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RENDERED: MAY 14, 2015
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2013-SC-000731-MR

ANDRE FELLIPE WILSON — APPELLANT

V.

ON APPEAL FROM BOONE CIRCUIT COURT
HONORABLE JAMES ROGER SCHRAND II, JUDGE
NO. 13-CR-00224

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING IN PART, REVERSING IN PART AND REMANDING

Appellant, Andre Fellipe Wilson, appeals his conviction in Boone Circuit Court for theft by unlawful taking over $500.00 and for being a first-degree persistent felony offender. He also appeals the assessment of court costs in the amount of $156.00 and the imposition of a fine of $5,000.00. As grounds for relief Appellant contends that: (1) the evidence was insufficient to prove that he took property worth more than $500.00; (2) erroneous testimony was presented during the sentencing phase concerning good behavior credit; (3) his sentence is cruel and unusual punishment because it is grossly disproportionate to the nature of his crime; and (4) the imposition of a fine and the assessment of court costs was erroneous in light of his status as an indigent defendant pursuant to KRS Chapter 31.

For the reasons explained below, we reverse the imposition of the $5,000.00 fine and remand for entry of a judgment excluding the fine. We affirm on all other issues raised.

I. FACTUAL AND PROCEDURAL BACKGROUND

By way of a security camera located in the men's department of a Macy's department store in Boone County, Appellant was seen placing items of clothing into a trash bag, tying the top of the bag, and leaving the store without paying for the items. Loss prevention detective Levi Turner detained Appellant as he exited the store. Turner also discovered that Appellant was wearing a jacket with a Macy's price tag and security device still attached, although Turner had not seen how Appellant acquired that garment. Appellant had no receipts for any of the items; he surrendered the trash bag and the jacket to Turner.

The trash bag contained four pairs of pants and four hooded sweatshirts having a combined retail value of $377.96. The retail value of the jacket was $150.00, and so the total value of the stolen merchandise was $527.96, which exceeds by $27.96 the minimum threshold for a felony theft charge.[1] Appellant admitted the theft to Turner and signed an itemized list of the stolen articles, which included the jacket.

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[1] KRS 514.030(2) provides, in relevant part, that theft by unlawful taking is a Class A misdemeanor unless "(d) The value of the property is five hundred dollars ($500.00) or more but less than ten thousand dollars ($10,000.00), in which case it is a Class D felony."

At trial, Appellant again admitted to stealing the items in the bag just before he was apprehended, but he further claimed that he had stolen the jacket on an earlier occasion. He contends that because the jacket was not stolen concurrently with the other items, its value should not have been consolidated with the other items to reach the $500.00 threshold that elevated his crime to a felony. Consequently, he complains that the trial court erred when it denied his motion for a directed verdict on the felony charge and declined to submit the case to the jury only as a misdemeanor theft relating to the items found in the trash bag. The jury found him guilty of theft by unlawful taking of property worth more than $500.00. As enhanced by the first-degree persistent felony offender conviction, Appellant was sentenced to twenty years' imprisonment.

II. THE EVIDENCE WAS SUFFICIENT TO WARRANT AN INSTRUCTION ON FELONY THEFT

We first consider Appellant's argument that he was entitled to a directed verdict on the felony theft charge because there was insufficient evidence to establish that he stole merchandise worth more than $500.00 on the occasion of his arrest. There is no doubt that without the addition of the jacket, the value of the stolen items is below the felony threshold of $500.00; and correspondingly, if the theft of the jacket was contemporaneous with the theft of the other items and its value is included in the total, the felony threshold was clearly surpassed. Appellant contends that the evidence did not support a finding that the jacket was stolen concurrently with the other items, and so he

argues that his motion for a directed verdict on the felony theft charge should have been granted. He concedes that the case should have gone to the jury only upon the misdemeanor theft of items worth less than $500.00.

