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Supreme Court of Kentucky **FINAL**

2006-SC-000167-MR

DATE 5-10-07 E.A. Groun, DC.

BROCK BOWLING

APPELLANT

V. APPEAL FROM CLAY CIRCUIT COURT
HONORABLE R. CLETUS MARICLE, JUDGE
NO. 04-CR-00165-001

COMMONWEALTH OF KENTUCKY

APPELLEE

AND 2006-SC-000168-MR

DEWEY SHANNON FINLEY

APPELLANT

V. APPEAL FROM CLAY CIRCUIT COURT
HONORABLE R. CLETUS MARICLE, JUDGE
NO. 04-CR-00165-003

COMMONWEALTH OF KENTUCKY

APPELLEE

AND 2006-SC-000169-MR

TIMOTHY WILLIS FINLEY

APPELLEE

V. APPEAL FROM CLAY CIRCUIT COURT
HONORABLE R. CLETUS MARICLE, JUDGE
NO. 04-CR-00165-004

COMMONWEALTH OF KENTUCKY

APPELLANT

MEMORANDUM OPINION OF THE COURT

AFFIRMING IN PART, REVERSING IN PART, AND VACATING IN PART

Appellants, Brock Bowling, Timothy Finley, and Shannon Finley, were jointly tried for the murder of Jimmy Mills. Each was found guilty of complicity to murder Mills. Additionally, Brock Bowling and Shannon Finley were convicted of tampering with physical evidence. Each was sentenced to twenty years' imprisonment for the complicity to murder charges. Brock Bowling and Shannon Finley were sentenced to an additional one-year term, to be served concurrently, for the tampering with physical evidence charge. They appeal to this Court as a matter of right, Ky. Const. §110(2)(b). For the reasons set forth herein, we vacate in part, reverse in part, and affirm in part.

I. Facts

The charges in this case arise from the death of Jimmy Mills, a known drug dealer. About a month before his own death, Mills shot and seriously wounded David Hoskins in Clay County. Mills fled first to Lexington, and then to Cancun, Mexico. He was accompanied by his girlfriend, Angela Fox. Following a two-week stay in Mexico, Mills returned to the United States only to be arrested at the Atlanta airport for the assault on Hoskins. Mills was taken to Kentucky and charged, posted bond two days later, and was released.

Mills went home and spent the evening with his wife, Donna Mills. The next morning, Mills left around 7:45 a.m. According to Donna, his plan was to meet with his attorney in London at 2:00 p.m. and then travel to the Cincinnati airport to retrieve his luggage, which had been abandoned upon his arrest in Atlanta. He further explained that he wanted Brock Bowling to accompany him, but that Brock's wife had a doctor's appointment. Instead, Mills told Donna that Josh Crabtree would make the trip with him.

Before he left, Mills also said to Donna, "I think they've robbed me," although he did not clarify to whom he was referring. He then indicated that he was going to Brock's house, and departed. When he left, according to Donna, Mills was wearing sweat pants. She testified that he would not have gone to his attorney's office dressed that way, indicating her belief that he intended to return home prior to leaving for the trip to London and Cincinnati.

The following day, Mills' body was found at the bottom of a ravine in Big Double Creek Park. The body was spotted by Donna Mills' cousin, Jimmy Henson, while he was deer hunting. Mills had been shot three times with a pistol. The body was wrapped in a tablecloth and covered with a garbage bag. An area rug was also found at the crime scene; investigating officers surmised that the body had been wrapped in the rug but had come loose as it rolled down the ravine. DNA material found under Mills' fingernails did not match Brock Bowling, Timothy Finley, Shannon Finley, or Brock's brother, Dennis Bowling. Donna Mills was included as a possible source of the DNA. Blood found on the area rug matched Mills'. Though three hairs were recovered from the rug, there was no DNA material detected. However, Mary Begley, a neighbor of Dennis Bowling, testified that the area rug looked "similar" to one that he owned.

Five days later, a trailer rented by Dennis Bowling caught fire at about four in the morning. Brock was present at the trailer, fully dressed, when it burned. Because the trailer was not insured by its owner, Darryl Collins, no arson investigation was conducted. After this initial fire, Brock asked Collins if he could tear or burn down what remained of the trailer. Speaking on behalf of his brother, Brock explained that Dennis was expecting a home visit from the attorney appointed to represent his children in a custody dispute. Apparently, Dennis desired to replace the trailer prior to the home

visit. Collins agreed, though he testified to his belief that the trailer would be bulldozed, not burned again. The remaining portions of the trailer were burned down and hauled away by Shane Wagers and Joseph Collins.

