[Cite as *State v. Burns*, 2010-Ohio-2831.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 22674
v.	:	T.C. NO. 07 CRB 9224
TIFFNI BURNS	:	(Criminal appeal from Municipal Court)
Defendant-Appellant	:	
	:	

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OPINION

Rendered on the 18th day of June, 2010.

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FROELICH, J.

{¶ 1} Defendant-Appellant, Tiffni Burns, appeals her convictions for attempted obstruction of official business and resisting arrest. For the following reasons, the judgment of the trial court will be affirmed.

I

{¶ 2} On the afternoon of June 24, 2007, Trotwood Police Detective Dexter

was investigating a burglary that had occurred the previous day. He learned that the victim's son had broken into the home and stolen several items, including a gun. When he interviewed the burglary suspect, the suspect told him that he sold the gun to his heroin dealer, whose name he believed was Jimmy. The suspect described the drug dealer, who was later identified as Gregory Burns, the vehicle that he drove, and the Auburn Avenue house in which the suspect believed Gregory Burns lived with his mother and his children. As the suspect was directing Detective Dexter to that house, the detective realized that he was following Gregory Burns. Being outside of his jurisdiction, Detective Dexter called for Dayton Police backup.

{¶ 3} Detective Dexter dropped his burglary suspect off, while Dayton Police Officers Wolpert and Beavers followed Gregory Burns to the Auburn Avenue house, where Gregory Burns parked the vehicle, exited, and went into the house. The officers reported this information to Detective Dexter, who decided to make contact with Gregory Burns at the Auburn Avenue address.

{¶ 4} Officer Beavers and Detective Dexter approached the front door and knocked, while Officer Wolpert went to the rear of the residence. Appellant answered the door, and Detective Dexter asked for the suspect, whose name he believed was Jimmy. Appellant told him that nobody by that name lived there, and the detective then asked to speak to the person who drove the vehicle parked in front of the residence. Appellant denied that the person was in the house, that there were any men in the house, and stated that she was alone.

{¶ 5} In the meantime, Officer Wolpert had climbed onto a wall at the rear

of the house, and he could see the suspect through an open window. Having heard Appellant's denials, he returned to the front of the house and confronted Appellant with the fact that he had seen Gregory Burns inside. Detective Dexter told Appellant that he needed to speak with Gregory Burns and told her to go and get him. Gregory Burns eventually came out to speak with the detective, while Officer Beavers watched the back of the residence. At first, Gregory Burns denied any knowledge of the stolen firearm, but then he acknowledged that he had picked the suspect up in his car the previous day and claimed that the suspect tried to sell a gun to him, but he declined. He did admit that he had previously purchased property from the suspect, knowing that it was stolen.

{¶ 6} Following that conversation, Detective Dexter asked Gregory Burns if he would agree to a search of the house. Gregory Burns, who is Appellant's older brother, explained that he could not agree to a search because it was not his house, but his mother's. The homeowner, Janet Burns, refused to allow a search. Detective Dexter noticed that a small crowd of curious neighbors had gathered outside the residence. He decided to obtain a search warrant and to secure the residence pending the warrant.

{¶ 7} Officer Wolpert entered the house and began to explain to Janet Burns and Appellant that he would not be searching the house until a warrant was secured, but that he would wait inside with them for the safety of the officers and in order to insure that no evidence was destroyed. Appellant began yelling and screaming at him, using foul language and demanding that he leave. Appellant called 911 and demanded the presence of a supervisor. She continued to scream

at both Officer Wolpert and the 911 operator.

{¶ 8} At this point, Officer Wolpert did not even know how many other people, if any, were present in the house, but he realized that the ones in the room with him were becoming more upset as a result of Appellant's behavior. After Appellant ignored Officer Wolpert's repeated requests to desist, he decided to place her under arrest for obstruction of official business.

