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COURT OF APPEALS

STATE OF WISCONSIN
COURT OF APPEALS

DISTRICT I

Appeal Case No. 2020AP000588-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

KENDALL MARCEL WHITE,

Defendant-Appellant.

On appeal from a Judgment Entered in the Circuit Court for
Milwaukee County, the Honorable Dennis Flynn, Circuit
Judge, presiding

BRIEF OF PLAINTIFF-RESPONDENT

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STATE OF WISCONSIN
COURT OF APPEALS
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BRIEF OF PLAINTIFF-RESPONDENT

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STATEMENT OF THE ISSUES

- I. Whether Officer Gaglione reasonably extended the traffic stop when he asked the driver, White, for ownership documentation due to his suspicions White's vehicle was stolen?

This issue was not raised at the trial court. Should this Court address this issue, this Court should respond no.

- II. Whether Officer Gaglione conducted an unreasonable search of White's vehicle by asking L.G. to produce the vehicle's title?

The circuit court concluded no.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication. The briefs in this matter can fully present and meet the issues on appeal and fully develop the theories and legal authorities on the issues. *See* Wis. Stat. § 809.22(1)(b). Further, as a matter to be decided by one judge, this decision will not be eligible for publication. *See* Wis. Stat. § 809.23(1)(b)4.

STATEMENT OF THE CASE

On March 2, 2018, the State of Wisconsin charged Kendall White with one count of Carrying a Concealed Weapon. (R. 1:1.) The charge stemmed from events on February 28, 2018, at 7915 West Palmetto Avenue after Milwaukee Police Officer Donald Gaglione and his partners Officers Kotnik and Schnell conducted a traffic stop of an Audi Q7 for a lack of a visible registration plate, for having dark tinted windows and for being parked two feet away from the curb. (R. 40:7-8; 16, 26.) At that point, Officer Gaglione had been a police officer with the City of Milwaukee for two and a half years. (R. 40:6.) Throughout his experience as a Milwaukee Police Officer, Officer Gaglione had conducted close to a thousand traffic stops. (R. 40:20.) This experience included investigating stolen vehicles and vehicles that are unregistered. (R. 40:13.) Officer

Gaglione testified, "I've conducted numerous investigations with vehicles including stolen autos while drug dealing and other incidents with unregistered autos. And that persons that don't have plates could either be unregistered autos or are used to facilitate some other type of crime. (R. 40:13.) Given his training and experience, Officer Gaglione wanted to confirm the vehicle was not stolen. (R. 40:17.) As a result, Officer Gaglione wanted to confirm if there were any identifiers as to ownership inside the vehicle. (R. 40:22.) Officer Gaglione testified the proper way to determine ownership of a vehicle is to conduct a registration check. (R. 40:19.) Officer Gaglione further explained that ownership can be determined through a vin number or through paper documents such as proof of purchase or title. (R. 40:19.)

The operator of the vehicle was identified as White. (R. 40:15.) The front passenger was identified as L.G. (R. 40:34.) Officer Gaglione approached the driver's side and made contact with White and explained the reason for the stop. (R. 40:14.) In response, White indicated he had a plate displayed in the back window. (R. 40: 16-17.) However, Officer Kotnik checked the plate and discovered the temporary license plate from Illinois was expired. (R. 40: 16-17.) White stated he recently purchased the vehicle, however the vehicle was not registered. (R. 40:27.) While speaking with White, Officer Gaglione noted White's demeanor. (R. 40:21.) Officer Gaglione testified White gave "excessive emotional attention, arm movement, elevated voice tone and volume." (R. 40:21-22.) For officer safety, White was instructed to exit the vehicle. (R. 40:21.)

Officer Gaglione asked the vehicle's passenger, L.G., to help find the title to the vehicle as he returned to the doorsill area to where the VIN would be written. (R. 40: 22, 38,40.) L.G. opened the glove box and Officer Schnell then observed a firearm was present in the vehicle inside the glove box. (R. 40:23, 41.) Approximately six minutes had elapsed between Officer Gaglione's initial contact with White and the discovery of the presence of the firearm. (R. 40:23.) Officers then recovered the firearm from the glovebox and White was thereafter arrested. (R. 1:1.)