Wagers and Collins both testified at trial regarding the circumstances of this second fire at the trailer. Collins stated that he had seen Brock's car near the trailer as it burned. Wagers alleged that Shannon Finley had set the fire. According to Wagers, he saw Shannon Finley and another man, Shannon Begley, get a red gas can off a truck. The two men left for some time, and when they returned Wagers said they were "wet" and "in a hurry." Moments later, Wagers heard fire trucks headed towards Dennis Bowling's trailer. A red gas can was found lying on the floor of the trailer following the fire.

Wagers further testified that, the following day, Brock approached him about burning down or hauling away the remains of the trailer for \$100. Wagers agreed and did the job with Collins. Wagers also stated that Timothy Finley later approached him and asked him to "change his story," but that he didn't know what Timothy was talking about. However, on cross-examination, Wagers admitted his belief that Timothy wanted him to say that Darrel Collins – not Brock – had asked him to remove the trailer's remnants.

About a month later, Mills' vehicle was located in a remote area of Leslie County near Ulysses Creek by two horseback riders. The location is near the Clay County line. According to the responding officers, the vehicle was found at the top of an ATV trail that had grown over. Fingerprints were lifted from the vehicle, as well as 47 trace samples, including hair, particles, and fabric. None of these trace samples matched Brock and Dennis Bowling, or Shannon and Timothy Finley. However, Ronald Collins

testified that he saw Brock walking near the Clay County/Leslie County line on the morning that Mills' body was found.

The investigation into Mills' murder then languished for about six months. The following July, Christine Gibson gave a statement to the lead investigator, Detective Hopkins. At the time, Gibson was in jail on domestic violence charges and, according to her own testimony, she gave the statement in order to get out of jail. She told Detective Hopkins that she witnessed her husband, J. C. Gibson, helping Brock Bowling and the Finley brothers disposing of Mills' body. Her testimony at trial, however, was less detailed and excluded her husband. At trial, Gibson testified that she and her husband had seen Brock Bowling and the Finley brothers at about three o'clock in the morning on the day Mills' body was found. The three were in a red pickup truck near the entrance to Double Creek Park. The Gibsons followed them just inside the park's entrance, where they stopped so Christine could use the restroom. When she got out of her own vehicle, Christine stated she got a closer look at the truck and saw that there was an area rug rolled up in the back of the truck, and that something appeared to be inside the rug. J. C. Gibson corroborated this testimony. However, J. C. further testified that the following day, Brock and Timothy asked him whether "the law" had been up in the park that morning. Notably, the Gibsons' testimonies differed as to who was driving their own vehicle that night. Christine testified that J. C. was driving, while J. C. testified that Christine was driving. Both admitted that they had been using cocaine and other prescription medications the entire day before witnessing this incident.

Two months later, a Clay County Grand Jury returned an indictment charging eight individuals with involvement in Mills' death: Brock Bowling, Dennis Bowling, Timothy Finley, Shannon Finley, Angela Fox, Shane Wagers, Joseph Collins, and J. C.

Gibson. Joseph Collins pled guilty to criminal conspiracy to commit arson and tampering with physical evidence in exchange for a probated sentence of two years. Shane Wagers, who had been indicted on charges of arson and tampering with physical evidence, pled guilty and received a two-year sentence with pretrial diversion in exchange for his testimony at trial. J. C. Gibson's two counts of tampering with physical evidence were dismissed in exchange for his testimony. Identical charges against Angela Fox were likewise dismissed in exchange for her testimony. The remaining indictees – Brock Bowling, Dennis Bowling, Timothy Finley and Shannon Finley – proceeded to trial.

They were tried jointly. Following the close of all evidence, Dennis Bowling moved for a directed verdict of acquittal, which was granted. The remaining defendants – Brock Bowling, Timothy Finley and Shannon Finley – were each found guilty of murder under a combination principal-accomplice instruction. Brock and Shannon were also found guilty of tampering with physical evidence for the destruction of the trailer. Each received a sentence of twenty years' imprisonment. Brock and Shannon received an additional one-year sentence for the tampering with physical evidence charges, to be served concurrently.

