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Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000993-MR

BILLY R. BOWMAN APPELLANT

ON REMAND FROM SUPREME COURT OF KENTUCKY
2008-SC-000945-DG

v.

APPEAL FROM CALLOWAY CIRCUIT COURT
HONORABLE CRAIG Z. CLYMER, JUDGE
ACTION NO. 03-CR-00072

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: KELLER, MOORE AND WINE, JUDGES.

KELLER, JUDGE: Billy R. Bowman (Bowman) entered a guilty plea to second-degree rape and to being a Persistent Felony Offender in the Second Degree. Bowman filed and lost a direct appeal and subsequently filed for relief under

Kentucky Rule(s) of Criminal Procedure (RCr) 11.42. The trial court denied Bowman's RCr 11.42 motion. It is from that denial that Bowman appeals. On appeal Bowman alleges that he received ineffective assistance of counsel prior to entering his guilty plea. We previously addressed these issues in our November 26, 2008, Opinion affirming the trial court. Bowman appealed to the Supreme Court, which granted discretionary review and remanded this matter to us for consideration of *Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009).

Pursuant to this Court's order, the parties filed supplemental briefs addressing *Leonard's* application to this appeal. In his supplemental brief, Bowman argues that his RCr 11.42 motion raises issues that differ from those he raised on direct appeal. The Commonwealth argues that the issues are the same and that Bowman is procedurally barred from raising them via RCr 11.42. For the following reasons, we agree with Bowman and vacate and remand.

FACTUAL AND PROCEDURAL BACKGROUND

As we did in our first opinion, we rely on and reiterate pertinent portions of the Supreme Court's summary of facts in its opinion addressing Bowman's direct appeal.

> According to the police report, late on the night of April 10, 2003, twelve-year-old CC and her fourteen-year-old cousin, SC, sneaked out of CC's home, took their grandmother's car, and drove off to find a friend named Matt.[1] Eventually they knocked on the door of a trailer where they thought Matt lived. A man answered

[1] Matt's last name is not included in the police report. He is referred to herein simply as "Matt." (Footnote 1 in original.)

> the door and told the girls he could show them where their friend lived. When the girls entered the trailer, two men, David Strum[2] [sic] and Appellant, extended an invitation to stay and watch a movie, which the girls accepted[3] . . . . After some time, the men made sexual advances towards the girls . . . . Appellant . . . had sexual intercourse with [CC].
>
> Afterwards, Appellant asked CC how old she was. When she told him she was twelve, Appellant told her not to tell anyone what had happened because he could get in "big trouble." CC agreed not to tell anyone, and shortly thereafter Appellant left for work. The girls stayed with Strum, who took the girls with him while he drove to do some errands. He later dropped the girls off at the trailer, which belonged to Appellant. The two girls then drove to their friend Matt's home, where someone from the sheriff's department picked them up.
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> On May 28, 2003, Appellant was indicted for First-Degree Rape, committed by engaging in sexual intercourse with CC, a minor, through the use of forcible compulsion, and for being a First-Degree Persistent Felony Offender. Strum was also indicted, though the record on appeal does not indicate what his charges were, and subsequently refused to talk with Appellant's attorney. SC died before Appellant's trial attorney had an opportunity to interview her.
>
> CC's parents refused to allow Appellant's attorney to interview her in preparation for Appellant's defense. However, the Commonwealth included in its discovery materials a statement of what CC's testimony would be.

[2] The record establishes that David's last name is Stutesman, not Strum; however, because his identity is not relevant to this appeal, we will not alter the name.

[3] Because there was no trial, the record on appeal is limited, and it is unclear if the man who answered the door of the trailer was one of the two men who extended the invitation to the girls. Based on Appellant's claim as to the witnesses present, however, it appears that only two men were present, David Strum and Appellant. It appears Strum was the man who answered the door and invited the girls into the trailer. (Footnote 2 in original.)

The statement indicated that CC would testify that she had been an unwilling participant, that she had not resisted Appellant's sexual advances because she was afraid he would kill her, and that Appellant had left a bite mark on one of her breasts. The Commonwealth also tendered a photograph of CC which had been taken a few days after the incident. The photograph, which was intended to be used as evidence of how old CC looked at the time of the incident, showed CC wearing no makeup and dressed in a t-shirt depicting a children's cartoon character.