At this point, we note that a motion for a directed verdict is an improper procedural means "for obtaining any relief short of complete acquittal." *Trowel v. Commonwealth*, 550 S.W.2d 530, 531 n.1 (Ky. 1977). Because Appellant contends that he was at most guilty of the lesser offense of theft by unlawful taking of property worth less than $500.00, the more appropriate procedural course would have been an objection to the giving of a jury instruction on the felony theft. *Kimbrough v. Commonwealth*, 550 S.W.2d 525, 529 (Ky. 1977) ("When the evidence is insufficient to sustain the burden of proof on one or more, but less than all, of the issues presented by the case, the correct procedure is to object to the giving of instructions on those particular issues."). And, where the evidence is *not* sufficient to prove the commission of the greater offense, but it is sufficient to satisfy the burden of proof on a lesser included offense, "the way to preserve the issue regarding the insufficiency of the evidence is to make a timely objection to the jury instruction on the unproved offense." *Commonwealth v. Jones*, 283 S.W.3d 665, 670 n.1 (Ky. 2009) (citing *Kimbrough* and *Campbell v. Commonwealth*, 564 S.W.2d 528, 530 (Ky. 1978)).

Despite *Trowel*, *Kimbrough*, and *Jones*, both parties have argued the matter as an issue under the *Benham* directed verdict standard.[2] Because the

[2] *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991).

two analyses are conceptually similar and, at least in this case, would produce the same result, we address the issue under both standards.

To ascertain whether the jury instruction on felony theft was correct, "we must ask ourselves, construing the evidence favorably to the proponent of the instruction, whether the evidence would permit a reasonable juror to make the finding the instruction authorizes." *Springfield v. Commonwealth*, 410 S.W.3d 589, 594 (Ky. 2013) (A trial court's decision concerning whether to give an instruction is reviewed under the "reasonable juror" standard.). *See also Allen v. Commonwealth*, 338 S.W.3d 252, 255 (Ky. 2011). Analyzed as a directed verdict issue, the question is whether, after all fair and reasonable inferences are drawn in favor of the prosecution, the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty. *Benham*, 816 S.W.2d at 187. A directed verdict is appropriate *only* "if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt." *Id.*

Under both analyses the question turns upon whether reasonable jurors could believe from the evidence beyond a reasonable doubt that the theft of the jacket occurred concurrently with the theft of the other items. We conclude that they could, and thus we hold that sufficient evidence was presented at trial to support a reasonable juror's belief that Appellant stole items worth more than $500.00.

Paramount among the evidence presented was the fact that the jacket still had Macy's price tag and security device attached to it. The jury was

certainly not compelled by the evidence to accept Appellant's claim that, having successfully stolen a jacket on a prior occasion, he then returned to the same store wearing the stolen jacket, with its price tag and security device still attached, while he committed another round of thefts. Appellant's possession of the jacket under the attendant circumstances robustly suggests that he stole it at the same time he took the other items. Further, after being apprehended by the store detective, Appellant handed over the jacket along with the other items, an act which a reasonable juror could readily construe as an acknowledgment that he had just stolen the jacket. And finally, upon returning to the store detective's office, Appellant signed a written confession wherein he admitted to stealing all of the items found in his possession, including the jacket.

A "[c]onviction can be premised on circumstantial evidence of such nature that, based on the whole case, it would not be clearly unreasonable for a jury to find guilt beyond a reasonable doubt." *Graves v. Commonwealth*, 17 S.W.3d 858, 862 (Ky. 2000). Based on the evidence as a whole, it was not unreasonable for a jury to conclude that upon the occasion of his arrest, Appellant had stolen items from Macy's worth more than $500.00. Accordingly, the trial court did not err by instructing the jury on theft by unlawful taking over $500.00; and Appellant was not entitled to a directed verdict on that charge.

III. INACCURATE TESTIMONY ABOUT THE STATUTORY SENTENCING CREDIT FOR GOOD BEHAVIOR DID NOT RESULT IN PALPABLE ERROR

Appellant contends that the probation and parole officer who testified for the Commonwealth at the penalty phase of the trial gave erroneous information to the jury concerning the KRS 197.045(1)(b)1 ten-day statutory good behavior credit provision. Appellant concedes that this issue is not preserved, but requests palpable error review under RCr 10.26.