Brock Bowling, Shannon Finley, and Timothy Finley separately appeal to this Court as a matter of right. In the interest of judicial economy, and because each case arises from the same facts, we have considered these appeals together, though we address each Appellant's arguments separately. For the reasons set forth below, we vacate in part, reverse in part, and affirm in part.

Further facts will be developed as necessary.

II. Arguments

All three Appellants raise the following allegations of error: (1) that each was entitled to a directed verdict on all charges; (2) that the trial court erroneously admitted the testimony of Angela Fox in violation of KRE 404(b); (3) that the trial court erred in instructing the jury; and (4) that photographs of the area rug found with Mills' body were erroneously admitted. In addition, Shannon and Timothy argue that the trial court erred to their substantial prejudice when it read the complicity instruction to the jury. Finally, Shannon alone argues that the trial court erred in failing to set aside inconsistent verdicts.

A. Sufficiency of the Evidence & Jury Instructions: Murder

Each Appellant argues that he was entitled to a directed verdict of acquittal on the murder charges. The arguments are preserved by counsels' motions for directed verdicts, all of which were denied. As a related argument, each Appellant challenges the jury instructions as related to the murder charges. These arguments are preserved by counsels' contemporaneous and specific objections to the instructions prior to their delivery. RCr 9.54(2).

Upon thorough review of the record, we conclude that the trial court erred in instructing the jury as to murder with respect to Timothy and Shannon, as each was entitled to a directed verdict on that charge. The trial court properly denied a directed verdict of acquittal as to Brock. However, though he was not entitled to a directed verdict, the trial court nonetheless erred in delivering a combination jury instruction as to Brock.

As a preliminary matter, it must be noted that each Appellant was found guilty of murder pursuant to a combination principal-accomplice jury instruction. Instruction 3 instructed the jury as to murder. Instruction 4 instructed the jury as to complicity to

murder, pursuant to KRS 502.020(2). Instruction 5 authorized a guilty verdict if the jury believed the defendant was guilty under Instruction 3 or 4, but could not determine whether the defendant acted as a principal or accomplice.

When a criminal defendant is found guilty under a combination principal-accomplice instruction, the evidence presented at trial must be sufficient to support a finding under both instructions, otherwise the verdict is not unanimous. Wells v. Commonwealth, 561 S.W.2d 85 (Ky. 1978). See also Halvorsen v. Commonwealth, 730 S.W.2d 921, 924 (Ky. 1986). Accordingly, the sufficiency of the evidence as to each Appellant's complicity to murder conviction must be assessed under both the principal theory and the accomplice theory.

When presented with a motion for a directed verdict of acquittal, the trial court must examine the evidence, drawing all fair and reasonable inferences in favor of the Commonwealth. Commonwealth v. Sawhill, 660 S.W.2d 3 (Ky. 1983). "If the totality of the evidence is such that the trial judge can conclude that reasonable minds might fairly find guilt beyond a reasonable doubt, then the evidence is sufficient and the case should be submitted to the jury." Hodges v. Commonwealth, 473 S.W.2d 811 (Ky. 1971). On appeal, the denial of a directed verdict of acquittal will be upheld if, under the evidence as a whole, it would be clearly unreasonable for a jury to find the defendant guilty. Sawhill, Id. at 5.

Timothy Finley

The Commonwealth's theory of this case was that Brock Bowling, Timothy Finley and Shannon Finley killed Mills at Dennis Bowling's trailer, and that his body was later taken to Double Creek Park. The trailer was burned to hide evidence of the crime. The Commonwealth also theorized that the murder occurred because Mills, Bowling and the

Finley brothers were involved in a drug trafficking conspiracy and that a dispute had arisen over money.

The evidence that Timothy was involved in a drug trafficking conspiracy came from Angela Fox, who testified that on one occasion Timothy had brought cocaine and marijuana to a Lexington hotel where she was staying with Mills for the purpose of selling it in Northern Kentucky. She could not recall exactly when this incident occurred. The testimony linking Timothy to Mills' death came solely from J. C. and Christine Gibson's accounts of the disposal of Mills' body at Double Creek Park. J. C. Gibson further testified that the next day Timothy inquired whether the police had been up in Double Creek Park. No physical evidence was found on Mills' person or his vehicle that linked Timothy to Mills' death. There was no testimony establishing that Timothy was with Mills before or at the time of his death. Nor did the Commonwealth present any evidence that Timothy was at Dennis Bowling's trailer that day, the alleged scene of the crime.