Suppression Decision

On July 17, 2018, White filed a motion to suppress, specifically alleging that L.G. did not have authority to search. (R. 8:1-8;) (R. 40:52-56.) After receiving the evidence at the evidentiary hearing, the circuit court denied the motion, finding:

The officer in this case acted entirely proper. He was focusing on his primary activity exactly as testified to see who owned the vehicle. Couldn't have a vehicle operated by somebody who had no right to the vehicle. It may well be a stolen vehicle.

It's strange in this case the defendant who claimed ownership and again that would have been verified by what was in the vehicle, he never stepped forward to say look in the box, we've got the information that would show it's my vehicle. He didn't do anything at all. So the officers – the officer didn't know if [L.G.] owned the vehicle or anybody owned the vehicle, if it was a stolen vehicle. The officer under the totality of the circumstances had no obligation to secure under the Fourth Amendment a search warrant before making an inquiry of [L.G.] or before without [L.G.] being there before going into the vehicle itself to see what was in the glove box.

(R.40:63-64.)

The court also found that “the officer didn't stray from his primary purpose,” and that “the vehicle could have been transported because of the no license plate and the distance from the curb to the wheels of the vehicle, that being two feet. (R. 40:61-62, 64.)

White thereafter tried his case to a jury on February 2019. (R. 46-49.) The jury found him guilty as charged. (R. 49:47.) The defendant now submits this appeal asking the court to reverse this conviction and the trial court's denial of his motion to suppress.

STANDARD OF REVIEW

“A suppression issue presents a question of constitutional fact.” *State v. Smith*, 2018 WI 2, ¶ 9, 379 Wis. 2d 86, 905 N.W.2d 353. This Court reviews “the circuit court's findings of historical fact

under the clearly erroneous standard.” *Id.* (quoting *State v. Floyd*, 2017 WI 78, ¶ 11, 377 Wis. 2d 394, 898 N.W.2d 560). “But the circuit court’s application of the historical facts to constitutional principles is a question of law [this Court] review[s] independently.” *Smith*, 2018 WI 2, ¶ 9 (quoting *Floyd*, 2017 WI 78 at ¶ 11).

ARGUMENT

I. OFFICERS DID NOT UNLAWFULLY EXTEND THE DURATION OF THE TRAFFIC STOP

A. The Issue Was Not Raised In The Trial Court So It Cannot Be Raised Now

The Court should not consider White’s new argument that police unlawfully extended the traffic stop. “Issues that are not preserved at the circuit court, even alleged constitutional errors, generally will not be considered on appeal.” *State v. Huebner*, 2000 WI 59, ¶ 10, 235 Wis. 2d 486, 492, 611 N.W.2d 727, 730. The party raising the issue on appeal has the burden of establishing, by reference to the record, that the issue was raised before the circuit court. *Young v. Young*, 124 Wis. 2d 306, 316, 369 N.W.2d 178 (Ct. App. 1985).

Here, the record establishes that the question of whether the extension of the stop was reasonable was not raised before the circuit court. The only issue White raised was whether officers conducted an unlawful search of his vehicle. (R. 8: 1-8; (R. 40:52-56.) White failed to note with particularity whether the extension of the stop was reasonable in his written motion or the suppression hearing. White cannot now argue that the stop was illegally extended. *Huebner*, 2000 WI 59, ¶ 10. However, even if the Court chooses to consider White’s new argument the Court should deny it.