During the sentencing phase, the probation and parole officer explained to the jury that an inmate's actual incarceration time may be reduced by application of the various sentencing credits provided by KRS 197.045. She told the jury that if sentenced to a term of imprisonment, Appellant would be granted, in accordance with the good behavior credit time provided for in KRS 197.045(1)(b)1, a ten-day reduction in his sentence for each month he served, which would amount to three months credit per year, or a quarter of the inmate's sentence.[3] She also explained that this credit was awarded when the inmate's sentence was "initially calculated" and could then be forfeited as a result of disciplinary action. The prosecutor then asked "[s]o right off the bat, [inmates] are given ten days a month from the beginning of their sentence towards their sentence?" The witness confirmed that statement and then again explained that as long as inmates do not misbehave, they get three months (ninety days) a year of KRS 197.045(1)(b)1 statutory credit.

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[3] Conceptually, for each thirty days served a prisoner is awarded ten good behavior days, and so ten out of every forty days calculated as having been served, or one-fourth, is good behavior credit (assuming the maximum credit each month).

Citing to our holding in *Robinson v. Commonwealth*, 181 S.W.3d 30, 38 (Ky. 2005), that "a prisoner does not actually receive credit for his good time until he reaches the minimum parole eligibility[,]" which in most cases is after the service of 20% of the sentence, Appellant contends that the probation officer's testimony was false. As further explained in *Robinson*, "[t]he use of incorrect, or false, testimony is a violation of due process when the testimony is material." *Id.* at 38, *citing Martin v. Chandler*, 122 S.W.3d 540 (Ky. 2003).

KRS 197.045(1)(b)1 provides that:

> (1) Any person convicted and sentenced to a state penal institution:
>
> . . . .
>
> (b) May receive a credit on his or her sentence for:
>
> > 1. Good behavior in an amount not exceeding ten (10) days for each month served, to be determined by the department from the conduct of the prisoner;

Because an inmate may only receive good behavior credit "for each month served, to be determined by the department from the conduct of the prisoner," it should be clear that the credit can only be awarded *after* a particular month is "served," because only then may there be an evaluation of "the conduct of the prisoner" so as to determine the amount of credit he will receive for that particular month.[4] And even then, the statutory good behavior time is limited to being listed in the sentence calculation on the prisoner's

[4] Of course, internal records may also be kept concerning an inmate's minimum serve-out time in which a hypothetical ten days maximum per month is attributed to him in order to do this useful calculation. By the same token, however, undoubtedly records are also kept concerning the inmates maximum serve-out time in which it is assumed that he receives no good behavior credit.

resident record card; the prisoner does not actually "receive" credit for his good behavior time until he reaches the minimum parole eligibility date. *Robinson* at 38. Here, Appellant was convicted of being a first-degree persistent felony offender with the associated underlying felony being a Class D felony. Under these circumstances, Appellant will not actually receive his credits until he serves twenty percent of his twenty-year sentence, and so accordingly he will not actually receive his good behavior credit until he has served four years of his sentence. KRS 532.080(7);[5] 501 KAR 1:030 § 3(b); *Robinson*, 181 S.W.3d at 38. Therefore, the probation officer's assent to the prosecutor's statement that Appellant would be credited with a good behavior credit against his sentence "right off the bat" was an incorrect representation of KRS 197.045(1)(b)1.

Appellant contends that the error was prejudicial because it left the jury with the impression that Appellant's sentence would start out with a reduction of ten days for every month. In fact, Appellant's statutory good time credit of ten days for each month served would be granted only if he qualified by his good behavior *after* each month of the sentence was served.

Under RCr 10.26, we may grant relief for an unpreserved error only when the error is: (1) palpable; (2) affects the substantial rights of a party; and (3) has caused a manifest injustice. *Commonwealth v. Jones*, 283 S.W.3d 665, 668 (Ky. 2009). "Manifest injustice" requires showing a probability of a different result or error so fundamental as to threaten a defendant's

[5] The ten year minimum parole eligibility requirement for a first-degree persistent felony offender does not apply to a Class D felony.

entitlement to due process of law, i.e., the error so seriously affected the fairness, integrity, or public reputation of the proceeding as to be "shocking or jurisprudentially intolerable." *Martin v. Commonwealth*, 207 S.W.3d 1, 3-4 (Ky. 2006).

