STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 2015AP1671-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

CHAD T KIPPLEY,

Defendant-Appellant.

PLAINTIFF-RESPONDENT'S BRIEF

ON APPEAL FROM THE CIRCUIT COURT OF DANE COUNTY,
BRANCH 1, THE HONORABLE JOHN W. MARKSON, PRESIDING
CIRCUIT COURT CASE 2014CT768

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STATEMENT OF THE ISSUES

1. WAS A DEPARTMENT OF NATURAL RESOURCES WARDEN'S BELIEF REASONABLE THAT THE MOTOR ON KIPPLEY'S VESSEL VIOLATED THE MOTOR POWER CAPACITY STATUTE?

   Circuit court answered: Yes (20:1-2; 33:66-67)

2. DID A DEPARTMENT OF NATURAL RESOURCES WARDEN HAVE REASONABLE SUSPICION TO CONDUCT A STOP OF KIPPLEY'S VESSEL?

   Circuit court answered: Yes (20:1-2; 33:66-67)

3. WAS WARDEN DILLEY'S INTERPRETATION OF WIS. STAT. § 30.62(2M) A MISTAKE OF LAW UNDER STATE V. HOUGHTON AND HEIEN V. NORTH CAROLINA?

   Circuit court answered: No (20:1-2; 33:68)

STATEMENT ON PUBLICATION AND ORAL ARGUMENT

The State requests neither oral argument nor publication because the briefs should adequately set forth the facts and applicable precedent, and because resolution of this appeal requires only the application of well-established precedent to the facts of the case.

STATEMENT OF THE CASE

As the Plaintiff-Respondent, the State exercises its option not to present a full statement of the case. Wis. Stat. § 809.19(3)(a)2.[1] The State will supplement the statement of the facts and case as appropriate in its argument.

[1] Unless indicated otherwise, all citations to Wisconsin Statutes refer to the 2013-14 edition.

STATEMENT OF THE FACTS

As respondent, the State exercises its option not to present a full statement of the case. *See* Wis. Stat. § 809.19(3)(a)2. Instead, the State presents the following summary and will present additional facts, if necessary, in the argument portion of its brief.

ARGUMENT

The only issue on appeal is whether the trial court properly denied Kippley's motion to suppress. "Ordinarily, a guilty plea waives all non-jurisdictional defects and defenses." *State v. Hampton,* 2010 WI App 169, ¶ 23, 330 Wis.2d 531, 793 N.W.2d 901, *rev. denied,* 2011 WI 29, 332 Wis.2d 279, 797 N.W.2d 524. But, "[a] narrowly crafted exception to this rule exists," "which permits appellate review of an order denying a motion to suppress evidence, notwithstanding a guilty plea." *See id.; see also* Wis. Stat. § 971.31(10).

I. THIS COURT SHOULD UPHOLD THE TRIAL COURT'S FINDINGS OF FACT THAT WARDEN DILLEY'S BELIEF WAS REASONABLE THAT KIPPLEY'S VESSEL VIOLATED THE POWER MOTOR CAPACITY STATUTE.

A. Standard of Review

The standard of review for findings of fact made by a trial court is that they will be affirmed unless clearly erroneous. Wis. Stat. § 805.17(2). A denial of a suppression motion is analyzed using a two-part standard of review. *State v. Conner*, 2012 WI App 105, ¶ 15, 344 Wis. 2d 233, 821 N.W. 2d 267; *see also* Wis. Stat. § 805.17(2). First, the trial court's findings of fact will be upheld

unless they are clearly erroneous, and second, this Court independently reviews whether those facts warrant suppression. *Conner*, 2012 WI App 105, ¶ 15.

B. General Principles of Fourth Amendment Law Regarding the Legality of Warrantless Searches and Seizures

Both the Fourth Amendment to the United States Constitution and Article I, Section 11 of the Wisconsin Constitution protect "the right of people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures." U.S. Const. amend IV; Wis. Const. art. 1, § 11. The touchstone of the Fourth Amendment is reasonableness. *See, e.g. State v. Robinson*, 2010 WI 80, ¶ 32, 327 Wis. 2d 302, 786 N.W.2d 463. It does not prohibit all searches and seizures, but rather the Fourth Amendment merely prohibits those which are unreasonable. *See, id*.

i. A *Terry* stop is one of the well-established exceptions to the general rule that seizures conducted without a warrant are per se unreasonable under the Fourth Amendment.