In conversations with his attorney, Appellant denied that any forcible compulsion had occurred and claimed that he thought CC was seventeen years old when he had sex with her. Appellant's attorney informed him that his mistaken belief that CC was at least sixteen years old was a possible defense to the charge under KRS 510.030. However, in light of CC's proffered testimony, the photo the Commonwealth intended to use, and Appellant's belief that *only* his own testimony would be available to support his version of the events, Appellant chose not to proceed to trial, where if found guilty he faced a possible sentence of life in prison. Instead, on June 14, 2004, the day before his scheduled trial, Appellant entered a plea of guilty to the lesser charges of Second-Degree Rape and being a Second-Degree Persistent Felony Offender. Less than a month later, Appellant filed a motion to withdraw his guilty plea under RCr 8.10 based on newly discovered evidence.

The day after Appellant entered his guilty plea, Misty Skinner and Brandy Imus, both of whom were related to Matt, found out that Appellant was scheduled to be tried that day for the alleged rape of CC. They claimed to have some knowledge of the incident. Imus called the courthouse to see if the trial was proceeding, and she was told that it was not. She then called Murray Police Detective Donald Bowman, who she knew was Appellant's brother. She told Detective Bowman that she had seen and talked to CC on the morning of April 11, 2003 and that, based on their meeting, she did not believe

a rape had occurred. Detective Bowman contacted Appellant's attorney with the new information.

Appellant's attorney then contacted Skinner and Imus, who provided written affidavits and videotaped statements that sharply conflicted with the evidence that Appellant believed the Commonwealth would have presented had the case gone to trial. Both women stated that CC told them she was fifteen years old, but claimed that she had told Appellant that she was seventeen. Imus stated that on the morning of April 11, 2003, CC and SC had arrived at her cousin's house, where CC described the events from the night before . . . . Imus also stated that, CC, who was wearing make up and a skin-tight, midriff-bearing shirt on the morning of April 11, 2003, looked like she was seventeen years old. Further, Imus said that CC had not appeared to be upset or distressed. Skinner stated that CC said that . . . [Appellant] . . . had been reluctant to have sex with her, but she had "seduced" him . . . . Skinner told CC that the Appellant could get in trouble over what happened, but that CC said "nothing['s] gonna come of it" . . . . Skinner echoed Imus's claim that CC looked and acted older than twelve years old.

In his motion to withdraw his guilty plea, Appellant described the statements made by Skinner and Imus and argued that his plea had not been voluntarily and intelligently made because he was not aware of all the available evidence and possible defenses. Relying on *Mounts v. Commonwealth*, 89 Ky. 274, 12 S.W. 311 (Ky.1889), he also argued that had the evidence been discovered after a jury trial, he would have been entitled to a new trial, and that, as such, he was entitled to withdraw his plea.

On October 11, 2003, the trial court denied Appellant's motion to withdraw his guilty plea, making the following findings:

> [T]his case, based on the record, clearly shows that [the] *Boyk[i]n* requirements have been met. The Court did

conduct a discussion to determine that the plea was intelligently, knowingly and voluntarily entered. While the Court did not go into great detail with respect to the facts of the crime, this particular case involved a negotiated plea to an amended charge. Defendant was initially charged with First Degree Rape and First Degree Persistent Felony Offender. Based upon the plea agreement, Defendant pled guilty to amended charges of Second Degree Rape and Second Degree Persistent Felony Offender. While there were a couple of instances in which the defendant paused before answering questions, the Court at the time found that the defendant's plea was made knowingly, intelligently and voluntarily, and the Court still believes that to be the case. As the Commonwealth noted in its opposition to Defendant's Motion to Withdraw Plea, defendant has an extensive criminal record. Defendant knew the ramifications of what could happen at trial, and defendant knew the defenses available to him. The court simply does not believe that the "newly discovered evidence" is such that the voluntariness or the intelligent nature of the plea was compromised in any way.