{¶ 9} As Officer Wolpert took Appellant's arm to lead her outside, she tried to pull away. Her mother and another male relative grabbed her other arm and tried to pull her in the opposite direction of the officer. Officer Wolpert was able to separate Appellant from her relatives, and he began to walk with her outside to his cruiser. Appellant and her younger brother grabbed each other in a tight hug, falling to the ground, and refusing to release one another. Two young men ran out of the house toward Appellant, but Detective Dexter intercepted them. Officer Wolpert was eventually able to separate Appellant and her brother, and Appellant was finally placed under arrest and put into the cruiser.

{¶ 10} Having heard the commotion, Officer Beavers had been forced to leave the rear of the house unsecured in order to assist Officer Wolpert in the front yard. By this time, a large crowd of thirty to forty people had gathered outside of the house, and the crowd was becoming agitated. The officers called for backup.

{¶ 11} After a search warrant was obtained, the house was searched. During the search, evidence was gathered that is unrelated to the crimes with which Appellant was charged. Appellant was charged by complaint with one count of obstruction of official business and one count of resisting arrest. Appellant pled

not guilty on both charges. On November 9, 2007, Appellant filed a motion to suppress. The State objected because the motion was untimely, and Appellant filed a response. The trial court dismissed the motion to suppress as untimely. The case proceeded to a jury trial on January 24, 2008.

{¶ 12} Appellant testified on her own behalf. She explained that she told the officers that there was no Jimmy in the house and that Jaquina had been driving the vehicle parked in front of the house. She insisted that they never asked about a male driving the vehicle, and it never occurred to her that they were looking for her brother Gregory Burns. Her explanation for calling 911 was that the officer was being nasty when she said there was no Jimmy there; she also claimed that she called 911 because she felt that her life was in danger. While she was on the phone, Officer Wolpert entered the house without permission, grabbed her arm, and pulled her toward the door. She insisted that this was the point at which she began yelling. She denied that he made any attempt to explain his presence in the home. Appellant denied that either she or her mother resisted the officer's attempts to escort her outside, but she admitted that once outside, relatives began pulling her back toward the house. She claimed that Officer Wolpert tackled her and her younger brother in the front yard, but she denied that she and her brother were holding on to each other.

{¶ 13} After all of the evidence was presented, the State requested an instruction on the lesser charge of attempted obstruction of official business. A jury found Appellant guilty of attempted obstruction of official business and resisting arrest, and she was sentenced accordingly.

II

{¶ 14} Appellant's First Assignment of Error:

{¶ 15} "APPELLANT'S CONVICTIONS ARE NOT SUPPORTED BY SUFFICIENT EVIDENCE TO PROVE GUILT BEYOND A REASONABLE DOUBT."

{¶ 16} In her first assignment of error, Appellant maintains that her convictions are not supported by sufficient evidence. Appellant claims that because Officer Wolpert's entrance into the house was unlawful, her actions in response to his entry cannot constitute attempted obstruction of official business. As a result, she concludes that her arrest was unlawful, thus precluding a conviction for resisting arrest.

{¶ 17} A sufficiency of the evidence argument challenges whether the State has presented adequate evidence on each element of the offense to allow the case to go to the jury or to sustain the verdict as a matter of law. *State v. Thompkins,* 78 Ohio St.3d 380, 387, 1997-Ohio-52. The proper test to apply to such an inquiry is the one set forth in paragraph two of the syllabus of *State v. Jenks* (1991), 61 Ohio St.3d 259: "An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt."

{¶ 18} Appellant was convicted of attempted obstruction of official business,

in violation of R.C. 2921.31(A), which states that "[n]o person, without privilege to do so and with purpose to prevent, obstruct, or delay the performance by a public official of any authorized act within the public official's official capacity, shall do any act that hampers or impedes a public official in the performance of the public official's lawful duties." (Emphasis added). Pursuant to R.C. 2923.02(A) "attempt" is explained as follows: "No person, purposely or knowingly, and when purpose or knowledge is sufficient culpability for the commission of an offense, shall engage in conduct that, if successful, would constitute or result in the offense."