Clearly, the case against Timothy was largely circumstantial. Circumstantial evidence is evidence that makes the existence of a relevant fact "more likely than not." Timmons v. Commonwealth, 555 S.W.2d 234, 237-38 (Ky. 1977). Such evidence "is sufficient to support a criminal conviction so long as the evidence, taken as a whole, shows it would not be clearly unreasonable for the jury to find the defendant guilty." Nugent v. Commonwealth, 639 S.W.2d 761, 763 (Ky. 1982). However, if circumstantial evidence is to prove the commission of a crime, it "must do more than point the finger of suspicion." Ratliff v. Commonwealth, 194 S.W.3d 258, 267 (Ky. 2006). Rather, when a case is entirely circumstantial, the evidence offered must be "of sufficient probative

value to justify submitting the case to a jury.” Elmore v. Commonwealth, 520 S.W.2d 328, 331 (Ky. 1975).

Here, the evidence presented by the Commonwealth implicated Timothy only in the removal and concealment of Mills’ body. Still, such circumstances create a legitimate inference that the person in possession of a dead body actually committed the crime. In fact, this Court has long recognized that acts of concealment are circumstantial evidence relevant to the issue of guilt. Welborn v. Commonwealth, 157 S.W.3d 608, 615 (Ky. 2005). See also Davis v. Commonwealth, 204 Ky. 601, 265 S.W. 10 (1924). However, can such evidence alone support a conviction for murder under a combination principal-accomplice theory?

In the strikingly similar case of People v. Galbo, 218 N.Y. 283, 112 N.E. 1041 (1916), eyewitnesses viewed Galbo and his brother carrying a large barrel towards a remote area. The victim’s body was ultimately found at the bottom of a nearby ravine in a wooden barrel. While several pieces of evidence linked the barrel to Galbo and his brother, no evidence was presented connecting him to the actual commission of the crime. In fact, it was physically impossible for Galbo, confined to a wheelchair, to have committed the murder, but he was nonetheless indicted as his brother’s accomplice because he was seen in the wagon. The State argued that possession and concealment of the corpse was sufficient evidence upon which to convict for the homicide as an accomplice.

The court disagreed, as the evidence only created equally legitimate inferences: “We have no evidence, direct or circumstantial, that the actual perpetrator was assisted by anyone. [Galbo] may have known of it in advance, and planned or encouraged [the crime]. He may have learned of it later, and attempted to shield the criminal.” Id. at

293. Judge Cardozo, writing for the court, acknowledged that the circumstances created a strong inference of guilt, but cautioned against convictions resting on multiplied inferences:

Even then, incriminating inferences remain possible; *but unless other circumstances are shown*, there is no principle of selection, aside from the presumption of innocence, to guide the choice between them. The guilty possessor of the body, though he did not use the weapon, may still have aided and abetted; but unless there are tokens that several joined in the affray, the likelihood of his presence is no greater than the likelihood of his absence.

Id. at 292. (Emphasis added).

Almost a century later, the circumstances herein are nearly identical. Timothy's participation in the disposal of Mills' body created a very compelling inference of his guilt. However, the Commonwealth presented absolutely no other evidence linking him to the actual commission of the crime. Moreover, if the jury was to believe Timothy participated as an accomplice, the Commonwealth offered no evidence to prove in what manner he assisted or aided the principal in committing the crime, or that a common plan between him and Brock or Shannon existed, or even that two perpetrators were present at the crime scene. In fact, in its closing argument, the Commonwealth argued that one person fired all three shots at Mills. Absent some other evidence or circumstance linking Timothy to Mills' murder, the weapon, or even the scene of the crime, there was simply no basis to convict Timothy as either the principal or accomplice. For this reason, the trial court erred in failing to direct a verdict of acquittal.