Here, while the inartful articulation of KRS 197.045(1)(b)1's good behavior credit was imprecise in that it did not faithfully describe the manner in which the credit would be awarded, the explanation indicated correctly that the maximum credit, if granted, would amount to three months per year, and that any credits so awarded could be forfeited by subsequent misbehavior. However misleading the "right off the bat" comment may have been, the issue was ultimately clarified. By and large, the testimony fairly described the overall effect of good behavior credit on a prisoner's ultimate imprisonment time.

We conclude, therefore, that the initial inaccuracy was not *"material"* as required for relief under the *Robinson* standard. We are not persuaded that the deficiency in the probation officer's testimony resulted in a different sentence than would have been produced by an impeccably accurate description of the process. The deficiency in the testimony did not result in an error so fundamental that Appellant's entitlement to due process was threatened. Therefore, Appellant is not entitled to relief under RCr 10.26.

IV. APPELLANT'S SENTENCE WAS NOT CRUEL AND UNUSUAL PUNISHMENT

As provided in KRS 514.030(2)(d), theft by unlawful taking of property valued at $500.00 or more but less than $10,000.00 is a Class D felony. The

sentencing range for a Class D felony is a prison term of not less than one year, nor more than five years. However, Appellant's contemporaneous conviction as a first-degree persistent felony offender enhanced the range of his potential sentence to the Class B felony level of ten to twenty years. KRS 532.080(6)(b).

Appellant contends that his twenty year sentence violates the "cruel and unusual punishments" provision of the Eighth Amendment and the similar "cruel punishment" provision of Section 17 of the Kentucky Constitution. While conceding that, as a recidivist, he is subject to an enhanced sentence, Appellant argues that his sentence far exceeds any reasonable recidivism enhancement for the crime he actually committed: a single, non-violent theft of clothing. He further notes that "the majority" of convictions the Commonwealth used for the first-degree persistent felony offender conviction also related to stealing, and he concludes his argument by noting that "[s]ociety is evolving to view increased punishment for non-violent offenders as wrong-headed and not worth the costs the state incurs to house these prisoners," and "[i]f the Eight[h] Amendment has ever meant anything, the Constitutional right to be free from cruel and unusual punishment should apply in the case at bar."

The Eighth Amendment's prohibition of cruel and unusual punishments also prohibits punishments that are disproportionate to the crime committed. However, "[t]his proportionality principle . . . is narrow and does not require strict proportionality between crime and sentence but rather forbids only extreme sentences that are grossly disproportionate to the crime." *Turpin v. Commonwealth*, 350 S.W.3d 444, 447 (Ky. 2011) (internal quotation marks

omitted), *citing Graham v. Florida*, 560 U.S. 48, 87 (2010). *See also Weems v. United States*, 217 U.S. 349, 367 (1910) ("[I]t is a precept of justice that punishment for crimes should be graduated and proportioned to [the] offense."). Quoting the United States Supreme Court in *Graham*, we said in *Turpin* that to properly assess the proportionality of a sentence in light of the Eighth Amendment:

> a court must begin by comparing the gravity of the offense and the severity of the sentence . . . . "[I]n the rare case in which [this] threshold comparison . . . leads to an inference of gross disproportionality" the court should then compare the defendant's sentence with the sentences received by other offenders in the same jurisdiction and with the sentences imposed for the same crime in other jurisdictions. If this comparative analysis "validate[s] an initial judgment that [the] sentence is grossly disproportionate," the sentence is cruel and unusual.

Turpin at 447-448, *quoting Graham*, 560 U.S. 48 at 60 (*quoting Harmelin*, 501 U.S. at 1005).

