Don’t Speak During a Police Search!

By Paul Gregoire and Ugur Nedim

NSW police executed a search warrant at the home of Brenton Van der Vegt in the NSW town of Bourke on 8 February 2012. They did so after receiving information that the man may have been in possession of child abuse material.

At the time, Mr Van der Vegt was living alone, having separated from his wife after the rocky breakdown of their marriage.

During the search, police located files containing child abuse material on Mr Van der Vegt’s computer, as well as several discs with similar material on them.

The material was found in a locked gun safe, along with a number of other pornographic discs. Several of these discs contained sexual material with unknown adults. One contained Van der Vegt and his ex-wife together, while six of the discs contained “young children in sexual settings.”

Mr Van der Vegt was subsequently charged with two counts of possessing child abuse material, under section 91H of the NSW Crimes Act 1900, which carries a maximum penalty of 10 years imprisonment.

At a jury trial in the NSW District Court in Sydney, Mr Van der Vegt pleaded not guilty to both offences.

His criminal lawyers argued their client had unwittingly downloaded the child abuse material onto his computer, and his ex-wife had planted the discs into his gun safe. They submitted their client only owned the discs that featured adult pornography.

The computer files

At trial, Mr Van der Vegt's ex-wife admitted that she deleted child abuse material, after she'd accidently come across it. She said she'd done so on 20 October 2011 after their separation, not in June 2010 while they were still together, as the defence team argued.

Van der Vegt's ex-wife explained that at the time she deleted the material, the pair were negotiating a settlement of their matrimonial property.

Despite being a child care welfare worker and it being mandatory for her to report such material, the defendant's ex-wife decided not to notify authorities straight away, so as not to prejudice the settlement negotiations.

Instead, she claimed to have reported it to police several days after the settlement was finalised.

The discs in the gun safe

The defence submitted that Van der Vegt had no knowledge of the child abuse discs being in the safe, and that his ex-wife had placed them in there. Her motive, they said, was "bitterness" and revenge due to their acrimonious separation.

His ex-wife testified that she had no knowledge of where the safe was, nor where the keys were. She gave evidence that she was only aware that her former husband was "talking about getting" a safe.

The woman acknowledged that she had accessed the defendant's house without permission while he was away, by deceiving his real estate agent in order to obtain a key. She also admitted taking property whilst there.

During cross examination, she accepted that she had the capacity to access the computer and burn discs when she was at the residence.

Police search

The police search of Van der Vegt's house was captured on video camera. The recording along with the transcript were submitted as evidence. The two senior constables cautioned Van der Vegt prior to executing the search warrant.

NSW police senior constable Campbell found the discs whilst searching the safe. They were in similar containers labelled in the defendant's handwriting. As the discs were taken out of the safe, Campbell and Van der Vegt had a verbal exchange regarding the contents.

The officer stated that the first two discs were labelled "mixed video." Van der Vegt then said, "Mate, as far as I am aware, mostly adult by the look of it, it's adult." The officer confirmed that he meant pornography, and when more discs were produced, the defendant said they were the "same thing."

Police found the defendant's fingerprint on one of the discs that featured child abuse material.

Van der Vegt decided to take the witness stand at trial. In cross examination, the he prosecution put it to him that he had never said words to the effect of, "'Look, I've never seen that DVD before in my life", or otherwise denied knowing about them. The defendant conceded this.

In its closing submissions, the prosecution emphasised this point – highlighting to the jury that Van der Vegt did not deny knowing about the discs or say that he had accidentally downloaded the material. This, according to the prosecution, was a recent invention that was entirely inconsistent with the defendant's statements to police during the search.

The verdict

As is customary in jury trials, District Court Judge Toner

directed the jury that the defendant must be presumed innocent unless the prosecution had proved to its "satisfaction beyond reasonable doubt he was guilty as charged." His Honour also reminded them that his ex-wife had lied to the real estate agent to gain access to the property.

On 6 June 2014, the jury found Mr Van der Vegt not guilty on the first count of possessing child abuse material relating to what was found on the computer. However, they found him guilty on the second count of possessing the material that was found on the discs locked in the gun safe.

Appealing the conviction

Mr Van der Vegt appealed his conviction to the NSW Court of Criminal Appeal (NSWCCA), which heard the case on 15 August 2016. He didn't appeal his sentence, as he had already served the term in its entirety by the date of the appeal.

The sole ground of appeal was that a miscarriage of justice had taken place, as the prosecution had "impugned" Van der Vegt's right to silence during the search.

The appellant's lawyers argued that, during the cross examination and closing submissions, the jury had been asked to make an adverse inference against Van der Vegt's silence regarding the discs containing the child abuse material, as he'd made no direct mention of them while police were questioning him.

Van der Vegt's barrister Grant Brady took particular issue over the prosecution's remark, "At no point in time did he say I've never seen that before, because he knew what was in them and he knew what was on them."

Mr Brady argued that the jury could only understand this as the prosecution stating that Van der Vegt "had demonstrated a consciousness of guilt by reason of his silence."

The barrister also took issue over the brevity of the process for displaying the discs during the search, and that they weren't individually presented to his client.

The NSWCCA's findings

NSWCCA Justice Button did not "accept that any miscarriage of justice has occurred in this case," as Van der Vegt had not "exercised his right to silence at all during the search."

His Honour noted that the conversation between Van der Vegt and police during the search had been a continuous one, with no significant pauses.

"In particular, it is not the case that the applicant spoke freely with regard to the discs that showed sexual activities of adults," His Honour continued, "but then remained silent with regard to the discs containing child abuse material."

Mr Van der Vegt was found to have neither exercised his right to silence partially or completely, the justice reasoned. That right had not therefore been impugned during the trial.

To the contrary, what was said in the witness box by Van der Vegt was inconsistent with what he had said to police at his home.

For these reasons, Justice Button dismissed Mr Van der Vegt's appeal.

Dilution of the right to silence in NSW

On 1 September 2013, NSW passed a law which inserted section 89A into the state's Evidence Act.

That section provides that during "official questioning" by police for a "serious indictable offence" (ie one which carries a maximum penalty of at least five years' imprisonment), an unfavourable inference can be drawn from the suspect's failure or refusal to mention a fact that:

- He or she could reasonable have been expected to mention at the time, and
- That is later relied on in his or her defence.

"Official questioning" means questioning by an investigating official in connection with the investigation of the commission or possible commission of an offence, and includes questioning during an investigation, interview or search.

However, the section only applies if:

- A "special caution' was given to the suspect, containing words which inform him or her of the effect of failing to disclose facts which may be relevant,
- That caution was given before the failure or refusal to mention the relevant facts,
- The caution was given in the presence of an Australian legal practitioner (lawyer) who was acting for the suspect at that time, and
- The suspect had been given the opportunity to consult a lawyer.

The requirement for the presence of a lawyer has effectively meant that lawyers rarely attend police interviews anymore, as this can jeopardise their clients' right to silence.

It has created a situation where suspects no longer benefit from the protection of lawyers during interviews, leaving them susceptible to police pressure and making it more likely that they will speak with police – usually to their detriment.