Shannon Finley

The case against Shannon Finley rested primarily on the same evidence as that against his brother. However, Shannon was implicated additionally in the destruction of Dennis Bowling's trailer. Wagers' testimony indicated that Shannon had set the fire and

fled the scene of that crime. As directly related to the murder, the Gibson testimony linked Shannon to the removal of Mills' body. However, no reason was given as to why Shannon would kill Mills. While Angela Fox tenuously linked Timothy to a drug trafficking operation to establish a motive, no such testimony was offered against Shannon.

As with the case against Timothy, the Commonwealth's evidence was insufficient to support a finding that Shannon assisted someone else in Mills' murder or that he actually committed the crime. Even when viewed in its totality, the circumstantial evidence against Shannon did not create an overall picture of the crime upon which to find him guilty beyond a reasonable doubt. It only established an unsubstantiated possibility. Cf. Elmore, 520 S.W.2d at 331-32. (circumstantial evidence was sufficient to support conviction where victim was last seen drinking with defendant near bridge, victim's body was found under bridge, victim's truck never left defendant's driveway, and blood was found at bridge and on truck). Absent some other circumstance or evidence, Shannon's involvement in the cover-up of a crime cannot be the sole basis for a finding that he actually committed the crime. The trial court erred in failing to direct a verdict of acquittal against Shannon.

Brock Bowling

The Commonwealth's strongest case was against Brock. Angela Fox's testimony more deeply implicated Brock in a drug trafficking ring with Mills. She testified that she had once witnessed Brock purchase over a thousand dollars worth of drugs from Mills. Significantly, she attested that Mills stored money obtained through his drug dealing operations at Brock's home. Donna Mills testified that Mills said he was going to see Brock just before he departed, and that he said, "I think they've robbed

me.” The day after the murder allegedly occurred, Brock was seen walking along the county line, near the area where Mills’ vehicle was ultimately found. J. C. and Christine Gibson testified that they saw Brock, with the Finley brothers, entering Double Creek Park in the middle of the night with a rolled-up area rug in the back of their pickup truck. Of course, Mills’ body was found in the same park shortly thereafter, along with an area rug. The testimony of Wagers and Collins involved Brock in the destruction of his brother’s trailer.

When viewed in its totality, the circumstantial evidence against Brock creates a sufficiently detailed and complete picture of the crime upon which a jury could find Brock guilty of Mills’ murder. The key difference in Brock’s case, as opposed to either Finley brother, is that the Commonwealth presented evidence placing Brock with Mills *prior* to his death. Furthermore, the fact that Mills was shot three times at close range is sufficient evidence from which the jury could conclude that the killing was intentional. A jury can also infer intent from conduct subsequent to the crime, including attempts to conceal the crime. Parker v. Commonwealth, 952 S.W.2d 209 (Ky. 1997). The evidence was sufficient to overcome a directed verdict motion as to the murder-principal charge against Brock. Cf Nugent, 639 S.W.2d at 763-64. (circumstantial evidence was sufficient to support conviction where victim was last seen going to defendant’s business to conduct drug transaction, victim’s body was found on defendant’s property, defendant was seen driving payloader in the area where victim’s body was found, and victim was killed by gun of same type owned by defendant).

However, Brock was found guilty pursuant to the combination principal-accomplice instruction. As explained above, to warrant delivery of a combination instruction, the evidence must be sufficient to prove guilt under either theory.

Halvorsen, id. Thus, we must determine whether the evidence was also sufficient to convict Brock of complicity to murder.

The complicity to murder instruction directed the jury to find Brock guilty of complicity to murder if it believed that Shannon or Timothy Finley intentionally killed Mills by shooting him with a pistol, and that Brock “was then and there present or nearby and was aiding counseling or attempting to aid Shannon Finley and/or Timothy Finley in planning or committing the offense.” As detailed above, the Commonwealth failed to present any evidence that either Shannon or Timothy Finley committed the murder, either as an accomplice or as a principal. Logic dictates that the evidence is, therefore, insufficient to prove that Brock assisted either Shannon or Timothy in the commission or planning of Mills’ murder. For this reason, the trial court erred in delivering the complicity to murder instruction and the combination principal-accomplice instruction to the jury as to Brock. Furthermore, Brock was denied his right to a unanimous verdict, Ky. Const. §7, where he was found guilty pursuant to a combination instruction and the evidence was insufficient to support one of the theories propounded. Halvorsen, 730 S.W.2d at 925.