Focusing on the issues at hand, the Court finds that the defendant entered his plea knowingly, voluntarily and intelligently, and that the newly discovered evidence would not be of such a nature that this Court would grant a new trial. The Court does agree with defense counsel that were the "newly discovered evidence" of such a nature that a new trial would be granted, that the Court would grant the Motion to Withdraw Guilty Plea. However, because the Court does not find that to be

> the case, the Court will not grant the relief requested.
>
> On the same day, the trial court also entered its final judgment, sentencing Appellant to twenty years in prison.[4] Appellant now appeals to this Court as a matter of right. Ky. Const. § 110(2)(b).

Bowman v. Commonwealth, 2006 WL 141586, *1-3 (Ky. 2006)(2005-SC-000234-TG). The Supreme Court of Kentucky affirmed the circuit court's decision to deny Bowman's motion to withdraw his guilty plea, holding as follows:

> The simple fact that a defendant would make a different decision at a later time does not render the earlier guilty plea involuntary; otherwise, the validity of most guilty pleas might potentially be challenged after defendants come to understand the reality of incarceration. Hindsight alone does not render the guilty plea unintelligent and involuntary. Appellant all but admits that *at the time he entered his guilty plea*, it was intelligently and voluntarily made. That is all that is required. Subsequent events that do not conform to a defendant's expectations do not automatically render an otherwise voluntary and intelligent guilty plea involuntary.

Id. at *4. The Court went on to hold that the circuit court did not abuse its discretion in denying the motion, stating that "Appellant has shown no compelling reason for us to second-guess the trial court in denying the motion to withdraw the guilty plea." *Id*. at *7.

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[4] Several days after the trial court ruled on the motion to withdraw the guilty plea, Appellant filed a *pro se* motion for a new trial that repeated the claims presented in the motion to withdraw the guilty plea. The trial court also denied this motion, noting, "[T]he motion should be more appropriately dealt with on appeal of this Court's Order which denied defendant's Motion to Withdraw his guilty plea." (Footnote 3 in original.)

While his direct appeal was pending, Bowman filed a *pro se* motion for relief pursuant to RCr 11.42, which was held in abeyance pending a decision in the direct appeal. In his motion, Bowman alleged four bases for relief, including: (1) ineffective assistance of counsel, which he claimed made his plea involuntary; (2) prosecutorial vindictiveness; (3) judicial error; and (4) the cumulative effect of those alleged errors. As to his ineffective assistance of counsel claim, Bowman relied upon the newly discovered evidence that had earlier provided the basis for his motion to withdraw his guilty plea and subsequent direct appeal. He also claimed that his attorney failed to inform him the Commonwealth offered him the opportunity to take a polygraph test once the new witnesses came forward. In conjunction with his RCr 11.42 motion, Bowman requested an evidentiary hearing and the appointment of counsel. Once the direct appeal had been decided, the Commonwealth filed a response to Bowman's *pro se* RCr 11.42 motion, stating Bowman had already raised the basis for the ineffective assistance claim in his motion to withdraw the guilty plea. Accordingly, that claim was not subject to attack in an RCr 11.42 proceeding. Furthermore, the Commonwealth pointed out that Bowman admitted to the offense to which he pled guilty.

On March 20, 2007, the circuit court entered an order denying Bowman's motion for relief:

> This matter is before the Court on Petitioner's Motion to Vacate, Set Aside or Correct Judgment Pursuant to RCr 11.42. The McCracken Circuit Court, Division Two, acquired jurisdiction from appointment by the Chief Regional Judge following the Calloway Circuit

Court's recusal. The Court has reviewed the allegations in the petition and the Commonwealth's response and finds from the face of the record that the allegations in the petition do not merit relief. Because the allegations can be fully adjudicated by resorting to the record, no evidentiary hearing is required, *Glass v. Commonwealth*, 474 S.W.2d 400 (1971), and appointment of counsel is not appropriate. RCr 11.42(5); *Coles v. Commonwealth*, 386 S.W.2d 465 (1965).

Petitioner *pro-se* alleges numerous grounds for relief. The grounds alleged do not merit relief because they fail under one of three legal categories. First, some of the allegations are refuted on the face of the record. For instance, his allegations that he did not understand the charges against him and that he was coerced by his attorney into pleading guilty are refuted by the record that he knowingly, intelligently, and willingly pleaded guilty to the charges against him.