In *Terry v. Ohio*, the United States Supreme Court approved a "frisk" for weapons as a justifiable response to an officer's reasonable belief that he was dealing with a

possibly armed and dangerous suspect. *Terry v. Ohio*, 392 U.S. 1, 24, 88 S. Ct. 1868 (1968). The *Terry* Court recognized the legitimacy of an investigative stop and its role in effective crime prevention and detection by stating, "a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest." *Terry*, 392 U.S. at 22.

A *Terry* stop is one of the specifically established and well-delineated exceptions to the general rule that seizures conducted without a warrant are per se unreasonable. *Minnesota v. Dickerson*, 508 U.S. 306, 372-73, 113 S. Ct. 2130 (1993). A *Terry* stop, including the stop of a vehicle or a boat, is a Fourth Amendment seizure of a person, and is therefore subject to the requirement of the Fourth Amendment that all seizures be reasonable. *See, e.g., State v. Post*, 2007 WI 60, ¶ 10, 301 Wis. 2d 1, 733 N.W. 2d 634.

Wisconsin has adopted the *Terry* rule and codified it in Wisconsin Statute § 968.24, which states:

> After having identified himself or herself as a law enforcement officer, a law enforcement officer may stop a person in a public place for a reasonable

> period of time when the officer reasonably suspects that such person is committing, is about to commit or has committed a crime, and may demand the name and address of the person and an explanation of the person's conduct. Such detention and temporary questioning shall be conducted in the vicinity where the person was stopped.

Wis. Stat. § 968.24.

Therefore, when interpreting the scope of Wis. Stat. § 968.24, courts must apply the principles from *Terry* and its progeny. *See, e.g.*, *Post*, 2007 WI 60, ¶ 11.

i. When determining whether a *Terry* stop is valid, the focus is on the reasonableness of the actions of law enforcement.

When a court is called upon to determine whether a *Terry* stop passes Fourth Amendment constitutional muster, the ultimate issue is whether the actions of the law enforcement officer were reasonable under all the circumstances. *See, e.g.*, *State v. Limon*, 2008 WI App 77, ¶¶ 11, 12, 26, 312 Wis. 2d 174, 751 N.W.2d 877. The State has the burden of establishing that a *Terry* stop was reasonable. *State v. Pickens*, 2010 WI App 5, ¶ 14, 323 Wis. 2d 226, 779 N.W.2d 1; *State v. Post*, 2007 WI 70, ¶ 12, 301 Wis. 2d 1, 733 N.W.2d 634.

The officer must be able to point to specific, articulable facts which, taken together with rational

inferences from those facts, reasonably warrant the intrusion of the stop. *State v. Batt*, 2010 WI App 155, ¶ 18, 330 Wis. 2d 159, 793 N.W.2d 104; *see also, e.g.*, *State v. Post*, 2007 WI 70, ¶ 10, 301 Wis. 2d 1, 733 N.W.2d 634. When a person is seized pursuant to a *Terry* stop, "reasonable suspicion" is the quantum of evidence that is required to satisfy the reasonableness requirement of both the Fourth Amendment and Article I, Section 11 of the Wisconsin Constitution. *Post*, 2007 WI 70, ¶¶ 2, 8. In assessing the constitutional validity of a *Terry* stop, the totality of the circumstances test is used – the whole picture must be taken into account – in determining whether the police have lawfully conducted a *Terry* stop. *Batt*, 2010 WI App 155, ¶¶ 18, 23.

In numerous cases, Wisconsin courts have stated that the question of what constitutes reasonable suspicion is a common sense approach: under all the facts and circumstances present, what would a reasonable police officer reasonably suspect in light of his or her training and experience. *State v. Bons*, 2007 WI App 124, ¶ 13, 301 Wis. 2d 227, 731 N.W.2d 367.