{¶ 19} Appellant contests that Officer Wolpert was performing "lawful duties" when he entered her mother's house prior to obtaining a search warrant. Although an unlawful entry may result in the exclusion of evidence, "'absent bad faith on the part of a law enforcement officer, an occupant cannot obstruct the officer in the discharge of his duty, whether or not the officer's actions are lawful under the circumstances.'" *State v. Stevens,* Morgan App. No. 07-CA-0004, 2008-Ohio-6027, ¶37, quoting *State v. Paumbaur* (1984), 9 Ohio St.3d 136, 138. There is no evidence of "bad faith" on the part of Officer Wolpert. He explained that his reason for entering the home was to ensure the safety of all concerned and to ensure that evidence could not be removed or destroyed. Even if Officer Wolpert's entry had been unlawful under these particular circumstances, absent evidence of bad faith, Appellant was not justified in obstructing his efforts to secure the residence.

{¶ 20} "It is well recognized that police may enter a home without a warrant where they have probable cause to search and exigent circumstances exist

justifying the entry." *State v. Carr,* Montgomery App. No. 19121, 2002-Ohio-4201, ¶15, citing *Minnesota v. Olson* (1990), 495 U.S. 91, 100, 110 S.Ct. 1684, 109 L.Ed.2d 85. In this case, the State offered sufficient evidence to establish that the officers had probable cause to search the home for the stolen gun and for evidence of "[h]eroin and paraphernalia related to the sale of heroin." A burglary suspect admitted that on the previous day he had stolen a gun from his father's home. He explained that he called his heroin dealer, who picked him up and then purchased the stolen gun. The suspect provided significant details of the man's physical description, his vehicle, and the Auburn Avenue home in which the suspect believed that the man lived. As a result of the suspect's information, a search warrant was obtained and executed about two hours after the house was secured by the police.

{¶ 21} Appellant argues that no exigent circumstances existed to justify Officer Wolpert's warrantless entry into the house prior to the issuance of the warrant. The State responds that this was not a search and thus no warrant was required for him to secure the house. One example of an exigent circumstance is when the evidence sought is in imminent danger of being destroyed. Id., citing *Olson,* supra. More specifically, the United States Supreme Court has held that "[s]ecuring a dwelling, on the basis of probable cause, to prevent the destruction or removal of evidence while a search warrant is being sought is not itself an unreasonable seizure of either the dwelling or its contents." *Segura v. United States* (1984), 468 U.S. 769, 810, 104 S.Ct. 3380, 82 L.Ed.2d 599. See, also, *Carr,* supra, at ¶15, citing *Olson,* supra.

{¶ 22} When officers secure a residence pending a search warrant, they may enter that residence. *State v. Carroll* (Nov. 30, 1994), Lorain App. Nos. 93CA005775 & 94CA005814, citing *State v. Swartz* (Sept. 12, 1990), Summit App. No. 14514, in turn citing *Segura,* supra, at 798. However, this intrusion must be limited in time and scope. *Illinois v. McArthur* (2001), 531 U.S. 326, 331, 121 S.Ct. 946, 148 L.Ed.2d 838. Therefore, any entry based upon exigent circumstances is "'strictly circumscribed by the exigencies which justif[ied] its initiation.'" *State v. Brewster,* 157 Ohio App.3d 342, 2004-Ohio-2722, ¶32, quoting *State v. Applegate,* 68 Ohio St.3d 348, 350, 1994-Ohio-356, in turn quoting *Terry v. Ohio* (1968), 392 U.S. 1, 26, 88 S.Ct. 1868, 20 L.Ed.2d 889. Thus, when a residence must be secured in order to preserve evidence, "the scope of the intrusion is limited to that necessary to secure the evidence." *State v. Martin,* Hamilton App. No. C-040150, 2004-Ohio-6433, ¶40, citing *United States v. Aquino* (C.A.10, 1970), 836 F.2d 1268, 1272; *Brewster,* supra, at ¶32. This may include securing "the people inside and any evidence in plain view." Id. See, also, *State v. Frankenhoff,* Licking App. No. 2006CA00095, 2007-Ohio-2806, ¶6; *State v. Mitchell,* Cuyahoga App. No. 88131, 2007-Ohio-3896, ¶32; *State v. Sturdivant,* Cuyahoga App. No. 87498, 2006-Ohio-5451, ¶2.