Other allegations fail in that they are conclusory statements which, even if true, are not shown to have prejudiced Petitioner. Examples are Petitioner's claims that his attorney did not pursue locating a witness who could testify as to the victim's mental state and that the victim looked older than she was. Petitioner fails to show how such testimony would be admissible at trial or how it would be relevant to the outcome. The state of mind of a twelve year old girl being raped is not a consideration in whether Petitioner was guilty.

Petitioner must show not only that Counsel's performance was deficient. He must also show that the deficient performance prejudiced him; generally by causing a trial result that was unreliable. *Strickland v. Washington*, 466 U.S. 688, 104 S.Ct 2052, 80 L.Ed.2d 674 (1984); *Gall v. Commonwealth*, Ky., 702 S.W.2d 37 (1986). The issue is not whether counsel made errors but whether counsel was so thoroughly ineffective that defeat was snatched from the hands of probable victory. *United States v. Morrow*, 977 F.2d 222, 229 (6th Cir. 1992). There is a strong presumption that counsel's conduct falls within the wide range of reasonable professional

> assistance. *Kimmelman v. Morrison*, 477 U.S. 365, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986)[.]
>
> A final reason the petition fails is that the allegations raised are appealable and have been appealed and are not, therefore, appropriate for consideration pursuant to RCr. [sic] 11.42. Petitioner's allegations raised under the heading of prosecutorial vindictiveness and the heading of judicial error are appealable and have, in fact, been appealed. RCr. [sic] 11.42 is limited to allegations that could not and are not raised on appeal. Labeling the appealable allegations as constituting ineffective assistance of counsel does not render them properly judiciable in an RCr. [sic] 11.42 petition.
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> The Court finds that the allegations raised in the petition are refuted by the record and do not otherwise merit relief.
>
> Therefore, **IT IS HEREBY ORDERED** that the motion for relief pursuant to RCr. [sic] 11.42 is hereby DENIED and the conviction AFFIRMED. Petitioner's motions for leave to proceed *in forma pauperis*, for appointment of counsel, and for an evidentiary hearing are DENIED as moot.

This appeal followed.

In his initial brief, Bowman presented two main issues. First, he argued that the circuit court should have held an evidentiary hearing on his ineffective assistance of counsel claim. Bowman maintained that, at a hearing, he would have established that his trial counsel gave him faulty advice regarding possible defenses to the rape because counsel failed to adequately investigate the facts or research the law. Bowman argued that, because he relied on that faulty advice, his plea was involuntary. Additionally, Bowman maintained that he would have established at a hearing that his trial counsel failed to discuss the

Commonwealth's request for a polygraph examination; that he changed counsel several times throughout the course of litigation, which affected the plea procedure; and the circuit court failed to look at the totality of the circumstances when it determined his plea was voluntary. For his second issue, Bowman argued the circuit court should have appointed counsel. In its initial brief, the Commonwealth maintained the circuit court did not commit any error in denying Bowman's motion without holding an evidentiary hearing, and Bowman's trial counsel was not ineffective.

After reviewing the record and the arguments of counsel, we affirmed the trial court's denial of Bowman's RCr 11.42 motion. In doing so, we held that Bowman's ineffective assistance of counsel claim was simply an impermissible re-argument of issues raised on direct appeal. However, we did not address what, if any, impact the Supreme Court of Kentucky's holding in *Leonard* had on our holding. Pursuant to the Supreme Court's remand, we do so below reiterating relevant portions of our November 26, 2008, opinion.