Additionally, the training, experience, and knowledge of the officer, acquired while on the job, should be given

due weight by a reviewing court when it determines whether reasonable suspicion for the stop was present at the time of the stop; the evidence, including inferences, must be seen and weighted not in terms of library analysis by scholars but as understood by those versed in the field of law enforcement. *State v. Bailey*, 2009 WI App 140, ¶ 25, 321 Wis. 2d 350, 773 N.W.2d 488. Therefore in determining reasonableness, courts apply a common sense test that considers what a reasonable officer would reasonably suspect in light of his or her training and experience. In order to make a valid traffic stop, including the stop of a boat, an officer need only have a reasonable suspicion that a crime has been or is being committed. *See, e.g.*, *State v. Waldner*, 206 Wis. 2d 51, 57, 556 N.W.2d 681 (1996).

ii. Law enforcement officers may conduct a Terry stop for criminal or non-criminal offenses.

An investigatory stop is also permissible for a violation of non-criminal traffic laws. A person's activity can constitute either a civil forfeiture or a crime – in either instance, a law enforcement officer may perform an investigative stop. *State v. Krier*, 165 Wis. 2d 673, 675, 478 N.W.2d 63 (Ct. App. 1991). Furthermore, a police officer does not have to issue citations for every -

or any - violation that the person was originally stopped for. *See State v. Limon*, 2008 WI App 77, ¶ 23, 312 Wis. 2d 174, 751 N.W.2d 877. In *Limon*, one of the reasons for the stop of the defendant, and several other persons, was a violation of Milwaukee's loitering ordinance. The Court, in finding that reasonable suspicions was present, stated, "[s]imilarly, it is of no consequence that loitering citations were never issued to Limon and the men." *Limon,* 2008 WI App 77, ¶ 23.

The potential availability of an innocent explanation does not prohibit an investigative stop. *Id*. If any *reasonable inference* of wrongful conduct can be objectively discerned, notwithstanding the existence of other innocent inference that could be drawn, the officers have the right to temporarily detain the individual for the purpose of the inquiry. *Limon*, 2008 WI App 77, ¶ 23 (emphasis added)(citing *State v. Griffin*, 183 Wis. 2d 327, 333, 515 N.W.2d 535 (Ct. App. 1994)).

C. This Court Should Uphold the Trial Court's Finding of Fact That Warden Dilley's Belief That Kippley's Vessel Violated the Power Motor Capacity Statute Was Reasonable and Therefore the Trial Court's Decision Was Not Clearly Erroneous.

At an evidentiary hearing on January 13, 2015, Department of Natural Resources Warden Kyle Dilley testified about stopping Chad Kippley and his small vessel near the Lottes Park boat launch in the City of Monona, Dane County, on June 7, 2014 (33:9-13). Warden Dilley testified that at approximately 5:36 p.m. he was preparing to launch his patrol boat when he observed a small vessel, possibly a personal water craft, several hundred yards away, traveling upstream on the Yahara River (33:10). He noticed it had a large object attached to the back (or stern) of the vessel. (33:10). Warden Dilley took no action at this time.

Warden Dilley testified that he and his partner continued launching their patrol boat, had pulled away from the dock, and then Warden Dilley saw the same small, personal water craft-like vessel again (33:11). As the vessel got closer, Warden Dilley observed that the large object on the stern of the vessel was a large outboard motor attached to the transom (33:11). At this point, the vessel was about 10-15 feet away from Warden Dilley, and traveling at a very slow speed (33:11-12). He observed the vessel was in a bow-out position, which based Warden Dilley's training and experience, he knew could indicate

that the boat has a motor in excess of the maximum horsepower rating (33:11-12). The motor power capacity statute states:

> No person may sell, equip or operate, and no owner of a boat may allow a person to operate, a boat with any motor or other propulsion machinery beyond its safe power capacity, taking into consideration the type and construction of such watercraft and other existing operating conditions.

Wis. Stat. § 30.62(2m).

