



CaseLaw

Update

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CaseLaw This Week

Week Ending July 16, 2004

- **Juror Misconduct**
- **Marijuana Possession – Chemical Testing**
- **Search & Seizure**
- **Mutually Exclusive Verdicts - Theft by Taking & Theft by Receiving**
- **Case Concerning Avena and Other Mexican Nationals**

Juror Misconduct

Terrell v. State, A04A0772 (06/28/04), 04 FCDR 2274, 2004 Ga. App. LEXIS 866.

The defendant was convicted of armed robbery. On appeal, he alleges juror misconduct. During a break, the juror was seen talking with a State's witness. The trial judge questioned the juror about the conversation and discovered that the two did not speak about the case and that the juror did not form any opinion about the case based on the conversation. **“When an irregularity occurs in the conduct of the jury, there is a presumption of prejudice to the defendant and the burden is on the prosecution to prove beyond a reasonable doubt that no harm has occurred.”** However, here the Court of Appeals determined that the defendant failed to demonstrate juror misconduct sufficient to upset the verdict.

Marijuana Possession – Chemical Testing

Jones v. State, A04A0023 (07/01/04), 04 FCDR 2283, 2004 Ga. App. LEXIS 897.

The defendant was convicted, among other things, of marijuana possession. On appeal, he claims this conviction should be reversed because the forensic chemist never tested the suspected marijuana for identification purposes. However, the forensic chemist did testify that he visually identified the substance as marijuana. The court discusses *Atkinson v. State*, 243 Ga. App. 570 (2000), which held that identification testimony of experienced officers was admissible and testimony based on scientific tests was not required to establish a substance is marijuana. However, in *Chambers v. State*, 260 Ga. App. 48 (2003), the court held that given the specific and scientific definition of marijuana, the instances in which the state could prove a substance was marijuana without scientific tests would be very rare. This case is one of the rare exceptions mentioned in *Chambers*. Here, the defendant told the arresting officers that he was “putting out a joint” and he never challenged the identification of the marijuana or argued that the substance was not marijuana. **The court held that the expert opinion of the officers based on visual observation coupled with the circumstantial evidence provided by the defendant's conduct was**

enough to prove the substance was marijuana absent conclusive scientific testing. Judgment affirmed.

Search & Seizure

State v. McKinney, A04A1062 (07/01/04), 04 FCDR 2304, 2004 Ga. App. LEXIS 894.

The defendant was indicted for trafficking methamphetamine and the State appealed the grant of defendant's motion to suppress evidence obtained from a search of his home conducted in his absence. The trial court record reflects that defendant's teenaged son appears to have given consent for the officers to search the residence. The trial court granted the motion reasoning that the son did not expressly authorize the search. Because the trial court did not consider the necessary factors outlined in *Davis v. State*, 262 Ga. 578, and *Atkins v. State*, 254 Ga. 641, it is directed on remand to address those factors and then determine if the son possessed common authority over his father's bedroom and if the son's consent to search was valid.

Mutually Exclusive Verdicts - Theft by Taking & Theft by Receiving

Ingram v. State, A04A0540 (06/28/04), 04 FCDR 2311, 2004 Ga. App. LEXIS 873.

The defendant was convicted of theft by receiving stolen property. However, he was charged with theft by taking and theft by receiving. The jury returned guilty verdicts on both charges. Prior to sentencing, the defendant moved to set aside the verdict on the ground that the two verdicts were mutually exclusive. The trial court vacated the theft by taking verdict and sentenced the defendant for theft by receiving. On appeal, the defendant, citing *Thomas v. State*, 261 Ga. 854 (1992), argued that he was entitled to a new trial because guilty verdicts for theft by receiving and theft by taking are mutually exclusive. **The court held that a new trial was required because it was**

improper for the trial court to merely set aside one of the mutually exclusive verdicts. To do so requires the court to speculate about what the jury might have done if it had been properly instructed.

Case Concerning Avena and Other Mexican Nationals

(*Mexico v. United States of America*), 2004 I.C.J., No. 128 (March 31, 2004)

Mexico brought an action against the United States before the International Court of Justice seeking to overturn the convictions and sentences of 52 Mexican nationals convicted in state and federal courts on the basis that their nationals were systematically denied their rights under Article 36 of the Vienna Convention on Consular Relations of 1963.

The Court found that the United States breached its obligations under the treaty in the case of 51 of the Mexican nationals' cases because local, state and federal authorities did not inform them that they had the right to have a Mexican consulate notified of their arrest and detention. The Court also found that the United States breached its obligations under the treaty by failing to provide timely notification of their nationals arrests and detention to Mexican consular authorities.

The Court rejected Mexico's assertion that the treaty required that foreign nationals be informed of their right to have their consulate notified before any interrogation by police. "The Court thus finds that 'without delay' is not necessarily to be interpreted as 'immediately' upon arrest. . . . The Court considers that the provision in Article 36, paragraph 1 (b), that the receiving State authorities 'shall inform the person concerned without delay of his rights' cannot be interpreted to signify that the provision of such information must necessarily precede any interrogation, so that the commencement of interrogation before the information is given would be a breach of Article 36." The court,

however, held that ". . . there is nonetheless a duty upon the arresting authorities to give that information to an arrested person as soon as it is realized that the person is a foreign national, or once there are grounds to think that the person is probably a foreign national.

The Court also rejected Mexico's claim that under the doctrine of *restitutio in integrum* (restoration to the status quo prior to the breach of the treaty), Article 36 should be interpreted as requiring the exclusion of any "statements and confessions obtained prior to notification to the national of his right to consular assistance."

The I.C.J. was especially critical of the doctrine of procedural default as practiced in the courts of the United States, which the Court found had precluded meaningful review of the claims by the Mexican nationals that they had been harmed by the treaty violation. The Court directed that the United States provide meaningful "review and reconsideration" of cases where a breach of the treaty is alleged. This process could be through judicial review or executive clemency proceedings. "[W]hat is crucial in the review and reconsideration process is the existence of a procedure which guarantees that full weight is given to the violation of the rights set forth in the Vienna Convention, whatever may be the actual outcome of such review and reconsideration."

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