STANDARD OF REVIEW

An overriding principle in RCr 11.42 proceedings is that a defendant can only raise claims that "were not and could not be raised on direct appeal. An issue raised and rejected on direct appeal may not be relitigated in [RCr 11.42] proceedings by simply claiming that it amounts to ineffective assistance of counsel." *Haight v. Commonwealth,* 41 S.W.3d 436, 441 (Ky. 2001). However, failure to prevail on a claim of error on direct appeal does not necessarily negate an

ineffective assistance of counsel claim related to the direct error. When those claims differ, the court must address the ineffective assistance of counsel claim using the appropriate standard of review. *Leonard,* 279 S.W.3d 157-59. To the extent ineffective assistance of counsel claims differ from issues raised on direct appeal, a defendant must establish that the claims raised are not "conclusively refuted by the record" and that those claims, "if true, would invalidate the conviction," before he is entitled to a hearing. *Lewis v. Commonwealth,* 411 S.W.2d 321, 322 (Ky. 1967). Finally, because Bowman pled guilty and is now arguing that he involuntarily did so because of ineffective assistance of counsel, he must establish:

> (1) that counsel made errors so serious that counsel's performance fell outside the wide range of professionally competent assistance; and (2) that the deficient performance so seriously affected the outcome of the plea process that, but for the errors of counsel, there is a reasonable probability that the defendant would not have pleaded guilty, but would have insisted on going to trial. *Hill v. Lockhart,* 474 U.S. 52, 106 S.Ct. 366, 370, 80 L.Ed.2d 203 (1985). *Cf., Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *McMann v. Richardson,* 397 U.S. 759, 90 S.Ct. 1441, 1449, 25 L.Ed.2d 763 (1970).

Sparks v. Commonwealth, 721 S.W.2d 726, 727-28 (Ky. App. 1986). *See also Bronk v. Commonwealth*, 58 S.W.3d 482 (Ky. 2001). With these standards in mind, we analyze Bowman's appeal.

ANALYSIS

Bowman's ineffective assistance of counsel claim revolves around two primary arguments: (1) counsel's failure to advise Bowman fully that he could defend himself from the charges by showing he did not know the victim's age; and (2) counsel's failure to investigate that defense in a timely manner. Bowman argues that, if he had known there were witnesses who would testify the victim appeared to be significantly older than her stated age, he would not have pled guilty.

In our initial opinion, we noted that Bowman made this argument to the Supreme Court in his direct appeal. The Supreme Court was not persuaded by Bowman's argument, and held that the "newly discovered evidence" did not alter the voluntariness of Bowman's guilty plea. We previously stated that holding applies to this appeal, which we reiterate. However, based on the Supreme Court's remand, we must take our analysis further and determine whether Bowman's RCr 11.42 ineffective assistance of counsel claim differs from his direct appeal claim. To the extent that it does, we must then determine if the trial court properly denied Bowman's RCr 11.42 motion.

We begin our analysis by reviewing *Leonard.* Jeffrey Leonard (Leonard) was tried and convicted of murder and robbery and sentenced to death. Following exhaustion of his direct appeals, Leonard filed an RCr 11.42 motion alleging ineffective assistance of counsel. The trial court denied Leonard's motion finding that the issues he raised therein had been addressed on direct appeal. Seven years later, the Supreme Court rendered its decision in *Martin v.*

Commonwealth, 207 S.W.3d 1 (Ky. 2006). In *Martin*, the Court held that "errors raised for the first time on appeal and found not to be palpable under RCr 10.26 could be the source of subsequent ineffective assistance of trial counsel claims." *Leonard*, 279 S.W.3d at 155. Leonard then filed a Kentucky Rule(s) of Civil Procedure (CR) 60.02 motion arguing that the Court's holding in *Martin* "removed the procedural bar that had prevented many of his claims from being addressed on their merits in the initial RCr 11.42 proceeding." *Leonard*, 279 S.W.3d at 155. The trial court denied Leonard's motion finding that the holding in *Martin* could not be applied retroactively. The Supreme Court agreed and affirmed the trial court. However, before doing so, the Court stated that the previously recognized rule that failure to prevail on direct appeal barred any claim for relief on related issues through RCr 11.42, was incorrect. The Court "noted that the standards for evaluating potential palpable errors on direct appeal and claims of ineffective assistance of counsel [are] substantially different, with the palpable error standard being more stringent." *Id.* at 157. Furthermore, the Court noted that claims on direct appeal relate to alleged errors made by the trial court, while claims via RCr 11.42 relate to alleged errors made by counsel. *Id.* at 158. Therefore, "appellate resolution of an alleged direct error cannot serve as a procedural bar to a related claim of ineffective assistance of counsel." *Id.*