Warden Dilley was unable to tell the horsepower rating of Kippley's motor by looking at the motor because the motor cover was spray painted – obscuring any information that may have been otherwise visible (33:23). In addition, Warden Dilley testified that he also observed that the registration decals on the starboard side of the vessel were black and the vessel was also black in color, which is a violation of the Wisconsin Statutes (33:12). The registration decals on a boat are required to be in a color that contrasts with the color of the boat. *See* Wis. Stat. § 30.523(2); *see also* N.R. 5.06(1).

After Warden Dilley made the observations of the large motor and the color of the registration decals, he turned his patrol boat around to get a look at the boat (33:12).

Warden Dilley testified that he returned to the pier where the vessel was docking, and he docked his patrol boat on the opposite side of that dock (33:12). Warden Dilley decided to make contact with the lone occupant of the vessel, later identified as Chad Kippley, because he wanted to further investigate whether or not the motor attached to Kippley's vessel was in violation of the motor power capacity statute (33:13). He informed Kippley of the reason for making contact with him, and asked Kippley if the vessel he was operating was a personal water craft (33:14). Kippley said that it was not a personal water craft (33:14). Kippley informed the warden that the small vessel was homemade and the previous owner built it from a kit (33:52). Kippley had done some mechanical work to get the boat running, but much of the work that he did on the vessel was cosmetic (33:52).

Warden Dilley testified that he asked Kippley if his vessel had a capacity plate, which identifies the maximum number of persons you can hold on a vessel and the maximum horsepower of a motor you have on the vessel (33:14). Kippley did not answer that question, but told Warden Dilley that it was a 30 horsepower motor (33:14). However, Warden Dilley explained during his testimony that Kippley's

vessel did not have a capacity plate, meaning Warden Dilley could not determine whether the motor was in violation of the statute (33:14). Wisconsin Statutes require the following information to be included on a capacity plate:

> A capacity plate shall bear the following information permanently marked thereon so as to be clearly visible and legible from the position designed or normally intended to be occupied by the operator of the vessel when under way:
> (a) For all vessels designed for or represented by the manufacturer as being suitable for use with outboard motor:
> 1. The total weight of persons, motor, gear and other articles placed aboard which the vessel is capable of carrying with safety under normal conditions.
> 2. The recommended number of persons commensurate with the weight capacity of the vessel and the presumed weight in pounds of each such person. In no instance shall such presumed weight per person be less than 150 pounds.
> 3. Clear notice that the information appearing on the capacity plate is applicable under normal conditions and that the weight of the outboard motor and associated equipment is considered to be part of total weight capacity.
> 4. The maximum horsepower of the motor the vessel is designed or intended to accommodate.

Wis. Stat. § 30.501(2).

Warden Dilley testified that in response to his questions, Kippley asked why the department would let him register a vessel if it was equipped with a motor in excess of the maximum horsepower rating (33:15). Warden Dilley

explained to Kippley that the department does not have that information when a vessel is registered, and department staff would have to look at the capacity plate on the actual boat to get that information (33:15). Warden Dilley testified that at this point in the conversation, Kippley was still sitting on the vessel next to the dock, and the warden was kneeling down on the dock, only a few inches from Kippley (33:15). Given the close proximity, Warden Dilley said he could smell the odor of intoxicants emanating from Kippley's breath (33:16). Warden Dilley also observed that Kippley had glassy, bloodshot eyes, and his mannerisms and responses were fairly slow and deliberate (33:16). It was at this point in the brief investigatory stop that the focus of the stop changed from the power motor capacity violation to a possible OWI investigation (33:17).

Warden Dilley testified that he has been a warden for four years, and during that time he gained experience with different types of water crafts and what equipment they should have (33:6-7). Moreover, Warden Dilley makes contact with approximately 50 boaters on a busy summer day, and nine out of 10 of contacts result in some type of equipment violation (33:8-9) In light of his experience and

training, Warden Dilley testified that he knew that the observations of Kippley's small vessel were typically indicative of two things: one, the vessel was operating at a speed greater than the slow no-wake which would cause the vessel's bow to rise out of the water or two, the vessel may be equipped with a motor that is in excess of its maximum horsepower or capacity rating (33:30).