Moreover, we have previously observed that "[p]roportionality review has never (or hardly ever) been used to strike down a mere prison sentence." *Hampton v. Commonwealth*, 666 S.W.2d 737, 741 (Ky. 1984) *citing Rummel v. Estelle*, 445 U.S. 263, 271 (1980). "'Cruel punishment' can relate to the severity in the amount or duration of the punishment, *but if the punishment is within the maximum prescribed by the statute violated, courts generally will not disturb the sentence.*" *Riley v. Commonwealth*, 120 S.W.3d 622, 633 (Ky. 2003) *citing Weber v. Commonwealth*, 196 S.W.2d 465, 469-70 (Ky. 1946) (emphasis added). And so the relief being requested by Appellant—a declaration that a particular sentence for a term of years violates the Eighth Amendment—is

seldom, if ever, available under a cruel and unusual punishment claim. This is especially so when recidivist sentencing is involved. For example, in *Ewing v. California*, 538 U.S. 11 (2003), the United States Supreme Court upheld a sentence of twenty-five years to life, imposed under California's "three strikes and you're out" law, for the theft of three golf clubs valued at $399.00 each; and in *Rummel v. Estelle*, 445 U.S. 263 (1980), the Court upheld a Texas recidivist sentence of life imprisonment for the obtaining by false pretenses the modest sum of $120.75.

Appellant's twenty year sentence fits within the statutory range for a first-degree persistent felony offender convicted of a Class D felony. KRS 532.080. In juxtaposition with *Ewing* and *Rummel*, it is easily seen that Appellant's twenty year sentence as a recidivist for stealing $527.96 worth of merchandise does not equate to cruel and unusual punishment. Upon application of the principles described above, we are convinced that Appellant has not been denied the protections provided by the Eighth Amendment or by Section 17.

And, as to society's "evolving" view of lengthy prison sentences for recidivist non-violent offenses, we concede that it is the function of the legislative branch to establish the range of penalties for each crime. *See Gibson v. Commonwealth*, 291 S.W.3d 686, 689 (Ky. 2009). We presume that the regimen of penalties statutorily provided for felony offenders reflects the General Assembly's continuous assessment of the social utility and the efficacy of the punishments so provided. We also presume that the evolution of societal

views on criminal punishment is represented by the frequent amendments to the sentencing regimen to which the courts must adhere. It is not the proper role of the judicial branch to gauge the public sentiment and the social acceptability of long prison sentences. As long as the penal statutes remain within boundaries of the applicable constitutional limitations on governmental authority, we are bound to respect the legislature's prerogative.

V. IMPOSITION OF FINES AND COURT COSTS

Prior to trial, Appellant filed an affidavit of indigency listing his monthly income as $400.00 per month with a $100.00 rent payment. The trial court appointed counsel to represent him in the trial proceedings. Subsequent to his conviction, the trial court again found him to be indigent and allowed him to proceed on appeal *in forma pauperis* with appointed appellate counsel to represent him. In light of these indicators of financial distress, Appellant contends that the trial court erred by imposing $156.00 in court costs and a $5,000.00 felony fine on him in relation to his conviction. Appellant concedes that this argument was not raised in the trial court but he contends that, "it results from a sentencing decision contrary to statute and may be raised for the first time on appeal."

A. Court Costs

In *Spicer v. Commonwealth*, 442 S.W.3d 26 (Ky. 2014), we clarified our rule for the appellate review of unpreserved allegations regarding the improper assessment of court costs as follows:

> The assessment of court costs in a judgment fixing sentencing is illegal *only* if it orders a person adjudged to be "poor" to pay costs. Thus, while an appellate court may reverse court costs on appeal to rectify an illegal sentence, we will not go so far as to remand a facially-valid sentence to determine if there was in fact error. If a trial judge was not asked at sentencing to determine the defendant's poverty status and did not otherwise presume the defendant to be an indigent or poor person before imposing court costs, then there is no error to correct on appeal. This is because there is no affront to justice when we affirm the assessment of court costs upon a defendant whose status was not determined. It is only when the defendant's poverty status has been established, and court costs assessed contrary to that status, that we have a genuine "sentencing error" to correct on appeal.

Id. at 35; *Cf. Travis v. Commonwealth*, 327 S.W.3d 456 (Ky. 2010) (Trial court's error in imposing fines and costs at sentencing upon indigent defendants was self-evident where defendants were receiving the services of a public defender at time of trial and both were granted the right to appeal *in forma pauperis*).