B. Officer Gaglione Was Permitted To Perform “Ordinary Inquiries” During The Traffic Stop As Part Of the Mission Of The Stop

The Fourth Amendment to the United States Constitution prohibits *unreasonable* seizures. U.S. Const. Amend IV. A traffic stop constitutes a seizure. *State v. Popke*, 2009 WI 37 ¶

11, 317 Wis. 2d 118, 765 N.W. 2d 56. However, an officer may conduct a traffic stop when there is “reasonable suspicion that a traffic law has been or is being violated.” *State v. Houghton*, 2015 WI 79, 364 Wis. 2d 234, 868 N.W. 2d 143.¹

The Supreme Court of Wisconsin has held that a traffic stop is comprised of 1) addressing the traffic violation; 2) conducting ordinary inquiries; and 3) taking negligibly burdensome precautions to ensure officer safety. *State v. Wright*, 2019 WI 45, ¶ 24, 386 Wis. 2d 495, 506, 926 N.W.2d 157, 162. Because they are a part of the traffic stop, an officer’s “ordinary inquiries” do not extend the stop or violate the Fourth Amendment. *Id.* These ordinary inquiries include checking the driver’s license, registration, and proof of insurance, as well as determining whether the driver has outstanding warrants. *Id.* at ¶ 24 n. 20. See also *State v. Floyd*, 2017 WI 78, at ¶ 27, 377 Wis. 2d 394, 413, 898 N.W.2d 560, 569 (holding an officer may ask about the presence of weapons and for permission to frisk without violating the Fourth Amendment). If the inquiry is part of the mission of the stop, it is not an extension of the stop. *Wright*, 2019 WI at ¶ 28. If the inquiry is unrelated to the mission of the stop, it only violates the Fourth Amendment if they “measurably extended the duration of the stop.” *Id.* See also *Rodriguez v. United States*, 575 U.S. 348, 354 (2015) (“Authority for the seizure ends when these tasks are, or reasonably should have been, completed.”). Moreover, the Fourth Amendment allows unrelated investigative inquiries *not* related to the mission of the stop, provided such inquiries do not “measurably extend the duration of the stop.” *State v. Wright*, 2019 WI 45, at ¶38.

Here, there was no unlawful extension of the stop because the interaction was part of the officer’s ordinary inquiries associated with the initial stop. Officer Gaglione was still determining the vehicle’s title and registration status. (R. 40:17; 23.) Determining ownership of the vehicle was one purpose for the stop due to Officer Gaglione’s experience with stolen and unregistered cars being used in the facilitation of crimes. (R.

¹ White concedes the initial stop was justified. This issue is not in dispute. (Br. Def. Appellant at 5.) Certainly, the record demonstrates that there was reasonable suspicion supporting the traffic stop based on the tint on the windows, the lack of a rear license plate with registration sticker, and parking too far from the curb (R. 40:7-8; 16, 26.)

40:13.) Applying the principles from *Rodriguez v. United States* and *State v. Wright*, the traffic stop's mission was incomplete. Moreover, the record shows Officer Gaglione acted promptly and diligently in his attempt to accomplish the initial justification for the stop. The entire detention, including determining White's identification, the vehicle registration, and then the ownership of the vehicle took less than six minutes. (R. 40:22.) Six minutes was not unreasonable.

White asserts that the mission of the traffic stop should have ended after approximately two minutes, because at that point Officer Gaglione discovered the vehicle was not registered. (Br. Def. Appellant at 6.) However, the record is clear that the officers were still completing the purpose for the stop. Further, it would be impractical and against public policy to deem the stop completed at this point as it would impede law enforcement's ability to ensure a vehicle is not stolen. Police officers must be able to conduct brief investigatory stops like in the current case to protect public safety. Officers have an affirmative duty to keep our public highways safe, which includes ensuring someone is licensed, insured, and does not have any outstanding warrants. It also includes ensuring that the vehicles being operated are not stolen or being used in the commission of crimes. In fact, when recognizing that officers may ask to inspect a vehicle's registration and proof of insurance as a part of ordinary inquiries, the United States Supreme Court noted that "[t]hese checks serve the same objective as enforcement of the traffic code: ensuring that vehicles on the road are operated safely and responsibly." *Rodriguez v. United States*, 575 U.S. 348, 355 (2015). The Court has also specifically recognized the special role VINs and checking vehicle ownership play in ensuring public safety, explaining, a "VIN helps to ensure that automobile operators are driving safe vehicles. By making automobile theft more difficult, the VIN safeguards not only property but also life and limb." *New York v. Class*, 475 U.S. 106, 111 (1986). Therefore, White's position completely flies in the face of the Court's underlying logic that officers may make ordinary inquiries in furtherance of their mission to complete the traffic stop and ensure public safety.