Violating the slow no-wake and the motor power capacity statutes are both citable offenses. *See* Wis. Stats. § 30.66(3)(ag)2. and § 30.62(2m). The observations of Warden Dilley, combined with the reasonable inferences he made from them, are certainly enough to rise to the level of reasonable suspicion allowing Warden Dilley to stop Kippley's small vessel and briefly question him.

The circuit court found Warden Dilley's testimony credible, based on the clarity in describing his observations of the vessel and the motor, and the court noted that he was an experienced warden given his four years on the job (33:63). The court concluded that from the standpoint of an experienced warden, one logical and reasonable explanation of the warden's observations was that the motor was oversized for the boat, and this was an adequate basis for the stop (33:66). The court also

confirmed that Warden Dilley was entitled to expand the scope of his stop based on observations indicative of intoxication made during the warden's investigation (33:66). The court found there was no basis for the motion to suppress, and subsequently denied Kippley's motion (20:1-2; 33:67).

An unpublished 2014 Court of Appeals case originating out of Dane County involving whether there was reasonable suspicion for the stop of a boat provides some persuasive value given the limited number of cases involving boating while intoxicated. In *State v. Teniente*, a law enforcement officer with the Marine and Trail Enforcement Team heard the operator of a boat yell "[t]hat's the sound of freedom" during the Rhythm and Booms fireworks event, and noticed the words sounded slurred. *State v. Teniente,* No. 2013AP799, ¶¶ 4-5, unpublished slip op. (Wis. Ct. App. Jan. 30, 2014). The officer stopped the boat based on that conduct alone. *Id*. The Court of Appeals held that the officer did have reasonable suspicion to stop the boat based on the officer's observations of the boater's conduct. *Id.* ¶ 19. Although this case is unpublished, pursuant to Rule 809.23(3), it can be cited for persuasive value.

When contrasting *Teniente* with the present case, the officer in *Teniente* only had a loud verbal statement that sounded slurred to base the stop of the boater on. However, in the present case Warden Dilley had several facts to support that Kippley violated the power motor capacity statute: a large motor on the back of the vessel, no horsepower markings on the motor, and the vessel was traveling in a bow-out position. Although these facts individually may not but sufficient to rise to the level of reasonable suspicion, when considered together with the warden's training and experience, a court could certainly find that reasonable suspicion for a stop existed. The trial court in this case did reason to that same conclusion. If this Court can find that a boater yelling during a community fireworks celebration is enough specific and articulable facts to support reasonable suspicion that crime is or may be afoot, then certainly Warden Dilley's observations amount to reasonable suspicion basis when considering the totality of the circumstances.

II. THIS COURT SHOULD AFFIRM THE TRIAL COURT'S DENIAL OF KIPPLEY'S MOTION TO SUPPRESS BECAUSE WARDEN DILLEY HAD REASONABLE SUSPICION TO STOP KIPPLEY AND HIS SMALL VESSEL.

The circuit court made a factual finding of Warden Dilley's observations of Kippley's vessel, the credibility of the warden, and Warden Dilley's relevant training and experience. The court held that the facts were sufficient to support a reasonable suspicion that Kippley's vessel may be in violation of the power motor capacity statute (20:1-2; 33:66). Under *Terry v. Ohio* and its progeny, as well as under Wis. Stat. § 968.24, if an officer has reasonable suspicion that a person is committing or has committed a criminal or non-criminal traffic offense, the officer may stop a person for brief questioning. The circuit court found that Warden Dilley did have reasonable suspicion to conduct a brief investigatory stop of Kippley, and therefore the *Terry* stop was justified and the court's denial of Kippley's motion to suppress should be affirmed.

III. IF THIS COURT FINDS THAT WARDEN DILLEY'S INTERPRETATION OF WIS. STAT. § 30.62(2M) IS CONTRARY TO THE MEANING OF THE STATUTE, THE STATE ARGUES THAT THE WARDEN'S MISTAKE OF LAW WAS REASONABLE UNDER STATE V. HOUGHTON AND HEIEN V. NORTH CAROLINA, AND THEREFORE THE STOP WAS VALID.