Summation

Because insufficient evidence was presented to support the conviction, Timothy Finley’s murder conviction is hereby vacated. Shannon Finley’s murder conviction is vacated. Because there was insufficient evidence to support a conviction for complicity to murder, Brock Bowling’s murder conviction is hereby reversed and remanded to the Clay Circuit Court for further proceedings consistent with this opinion.

B. Sufficiency of the Evidence: Tampering with Physical Evidence

Shannon and Brock each were convicted of tampering with physical evidence as a result of the burning of Dennis Bowling's trailer. Both now argue that the evidence was insufficient to support the convictions. The issue is preserved by counsels' motions for directed verdicts of acquittal.

Brock first calls our attention to the fact that the jury instructions indicated that Brock burned the trailer "on or about November 14, 2003," though all evidence indicated that the trailer burned on November 20, 2003. Because it was apparent from the testimony and counsels' arguments that all parties understood the fire occurred on November 20, 2003, the error appears to be simply clerical or typographical. We have previously held that typographical errors regarding the date of the crime do not affect a defendant's substantial rights warranting reversal. Howe v. Commonwealth, 462 S.W.2d 935, 937-38 (Ky. 1971).

The evidence established that Dennis' trailer burned about five days after Mills' death. The Commonwealth presented testimony that, prior to the fire at the trailer, large squares of linoleum had been removed from the kitchen floor. Based on this circumstance, the Commonwealth argued that Mills had been killed in the kitchen and that Brock and Shannon were aware that the trailer would be used as evidence. Wager's testimony indicated that, moments before the fire broke out, Shannon was in possession of a red gas can similar to the one later found in the trailer's kitchen. Though the fire occurred at four a.m., Brock was present and fully dressed. The following day, Brock also requested Wagers to tear down the remaining portions of the trailer as soon as possible, which he did at Brock's direction.

Wagers' testimony alone provided sufficient evidence to convict Shannon of tampering with physical evidence. It was not clearly unreasonable for the jury to find

guilt, and therefore the trial court properly denied the motion for a directed verdict. Sawhill, 660 S.W.2d at 5. As to Brock, though the evidence more clearly supported the theory that he was complicit in the destruction of the trailer, he was convicted of tampering with physical evidence as a principal. Still, viewing the totality of the evidence surrounding Mills' death, the fact that Brock was present at the scene of the crime and his later hurried attempts to fully destroy the trailer provided the requisite scintilla of evidence to submit the case to the jury. Sawhill, 660 S.W.2d at 6. The motions for a directed verdict were properly denied.

C. Additional Allegations of Error

Brock argues that the trial court erred in admitting Angela Fox's testimony concerning Mills' drug trafficking operation and Brock's involvement in such on two grounds. First, Brock contends that he was given insufficient notice of the testimony pursuant to KRE 404(c). This circumstance is unlikely to recur upon retrial, and therefore we need not address it. Terry v. Commonwealth, 153 S.W.3d 794, 797 (Ky. 2005). Brock additionally challenges the testimony on the grounds that it was unduly prejudicial and irrelevant. We find no abuse of discretion in the admission of this testimony. Commonwealth v. English, 993 S.W.2d 941, 945 (Ky. 1999). Evidence of Brock's involvement in Mills' drug trafficking scheme established a motive and was therefore admissible pursuant to KRE 404(b). See Young v. Commonwealth, 50 S.W.3d 148, 167-68 (Ky. 2001).

Brock also argues that the trial court erroneously admitted photographs of the area rug found with Mills' body and allegedly removed from Dennis Bowling's trailer. Due to the Commonwealth's violation of a discovery order, the rug itself was excluded from evidence. However, the trial court permitted photographs of the rug to be

introduced. Again, this circumstance is unlikely to recur upon retrial and we therefore decline to address it. Terry, id.

III. Conclusion

For the foregoing reasons, in *Timothy Finley v. Commonwealth*, we hereby vacate the conviction. In *Shannon Finley v. Commonwealth*, we vacate the murder conviction and affirm the tampering with physical evidence conviction. In *Brock Bowling v. Commonwealth*, we reverse the murder conviction and remand to the Clay Circuit Court for further proceedings consistent with this opinion. We affirm the tampering with physical evidence conviction in that case.

All sitting. All concur.

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