Furthermore, even if this court finds there was an extension of the original stop, the extension was reasonable and did not run afoul of the Fourth Amendment. The courts have

recognized that extensions are permitted so long as they are reasonable and do not measurably extend the stop. *See e.g. State v. Brown*, 2020 WI 63, ¶ 29, 392 Wis. 2d 454, 475, 945 N.W.2d 584, 594 (question regarding the possession of any “concerning items” did not ‘measurably extend the duration of the stop’ because it was posed ‘concurrently with mission-related activities’) (internal citations omitted). Officer Gaglione explained that many vehicles without license plates “are either unregistered autos or are used to facilitate some other type of crime.” (R. 40:13.) Checking for the VIN number and inquiring about the title was a reasonable measure to ensure the vehicle was not stolen. *See e.g. United States v. Lepinski*, 460 F.2d 234, 238 (10th Cir. 1972) (finding limited investigative detention proper where neither occupant provided proper registration or title documents and officer did not know who might be the vehicle’s owner); *United States v. Viezca*, 555 F. Supp. 2d 1254 (M.D. Ala. 2008), *aff’d sub nom. United States v. Ubaldo-Viezca*, 398 F. App’x 573 (11th Cir. 2010) (traffic stop of truck and trailer was not unreasonably prolonged within meaning of the Fourth Amendment; trooper was justified in prolonging the stop particularly since he had an articulable suspicion of illegal activity, including the lack of a valid title, registration, and proof of insurance). Based on these facts, given the suspicions over the ownership of the vehicle and the concurrency of the mission, White cannot establish the six-minute stop was unreasonably extended.

II. THE FOURTH AMENDMENT WAS NOT IMPLICATED BECAUSE THE OFFICER’S ACTIONS WERE REASONABLE UNDER ALL OF THE CIRCUMSTANCES

A. Protection From *Unreasonable* Searches Turns On The Specific Facts And Circumstances, Including Whether The Search Was Of A Vehicle

While the Fourth Amendment protects from unreasonable searches and seizures, there is no simple test for determining reasonableness other than by balancing the need to search against the invasion. *New York v. Class*, 475 U.S. 106, 116 (1986). Thus, reasonableness lies in the circumstances of each specific situation. *United States v. Burton*, 441 F.3d 509, 511 (7th Cir. 2006); *State v. Coffee*, 2020 WI 53, ¶ 36, 391 Wis. 2d

831, 849, 943 N.W.2d 845, 854 (“bright-line rules are disfavored in United States Supreme Court Fourth Amendment jurisprudence.”).

Circumstances involving vehicles are treated differently than dwellings. *State v. Bruski*, 2007 WI 25, ¶ 37, 299 Wis. 2d 177, 194, 727 N.W.2d 503, 511. “Warrantless searches of homes are ‘presumptively unreasonable,’ but searches of vehicles are not.” *State v. Marquardt*, 2001 WI App 219, ¶ 26, 247 Wis. 2d 765, 781, 635 N.W.2d 188, 196. “The Fourth Amendment does not treat a motorist’s car as his castle.” *Illinois v. Lidster*, 540 U.S. 419, 424 (2004).

The Supreme Court has recognized both that a vehicle’s physical characteristics and use results in a lessened expectation of privacy, as well as the fact that vehicles themselves are heavily regulated by the state. *New York v. Class*, 475 U.S. 106, 112-113 (1986). Therefore, the Supreme Court noted, “Every operator of a motor vehicle must expect that the State, in enforcing its regulations, will intrude to some extent upon that operator’s privacy,” particularly with regards to the VIN. *Id.* at 113.