The Commonwealth argues that *Leonard* should be narrowly construed as applying only to those cases involving direct appeal of unpreserved trial error with subsequent ineffective assistance of counsel claims based on failure

to preserve the error. We disagree. Had the Supreme Court wanted to limit its holding in *Leonard* to those cases it certainly could have done so. In fact, the Supreme Court could have decided *Leonard* by simply stating that the new rule announced in *Martin* could not be applied retroactively. The Supreme Court did not need to expound on its holding in *Martin,* and we do not believe that it did so without purpose. Reading *Leonard* as a whole, we believe that the Supreme Court extended the holding in *Martin* to encompass all cases where an ineffective assistance of counsel claim is related to a claim of direct error. The Supreme Court did not limit *Martin's* application only to those ineffective assistance of counsel claims related to direct error claims involving issues of palpable error. Therefore, we must determine if the trial court, applying the standards set forth in *Leonard* and *Martin,* properly denied Bowman's RCr 11.42 motion.

As noted above, in order to successfully prosecute an ineffective assistance of counsel claim, a defendant who pled guilty must show that counsel made serious errors and that, but for those errors, he would have proceeded to trial. *Sparks,* 721 S.W.2d at 727-28. Bowman argues that counsel was deficient because he did not conduct an adequate investigation. According to Bowman, if counsel had done so, he would have discovered the two potentially corroborating witnesses, Skinner and Imus, before Bowman entered his guilty plea. Bowman asserts that, had he known of the existence of these witnesses, he would not have pled guilty.

The Commonwealth argues that Bowman's counsel conducted a sufficient investigation. Furthermore, the Commonwealth argues that, even if counsel had discovered Skinner and Imus, they would not have been permitted to testify. Therefore, any deficiency in investigation was not prejudicial to Bowman.

We begin by addressing the Commonwealth's arguments regarding the admissibility of testimony from Skinner and Imus. Initially we note that, because Bowman pled guilty, no testimony was presented. Therefore, whether testimony by Skinner and Imus would have been admissible is, in part, speculative. The majority of what is contained in the affidavits of Skinner and Imus is based on what the victim related to them and falls directly within the definition of hearsay. Other portions of those affidavits refer to CC's alleged actions the night in question. The Commonwealth is correct that portions of what is contained in the affidavits, if presented at trial, would be excluded under either Kentucky Rule(s) of Evidence (KRE) 403 as irrelevant or under KRE 412 as inadmissible character and behavior evidence. However, depending on what CC may have said while testifying, some of what she told the witnesses may have been admissible under KRE 801A as inconsistent statement evidence. Furthermore, in light of the Commonwealth's intent to introduce the photograph of CC with no makeup and wearing a cartoon character t-shirt, observations by Skinner and Imus regarding CC's apparent age may have been admissible. Therefore, we cannot agree with the Commonwealth or the trial court that any testimony from the witnesses would be inadmissible under any circumstances.

Having determined that the witnesses may have been permitted to testify, at least in part, and that their testimony may have assisted Bowman, we must next address whether Bowman's counsel conducted a sufficient investigation. The Commonwealth argues that it was reasonable for Bowman's counsel to rely on Bowman to provide the names of potential witnesses. We agree. However, because the trial court did not hold an evidentiary hearing on Bowman's motion, we cannot discern whether or not that occurred. In fact, without an evidentiary hearing, we cannot determine what investigation took place. Therefore, we must remand this matter to the trial court with instructions to hold an evidentiary hearing regarding the adequacy of the investigation performed by Bowman's counsel. Following that hearing, the trial court will be free to determine whether Bowman did or did not receive effective assistance from counsel. Because Bowman is entitled to a hearing on his ineffective assistance of counsel claim, the trial court shall appoint counsel if Bowman otherwise qualifies.

CONCLUSION

Based on the preceding and our interpretation of *Leonard v. Commonwealth* and *Martin v. Commonwealth*, we vacate the trial court's finding with regard to Bowman's ineffective assistance of counsel claim. We remand this matter for an evidentiary hearing by the trial court on that claim.

ALL CONCUR.

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