Criminal Law Notes: The Uniform Controlled Substance Act of 1973 – A Hiatus in Criminal Law

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Criminal Law Notes

by F. Thomas Schornhorst

One of the more intriguing questions working its way up through Indiana courts is whether the state was without any criminal law relating to the sale, possession or use of marijuana, lysergic acid diethylamide (LSD) and other non-narcotic drugs from 2 p.m. July 26, 1973 (the promulgation date of the Indiana Acts of 1973) to 12:01 a.m., October 1, 1973, (the effective date of the Uniform Controlled Substances Act) IC 1971, 35-24-1, Burns §§ 10-3558 et seq. (Supp. 1973).

During the 1973 session the General Assembly moved to consolidate the penal law coverage of narcotics and other dangerous drugs in a single act. Coverage had been split between (1) the Uniform Narcotic Drug Act (IC 1971, 35-24-1, Burns §§ 10-3519 et seq.) dealing with the opiates and cocaine, and (2) the Dangerous Drug Act (IC 1971, 16-6-8, Burns §§ 35-3331 et seq.) covering, among other things, marijuana and LSD.

Here's what happened. The legislature amended the Dangerous Drug Act by striking from the definition of "dangerous drug" the following subsections: "(4) any hallucinogenic, psychedelic, psychogenic drug or substance including but not limited to cannabis [marijuana] or . . . LSD; or (5) any drug appearing on the list of drugs under Schedules I, II, III and IV of the Controlled Substance Act [21 U.S.C. § 812], and any drugs included therein by duly promulgated regulation." Coverage of these items was provided in the Uniform Controlled Substances Act, supra, that was passed during the same session.

But the two actions did not mesh. The amendment of the Dangerous Drug Act became effective with the promulgation of the 1975 Acts on July 26. However, Section 7 of the Controlled Substances Act stipulated that the new law would not go into effect until October I, and the savings clause of the Controlled Substances Act referred only to the repealed Uniform Narcotic Drug Act.

Criminal Law Hiatus Results

The inescapable result was a hiatus in the criminal law with regard to a variety of non-narcotic drugs. Instead of a legislative remedy for this serious oversight, a cure was sought by causing the State Board of Pharmacy to issue a rule declaring marijuana, LSD, and other "controlled substances" to be dangerous drugs. The asserted authority for this action was the provision in a section of the Dangerous Drug Act which delegated to the Board of Pharmacy power to include within the dangerous drug definition "any substance which the [Board], after reasonable notice and hearing, shall by promulgated rule determine has qualities similar to that of any dangerous drug." IC 1971, 16-6-8-2(j), Burns §§ 35-3332(j). This language is contained in the same section which, prior to July 26, 1973, specifically included marijuana, LSD, etc., within the dangerous drug definition, and which after July 26, was amended to exclude those substances.

Fine print notice of the required hearing on the proposed rule was published in a single issue of the Indianapolis Star on June 13, 1973. The notice recited that at its regular meeting on June 11, 1973, the Board of Pharmacy prepared and approved a new proposed rule (No. 27) concerning "proposed clarification of definitions in the Dangerous Drug Act." Nothing was revealed as to the nature of the "clarification" that was to be made. Hearing was set for 2 p.m., on June 26, 1973.

At this point a potentially serious discrepancy appears in the records of the proceedings. Although the notice specified the hearing date to be June 26, 1973, the minutes of the Board of Pharmacy dated Monday, June 25, 1973, contain the following entry under the heading INFORMAL HEARINGS: "Rule No. 27 There be [sic] no one present to offer any objections to this regulation, the Board hereby unanimously approved said rule No. 27 and submits same to the Office of the Attorney General. (Six copies, as required by law, were sent to the Attorney General's office June 26, 1973)." The text of the Rule recites that it was adopted at a regular meeting held on June 26, but the minutes indicate otherwise.

A Contradictory Result

The Rule as proposed and adopted states: "Pursuant to the powers granted to the Board by IC 1971, 16-6-8-2(j), as amended by Indiana Acts of 1971, P.L. 212, Section 1, and after reasonable notice and hearing, the Board hereby finds that the following substances have qualities similar to those of any dangerous drug," and then goes on to include precisely the same language with respect to marijuana, LSD and other drugs that the legislature had undertaken to remove from the same section from which the Board purported to draw its authority.

It was provided also that the rule would expire on October 1, 1973, or on the date of promulgation of the 1973 Acts, if later than October 1. The provision for an expiration date beyond October 1, 1973, tied to the effective date of the 1973 Act seems as superfluous as would be the rule itself before that date. Since the amendment deleting marijuana and other drugs from the Dangerous Drug Act would not have become law until the promulgation date, Rule 27 would have been totally redundant until the amendment took effect.

(Continued on page 19)
Numerous Questions Unanswered

This leaves us with the question whether Rule 27 was effective to preserve criminal penalties with regard to the drugs mentioned therein during the period of the legislatively created hiatus—July 26 to October 1, 1973. Courts responding to this question will have to deal with the following questions:

1. Was it a valid exercise of administrative rule-making authority to place within the coverage of a criminal statute substances which the legislature expressly removed?

2. Since the statute authorizes the Board of Pharmacy to declare substances to be dangerous drugs only if they have “qualities similar to that of any dangerous drug,” is the Board required to examine available scientific evidence regarding a drug alleged to be dangerous (e.g., marijuana) and base its finding on such evidence?

3. May the Board, as it apparently did with Rule 27, regard the absence of stated opposition to the rule as sufficient basis for its adoption?

4. Did the Board, as it must, adhere to the legislative criteria that delimit its rule-making authority?

5. Did the Board act in good faith?

6. Was the notice and hearing provided “reasonable” as required by IC 1971, 4-22-2-4, Burns & 60-1504(j)?

7. Is Rule 27 valid if, as revealed by the Board’s minutes, it was adopted (in default of opposition) on June 25, when the only published notice set the hearing date for June 26?

8. Is it ever appropriate for the legislature to delegate to an administrative board power to create new felonies?

While these questions probably do not exhaust the considerations that must go into an examination of Rule 27, they suggest that the state will have a difficult time defending the Board of Pharmacy action against the attacks that are sure to come.

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