Specifically, in *New York v. Class*, the Supreme Court of the United States held that officers’ act of reaching into a vehicle to remove papers which were obscuring the vehicle’s VIN, was constitutionally permissible, justifying the subsequent seizure of the weapon protruding from under the driver’s seat. 475 U.S. 106, 107 (1986). There, the defendant was stopped for two traffic violations. *Id.* at 108. The defendant provided the vehicle’s registration and proof of insurance, but stated that he had no driver’s license. *Id.* There was no reason to suspect that the vehicle was stolen or contained contraband, nor that the defendant committed any other offense other than the traffic violations. *Id.* The Court noted a “demand to inspect the VIN, like a demand to see license and registration papers, is within the scope of police authority pursuant to a traffic violation stop.” *Id.* at 115. When considering whether the defendant could have returned to the vehicle to remove the papers himself, the Court also commented,

The pistol beneath the seat did not, of course, disappear when respondent closed the car door behind him. To have

returned respondent immediately to the automobile would have placed the officers in the same situation that the holding in *Mimms* allows officers to avoid—permitting an individual being detained to have possible access to a dangerous weapon and the benefit of the partial concealment provided by the car's exterior. In light of the danger to the officers' safety that would have been presented by returning respondent immediately to his car, we think the search to obtain the VIN was not prohibited by the Fourth Amendment.

Id. at 116.

Therefore, the court ultimately found the seizure of the firearm was constitutionally permissible. *Id.*

Also, the courts recognize that vehicles create more exigency because they “are movable, making plausible an automobile's escape from a jurisdiction or concealment before a warrant can be obtained.” *State v. Coffee*, 2020 WI 53, ¶ 25. Therefore, not only is there a lower expectation of privacy, but also “the legitimate governmental interest in a warrantless search is stronger.” *Id.*

Furthermore, third parties with common authority may consent to a search. *United States v. Matlock*, 415 U.S. 164, 171 (1974). Common authority generally rests on mutual use and joint access or control. *Id.* at 171 n. 7. It does “not depend on legal property rights, but rather on the relationship in fact of the consenting party to the searched premises.” *Kelly v. State*, 75 Wis.2d 303, 315, 249 N.W.2d 800, 806 (1977). Such common authority could extend to girlfriends or family friends. *See e.g.*, *State v. Sobczak*, 2012 WI App 6, 338 Wis. 2d 410, 808 N.W.2d 730 (holding Sobczak's girlfriend, who was staying in home by herself for the weekend, had actual authority to consent to search of the home and of Sobczak's laptop which she had permission to use); *People v. White*, 64 P.3d 864 (Colo. App. 2002) (holding a family friend had authority to consent to the entry of police into the defendant's father's home).

However, even if common authority does not exist, the inquiry is not over. The court next turns to whether police reasonably believed the individual had general access or control. *Illinois v. Rodriguez*, 497 U.S. 177, 188 (1998). A search may

still be permissible via the apparent authority doctrine if police reasonably believed that the third party had the authority to consent. *State v. Sobczak*, 2012 WI App 6, ¶ 11. This doctrine may be applied to passengers in vehicles. *See e.g. United States v. Ospina*, 682 F. Supp. 1182, 1185–86 (D. Utah 1988)(search with passenger’s consent valid where passenger had knowledge about the car, had control and dominion by readily retrieving the registration from the glove compartment without help from the defendant, and controlling the keys while opening the trunk for the search, all without objection by the defendant); *United States v. Chavez Loya*, 528 F.3d 546, 555 (8th Cir. 2008) (valid passenger consent search where passenger responded to officer’s request for the registration and opened the glove box and removed the registration without any help from the driver; passenger responded to the questions about ownership, and driver gestured to passenger for consent to search.). The policy behind the apparent authority doctrine is rooted in the fact that the exclusionary rule operates to deter the police from unreasonable search and seizures. *Nix v. State*, 621 P.2d 1347, 1349 (Alaska 1981). Therefore, there can be no deterrent effect where the police believe they are acting reasonably and it is only with hindsight that actual authority to consent to a search is missing. *Id.*