In this case, as in *Spicer*, the judgment imposing court costs from which this appeal was taken does not reflect any assessment of Appellant's financial status. The trial court did not, and was not requested to, determine whether Appellant was a "poor person" as defined by KRS 453.190(2) and therefore exempt from court costs under KRS 23A.205(2).[6] As we held in *Spicer*, absent that factual determination we cannot say that a judgment imposing court costs was "an illegal sentence" subject to correction on appeal despite its lack of preservation. *Id.* at 35. The record indicates that after entry of the judgment

[6] KRS 23A.205(2) provides that "The taxation of court costs against a defendant, upon conviction in a case, shall be mandatory and shall not be subject to probation, suspension, proration, deduction, or other form of nonimposition in the terms of a plea bargain or otherwise, unless the court finds that the defendant is a poor person as defined by KRS 453.190(2) and that he or she is unable to pay court costs and will be unable to pay the court costs in the foreseeable future."

the trial court determined that Appellant was a "needy person" under KRS 31.110[7] and accordingly it appointed appellate counsel to represent him. In *Maynes v. Commonwealth*, 361 S.W.3d 922, 929 (Ky. 2012) we clearly distinguished the "poor person" standard in KRS 23A.205 (relating to payment of court costs) from the "needy person" standard in KRS 31.100 (which authorizes the appointment of counsel for the indigent defendant.) Appellant is not deemed to be a "poor person" who is exempt from court costs, simply because he was determined to be a "needy person" eligible for the services of a public defender. The trial court's decision regarding court costs was not inconsistent with the facts in the record. This decision "does not constitute error, 'sentencing' or otherwise," and we affirm the imposition of court costs. *Spicer*, 442 S.W.3d at 35.

B. Felony Fine

KRS 534.030 directs the trial court to impose upon "a person who has been convicted of any felony [] in addition to any other punishment imposed upon him [] a fine in an amount not less than one thousand dollars ($1,000.00) and not greater than ten thousand dollars ($10,000.00) or double his gain from commission of the offense, whichever is the greater." However, the statute further provides "[f]ines required by this section shall not be imposed upon any

[7] KRS 31.110(1) provides that "A needy person who is being detained by a law enforcement officer, on suspicion of having committed, or who is under formal charge of having committed, or is being detained under a conviction of, a serious crime . . . is entitled: (a) To be represented by an attorney to the same extent as a person having his or her own counsel is so entitled; and (b) To be provided with the necessary services and facilities of representation including investigation and other preparation. The courts in which the defendant is tried shall waive all costs."

person determined by the court to be indigent pursuant to KRS Chapter 31." KRS 534.030(4). As part of Appellant's sentence, the trial court imposed a $5,000.00 fine. Appellant raised no objection to the imposition of the fine.

The record discloses that at every stage of the trial court proceedings Appellant was found to be indigent pursuant to KRS Chapter 31, and thus was exempt from the fines provision of KRS 534.030. Unlike the statutory exemption from court costs, Appellant is not required to meet the statutory definitions of a "poor" person or a "needy" person. A finding of indigency alone is sufficient to trigger KRS 534.030(4)'s prohibition on the imposition of a felony fine.

Therefore, in contrast with our discussion of the assessment of court costs, the trial court's imposition of a $5000.00 fine *was* inconsistent in its findings throughout the proceedings that Appellant was indigent pursuant to KRS Chapter 31. We review the trial court's imposition of fines for clear error. *Travis v. Commonwealth*, 327 S.W.3d at 459 (applying clear error standard to unpreserved allegation of improper imposition of fines).

The imposition of the fine was clearly erroneous; accordingly, we vacate that portion of Appellant's sentence and remand for entry of a final judgment consistent with this opinion. *See Simpson v. Commonwealth*, 889 S.W.2d 781, 784 (Ky. 1994) ("[W]e observe that at sentencing in this case, the appellant was represented by an assistant public advocate. Thus, we may assume that the trial judge had already determined that the appellant was indigent. For this

reason, imposition of any fine was inappropriate, and accordingly, we vacate such portions of the sentence as pertain thereto.").

VI. CONCLUSION

For the foregoing reasons, the judgment of the Boone Circuit Court is affirmed in part, reversed in part, and the proceeding is remanded for entry of a new judgment reflecting Appellant's statutory exemption from the imposition of a fine.

Minton, C.J., Abramson, Barber, Keller, Noble, and Venters, JJ., concur. Cunningham, J., recused.

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