{¶ 23} Ignoring the possible presence of heroin and paraphernalia related to the sale of heroin, Appellant focuses only on the stolen gun. She insists that there was no way for the gun to be destroyed while the officers waited for a warrant, and she maintains that since the suspect Gregory Burns was outside of the house at this point, there was no reason to believe that any evidence would be concealed or

removed.

{¶ 24} Although it is unlikely that the gun could have been destroyed, it certainly could have been hidden inside the house, or it could have been carried away by any of the occupants. It is also possible that the gun could have been dismantled or disfigured in an effort to conceal the gun and/or to prevent its identification, effectively destroying its evidentiary value. Furthermore, heroin and related paraphernalia could have been hidden or removed from the house, and those items are easily destroyed.

{¶ 25} The fact that Gregory Burns was in the front yard does not negate the possibility of any of the evidence being destroyed or removed by other occupants of the house. When Detective Dexter decided to obtain a search warrant, the officers did not know how many people were inside the house. Although Appellant claimed to be alone, the officers knew that at least four other people were there. Later, Detective Dexter estimated that there were seven or eight people inside the house. Any of those individuals could have destroyed, hidden, or removed the evidence. In fact, behavior such as that exhibited by Appellant could have been used to provide an opportunity for someone to leave the house with the evidence, as the commotion caused by Appellant forced Officer Beavers to leave the rear of the house unsecured for several minutes.

{¶ 26} For all of these reasons, we conclude that Officer Wolpert was acting within the scope of his lawful duties, and not in bad faith, when he entered the house to secure it during the wait for a search warrant. The jury found that Appellant's behavior of yelling and screaming to the point that Officer Wolpert could

not communicate with the homeowner was done with the purpose of obstructing and delaying his ability to secure the residence, and, if successful, would have had the result of hampering or impeding all of the officers from performing their lawful duties. Therefore, Appellant's conviction for attempted obstruction of official business is supported by sufficient evidence.

{¶ 27} Appellant was also convicted of resisting arrest, in violation of R.C. 2921.33(A), which provides that "[n]o person, recklessly or by force, shall resist or interfere with a lawful arrest of the person or another." She argues that because her arrest was unlawful, "[a]ny resistance offered by her to that arrest cannot constitute a violation of the resisting arrest statute." In essence, she claims that she was permitted to use force because her arrest was unlawful. Although this was true at common law, the Ohio Supreme Court has held that "in the absence of excessive force or unnecessary force by an arresting officer, a private citizen may not use force to resist arrest by one he knows or has good reason to believe, is an authorized police officer engaged in the performance of his duties, whether or not the arrest is illegal under the circumstances." *City of Columbus v. Fraley* (1975), 41 Ohio St.2d 173, 180, and paragraph three of the syllabus, cert. denied (1975), 423 U.S. 872, 96 S.Ct. 138, 46 L.Ed.2d 102.

{¶ 28} In this case, there is no evidence that Officer Wolpert used excessive or unnecessary force when he took Appellant's arm and attempted to lead her out of the house and to his cruiser. He was in uniform and engaged in the performance of his professional duties.

{¶ 29} However, *Fraley* involved a conviction for resisting arrest under a

Columbus city ordinance which, unlike R.C. 2921.33(A), did not include a requirement that the arrest be lawful. Pursuant to R.C. 2921.33(A), "[a] lawful arrest is an essential element of the crime of resisting arrest." *State v. Vactor,* Lorain App. No. 02CA008068, 2003-Ohio-7195, ¶34, citing *State v. Thompson* (1996), 116 Ohio App.3d 740, 743. In order to prove a lawful arrest, the State need not prove that the defendant was, in fact, guilty of the offense. Id., citing *State v. Sansalone* (1991), 71 Ohio App.3d 284, 285. Instead, the State must prove both "that there was a reasonable basis to believe that an offense was committed, [and] that the offense was one for which the defendant could be lawfully arrested." Id., citing *Thompson,* supra, at 743-44. See, also, *City of Xenia v. Smith* (June 30, 1995), Greene App. No. 94-CA-110.