B. The Officer’s Actions Were Reasonable Under These Particular Circumstances

As the circuit court pointed out, the officer could have merely transported the car due to the traffic violations, including the improper licensure and registration. (R. 40:61.) Indeed, then the officers could have impounded the vehicle and conducted an inventory search, leading to the inevitable discovery of the firearm. *See e.g. State v. Asboth*, 2017 WI 76, ¶ 35, 376 Wis. 2d 644, 670, 898 N.W.2d 541, 553 (“given the uncertainty arising from the fact that Asboth was not the car’s registered owner, taking possession of the car to investigate its ownership may have been more reasonable than outright returning the car to Asboth.”); *State v. Brooks*, 2020 WI 60, ¶ 24, 392 Wis. 2d 402, 425, 944 N.W.2d 832, 843 (“when law-enforcement officers have constitutionally legitimate reason for impounding vehicle, they may inventory its contents without warrant and without violating constitution). Moreover, as the circuit court found, under all of the specific circumstances in this case, the officer’s

actions were not unreasonable. Officer Gaglione has vast experience with investigating stolen and unregistered vehicles. (R. 40:13.) Often, such vehicles do not have license plates and are used for the facilitation of other crimes. (*Id.*) Thus, in addition to the governmental interests in ensuring vehicles are registered and safe to drive on public roads as acknowledged by *Class*, there is a strong governmental interest in curtailing the operation of stolen vehicles. Here, there was no valid license plate. (R. 40:16-17.) White provided no proof of registration. (R. 40:27.) White also provided no proof of ownership. (R. 40:15-21.) Additionally, White became excessively emotional. (R. 40:21-22.) Officer Gaglione, as a part of the ordinary inquiries permitted by law and associated with the traffic stop, requested the title so he could verify whether White was, in fact, the owner. (R. 40:17, 19, 22.) This was the reasonable thing to do. At that point in time, Officer Gaglione suspected the vehicle was stolen, in which case L.G. would have the same apparent authority as White to provide the title and registration documents. Also of note, L.G. was sitting in front of the glove compartment and was able to open it without any assistance from White. (R. 40:22-23.) There is no evidence that her access to the glove compartment was restricted or curtailed in any way while L.G. was occupying the vehicle, nor any evidence that White told L.G. not to allow anyone into it. Further, as *Class* noted, due to the heavy State regulations of vehicles, there is a lesser privacy interest in titles and registration information and it was permissible for Officer Gaglione to request it as a part of his traffic stop. Given all of these facts, the officer's conduct was reasonable. Therefore, because the Fourth Amendment only prohibits unreasonable searches, White's rights were not violated.

White asserts that it is unreasonable to believe that L.G. had any authority over the glove box. (Br. Def.-Appellant 9.) Again, as indicated above, it was reasonable to believe L.G. had just as much authority as White, given the Officer's reasonable belief, based on his training and experience, that the car was stolen given the lack of documentation of ownership and registration, as well as the out-of-state expired license. Furthermore, there is no rule that passengers being picked up in a vehicle cannot have authority. Also L.G., who was sitting in front of the unlocked glove compartment, had direct access to the glove compartment as well. White also cites *United States*

v. Impink, 728 F. 2nd 1228, 1234 (9th Cir. 1984) to argue that any authority L.G. had was trumped from White's objection. However, there is no evidence in the record that White did object to the officer's request of L.G. to provide any title document. Therefore, this case does not apply to the current facts.

Rather, all of the facts show the officer's actions were reasonable. The officer could have impounded the vehicle from the beginning of the interaction, when it was discovered that there was no proper license, registration, and White provided no documentation of ownership. The officer was merely doing his duty to try to establish ownership. It would be *unreasonable* to release a suspected stolen car to the car's occupants without any verification of ownership. Therefore, because the Fourth Amendment protects against *unreasonable* searches, under these circumstances this court should uphold the ruling of the circuit court.

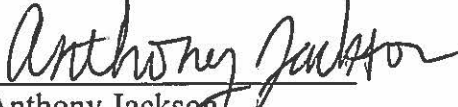
CONCLUSION

For the reasons discussed, this Court should affirm the circuit court's denial of White's motion to suppress and his judgment of conviction.

Dated this 6th day of October, 2020.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19 (8) (b) and (c) for a brief produced with a proportional serif font. The word count of this brief is 4114.

10-6-2020
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**CERTIFICATE OF COMPLIANCE
WITH 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 s. 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.

10-6-2020
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