entrapment probable cause rule will be beneficial to the efforts of law enforcement and to society is not the question of importance with regard to the *Hardin* decision. Nor will *Hardin* answer that question in the short run. Rather, as Justice Prentice commented, concurring in the result to *Hardin*, "Such unnecessary activism . . . is subject to criticism as an intrusion upon the legislative prerogative and as destabilizing to our case law."[38]

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[35]Bouie v. City of Columbia, 378 U.S. 347, 353-54 (1964).

[36]*See* Riding v. State, 350 N.E.2d 629 (Ind. 1976); Shipp v. State, 350 N.E.2d 619 (Ind. 1976); Thomas v. State, 345 N.E.2d 835 (Ind. 1976).

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> The Ex Post Facto Clause is a limitation upon the powers of the legislature, and does not of its own force apply to the Judicial Branch of government. But the principle on which the clause is based—the notion that persons have a right to fair warning of that conduct which will give rise to criminal penalties—is fundamental to our concept of constitutional liberty.

Marks v. United States, 97 S. Ct. at 992. (citations omitted).

[38]358 N.E.2d at 137.