{¶ 30} Obstruction of official business is an offense for which Appellant could be lawfully arrested. Moreover, as we discussed above, there was a reasonable basis for the officers to believe that the offense had been committed. Appellant's arrest for obstruction of official business having been lawful, and the officers not having used excessive or unnecessary force, Appellant was not permitted to forcibly resist her lawful arrest. Therefore, we conclude that Appellant's conviction for resisting arrest was supported by sufficient evidence.

{¶ 31} Considering the evidence in a light most favorable to the State, a rational trier of fact could have found that there was sufficient evidence of each of the essential elements of attempted obstruction of official business and resisting arrest to warrant submitting the case to the jury. Appellant's first assignment of error is overruled.

III

{¶ 32} Appellant's Second Assignment of Error:

{¶ 33} "THE TRIAL COURT ERRED IN DISMISSING DEFENDANT'S MOTION TO SUPPRESS AS UNTIMELY IN LIGHT OF THE CHANGE IN APPLICABLE PRECEDENT."

{¶ 34} In her second assignment of error, Appellant argues that the trial court should not have dismissed her motion to suppress, even though it was untimely, because the motion relied upon "new" case law. It is Appellant's position that Officer Wolpert unlawfully intruded upon the curtilage of the house by climbing on a wall to look through a window, and therefore, his observation of Gregory Burns should have been suppressed. Furthermore, Appellant contends that Officer Wolpert's entry into the house was based upon that unconstitutional observation and that everything that occurred in the house after his entry was derivative evidence discovered in violation of the Fourth Amendment. We disagree.

{¶ 35} Crim.R. 12(D) states that pre-trial motions, such as a motion to suppress, "shall be made within thirty-five days after the arraignment or seven days before trial, whichever is earlier. The court in the interest of justice may extend the time for making pretrial motions." A trial court's decision of whether to allow an untimely motion to suppress is within the trial court's discretion. *State v. Garrett,* Greene App. No. 2004 CA 110, 2005-Ohio-4832, ¶14, citation omitted. "'An abuse of discretion means an unreasonable, arbitrary, or unconscionable action.'" *State ex rel. Doe v. Smith,* 123 Ohio St.3d 44, 2009-Ohio-4149, ¶15, quoting *State ex rel. Beacon Journal Publishing Co. v. Akron,* 104 Ohio St.3d 399, 2004-Ohio-6557,

¶59.

{¶ 36} Appellant was arrested on June 24, 2007. She pled not guilty on both charges, and a pretrial was scheduled for July 16, 2007. A trial was scheduled for the following month. At Appellant's request, the trial date was continued to September 24, 2007. Appellant filed a jury demand and the trial date was set for September 27, 2007. Appellant filed a time waiver, and the case was scheduled for a jury pretrial on October 1, 2007, with the trial to follow ten days later. Appellant requested a bill of particulars. The pretrial was rescheduled for November 5, 2007, with the trial to follow ten days later. On November 5, 2007, Appellant requested another continuance. The pretrial was rescheduled for December 10, 2007, with the trial to follow ten days later.

{¶ 37} On November 9, 2007, Appellant filed a motion to suppress. The State objected because the motion was untimely, and Appellant filed a response, citing Crim.R. 12(D), supra. The trial court dismissed the motion to suppress as untimely. The case proceeded to a jury trial on January 24, 2008.

{¶ 38} Appellant was aware of all the facts and that her motion did not comply with Crim.R. 12(D), but argues that the court should have allowed the motion based on our decision in *State v. Peterson,* 173 Ohio App.3d 575, 2007-Ohio-5667, which was filed on October 19, 2007. In that case, we held that evidence seen through a basement window by an officer, who approaches a home at night in order to perform a "knock and announce," should have been suppressed because in order to look through the window, the officer entered a non-public portion of the curtilage of the home. Id. More simply stated, "[t]he only areas of

the curtilage where the officers may go are those impliedly open to the public." Id. at ¶17.