In *State v. Houghton*, 2015 WI 79, 364 Wis. 2d 234, 868 N.W.2d 143, the Wisconsin Supreme Court held that that an officer's objectively reasonable mistake of law may form

the basis for a finding of reasonable suspicion to support a traffic stop. *Id.* ¶ 5; *see also Heien v. North Carolina*, 135 S. Ct. 530, 536 (2014). In *Houghton*, the police pulled over the defendant's vehicle for traveling on a highway without a front license plate, and also for having an air freshener and a GPS unit visible in the front windshield. *Id.* ¶ 7. Upon making contact with the driver, the police officer detected an odor of marijuana, which ultimately led to a search of the defendant's vehicle, revealing about 240 grams of marijuana as well as various paraphernalia commonly used for the packaging and distribution of marijuana. *Houghton*, 2015 WI 79, ¶¶ 8-9.

Houghton argued that this stop was unlawful because he was from Michigan and Michigan law did not require a front license plate, therefore the Wisconsin two license plate requirement did not apply to his vehicle; the State conceded this issue. *Id.* ¶ 14. He also argued that neither the GPS unit nor the air freshener materially obstructed his vision through the front windshield, and therefore there was no traffic law violation and no reasonable suspicion for the stop. *Houghton,* 2015 WI 79, ¶¶ 10, 14.

The Court first concluded that reasonable suspicion that a traffic law has been or is being violated is sufficient to justify all traffic stops. *Id.* ¶ 30. Second, the Court discussed Wis. Stat. § 346.88, and concluded that not every object that obstructs vision is unlawful, such as an oil change sticker affixed on a windshield might obscure vision, but not in a meaningful way. *Houghton,* 2015 WI 79, ¶¶ 60-62. The Court determined that not every object in a driver's clear view is a violation of the law, and interpreted the statute to require a "material obstruction." *Id.* ¶ 65. Ultimately, the Court held that the officer's interpretation of the statute – that it prohibited the placement of any object – was objectively reasonable. *Id.* ¶ 70. Factors leading to this conclusion were: the statute had never been interpreted before, the analysis of the statute is a close call, and that a reasonable judge could agree with the officer's view. *Id.* ¶¶ 70-71.

In the present case, Warden Dilley testified at the hearing that he believed his observations of the size of the motor and the vessel's bow-out position in the water were indicative of a potential violation of the motor power capacity statute (33:11-12).

As discussed earlier in this brief, Wis. Stat. § 30.62(2m) prohibits "a boat with any motor or other propulsion machinery beyond its safe power capacity, taking into consideration the type and construction of such watercraft and other existing operating conditions." If this Court finds that Warden Dilley's interpretation that the physical size of the motor could be indicative of a violation of Wis. Stat. § 30.62(2m) is incorrect, the State would argue that this mistake is reasonable under the circumstances. Based on the plain language of the statute, this Court could find that Warden Dilley's interpretation of the statute – that a large motor, without any horsepower markings on it, located on a small vessel could indicate a violation of the power motor statute - was objectively reasonable.

Furthermore, in this case, as in *Houghton*, a reasonable judge could agree with the warden's interpretation of the motor power capacity statute. Additionally, the State could find no published cases interpreting Wis. Stat. § 30.62(2m). By applying the reasoning of the *Houghton* Court, the State asserts that this court should find that Warden Dilley's

mistake of law was objectively reasonable and therefore uphold the validity of the stop. Additionally, the State would ask the Court for guidance on how to interpret Wis. Stat. § 30.62(2m) because that would assist law enforcement officials such as Warden Dilley in how to appropriately enforce this Wisconsin statute.

CONCLUSION

For the above reasons, the State of Wisconsin asks this court to affirm the circuit court's denial of Chad Kippley's motion to suppress and the conviction should be affirmed.

Dated this 9th day of February, 2016.

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CERTIFICATION

I certify that this brief conforms to the rules contained in sec. 809.19(8)(b) and (c) for a brief produced using the following font:

> Monospaced font: 10 characters per inch; double spaced; 1.5 inch margin on left side and 1 inch margins on the other 3 sides. The length of this brief is _____ pages.

Dated: _____.

Signed,

_____
Attorney

CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 9th day of February, 2016.

_____

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