{¶ 39} Assuming, arguendo, that Officer Wolpert unlawfully intruded upon the curtilage of the home when he was making observations, neither of Appellant's charges was related to any evidence observed during Officer Wolpert's look through the window. "The exclusionary rule only pertains to evidence obtained as a result of an unlawful search and seizure." *State v. Ali,* Belmont App. No. 02 BE 46, 2003-Ohio-5150, ¶16, citing *Mapp v. Ohio* (1961), 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081, *Wong Sun v. United States* (1963), 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441. There is no indication in the record that Officer Wolpert saw anything that was later seized as evidence. Furthermore, although it is true that evidence items were seized from the Burns home, none of that evidence was used against Appellant.

{¶ 40} Rather than being based upon any evidence observed by Officer Wolpert or seized by the police, Appellant's convictions were based upon her own actions. Appellant's attempted obstruction of official business charge was based upon her behavior after the officers' decision to secure the home while waiting for a search warrant, while her resisting arrest conviction was based upon her interaction with Officer Wolpert as he escorted her from the house to the police cruiser.

{¶ 41} Appellant seems to argue that had Officer Wolpert not looked in the window, Gregory Burns would not have come outside, there would have been no decision to obtain a search warrant, Officer Wolpert would never have entered the home because it would not need to have been secured, and, finally, Officer Wolpert

and Appellant would not have had their confrontation.

{¶ 42} Detective Dexter had detailed information from an informant about Gregory Burns' possible possession of a stolen firearm. He had a description of the suspect and his vehicle, as well as the Auburn Avenue house in which the informant believed Gregory Burns lived. In fact, the informant was directing Detective Dexter to that house when the detective realized that he was following the suspect. Being outside of his jurisdiction, he called for Dayton Police backup. The Dayton officers followed Gregory Burns to the Auburn Avenue house, where he parked, exited the vehicle, and entered the house. Because the officers did not see Gregory Burns leave the house, and his vehicle remained parked in front, they reasonably believed that he was still inside the house, despite Appellant's claims to the contrary.

{¶ 43} We cannot conclude that the trial court abused its discretion in dismissing Appellant's untimely motion to suppress. Appellant's second assignment of error is overruled.

IV

{¶ 44} Appellant's Third Assignment of Error:

{¶ 45} "APPELLANT WAS PREJUDICED BY THE DENIAL OF HER RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL, IN VIOLATION OF HER RIGHTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION."

{¶ 46} In her third assignment of error, Appellant submits that she was denied her right to effective assistance of trial counsel because counsel failed to file

a timely motion to suppress. In order to prevail on a claim of ineffective assistance of counsel, the defendant must show both deficient performance and resulting prejudice. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052. See, also, *State v. Bradley* (1989), 42 Ohio St.3d 136. Trial counsel is entitled to a strong presumption that his conduct falls within the wide range of effective assistance, and to show deficiency the defendant must demonstrate that counsel's representation fell below an objective standard of reasonableness. Id.

{¶ 47} Appellant insists that "[n]o sound trial tactic supports the failure of counsel to move for suppression" in a timely manner. However, as Appellant explains in her second assignment of error, "the delay in filing was not the result of inadvertence or neglect." Instead, she explains that the reason for the late filing was that she was relying on a recently decided case. "[E]very effort [must] be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Id. at 689. Thus, trial counsel's performance was not deficient.

{¶ 48} The Ohio Supreme Court has held that neither the failure to file, nor the withdrawal of a motion to suppress amounts to ineffective assistance of counsel "when * * * there was no reasonable probability of success, or there was no prejudice to the defendant." *State v. Nields,* 93 Ohio St.3d 6, 34, 2001-Ohio-1291, citations omitted. As discussed above, the *Peterson* case is not controlling, and we cannot say that there was deficient performance or that, if there were any, resulting prejudice has been shown.

{¶ 49} Appellant's third assignment of error is overruled.

V

{¶ 50} Having overruled all three assignments of error, the judgment of the trial court will be Affirmed.

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BROGAN, J. and GRADY, J., concur.

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