Affirmed and Memorandum Opinion filed November 30, 2017.

In The

Fourteenth Court of Appeals

NO. 14-17-00096-CR

EX PARTE DAVID RINCON

On Appeal from the 351st District Court
Harris County, Texas
Trial Court Cause No. 1193080-A

MEMORANDUM OPINION

In this appeal from an order denying an application for writ of habeas corpus, the issue is whether the trial court abused its discretion when it rejected a claim that a guilty plea was involuntary because the plea was the product of counsel's ineffectiveness. Because we conclude that the trial court did not abuse its discretion, we overrule this issue and affirm the trial court's order.

BACKGROUND

The Alleged Assault. A fight erupted at a party. Punches were thrown, shots were fired, and bricks were hurled. One of the bricks struck the complainant in the

head, resulting in serious bodily injury. Appellant was accused of hurling that brick, and he pleaded guilty to a single count of aggravated assault with a deadly weapon.

Pursuant to an agreed recommendation, the trial court deferred an adjudication of guilt and placed appellant on community supervision for a period of five years. Four years into appellant's community supervision, the State moved to adjudicate appellant's guilt, based on information that appellant had committed another offense by driving while intoxicated.

The Habeas Application. In response to the motion to adjudicate, appellant filed an application for writ of habeas corpus, seeking to set aside his guilty plea. Appellant argued that his plea was involuntary because it was the product of his counsel's ineffective assistance. Appellant claimed that his counsel, Terry Gaiser, was deficient because Gaiser failed to investigate the facts of the case and, as a result of his unpreparedness, Gaiser encouraged appellant to accept a plea bargain when appellant was actually innocent.

In support of his application, appellant referred to exculpatory evidence that Gaiser possessed at the time of the plea, which included the written statements of five witnesses from the party and a cellphone video corroborating those statements. The witnesses wrote that appellant was jumped by multiple assailants at the party, suggesting that appellant was just a victim in the fight, not an attacker. The witnesses also identified a separate person, Donald Koontz, as the man who hit the complainant with the brick.

The cellphone video confirms that a fight occurred. It depicts a large number of people brawling in the street. The lighting is poor, however. The fight occurred at night and the faces of those involved are not visible, but a woman can clearly be heard saying that appellant was being attacked: "They jumping David!"

Appellant also attached evidence that Gaiser did not possess at the time of the plea. This evidence consisted mainly of the statement of the complainant, who wrote that appellant was not his attacker. The complainant could not remember who specifically hit him with a brick, but he positively excluded appellant because he remembered seeing his brother fighting with appellant just before he (the complainant) was struck.

Appellant attached his own affidavit as well, attesting that he was not the person who hit the complainant with a brick. Appellant further attested that he proclaimed his innocence to Gaiser, but Gaiser said that appellant would lose if the case proceeded to trial. Appellant said that he agreed to accept an offer of deferred adjudication because he did not want to go to prison.

The Habeas Hearing. The trial court conducted an evidentiary hearing to consider the fact questions raised in appellant's application. The hearing spanned four days, and many witnesses testified.

Caylynn Guerra, Alaysha Justice, and Michelle Ramsey testified about essentially the same set of facts. They said that they went to a birthday party after hearing about an open invitation on social media. Shortly after they arrived at the party, they said that someone at the party made a comment that was perceived as being disrespectful towards the mother of the birthday girl. They said that people were then turned away from the party and that fighting broke out as they were leaving. Appellant was jumped in this fight. The witnesses said that they did not see appellant throw a brick at anyone, but they did see Donald Koontz use a brick. They also said that they gave written statements to appellant after they knew that he had been charged, expecting those statements to be passed on to appellant's defense attorney. Those statements were delivered to Gaiser, but according to the witnesses, Gaiser never contacted them.

The complainant testified as well, and he reiterated the story from his written statement. He testified that he "truly [had] no idea" who hit him with a brick, but he was sure that appellant was not responsible. The complainant said that he remembered seeing his brother fighting with appellant shortly before he was hit with the brick. The complainant also said that Gaiser never reached out to question him about his story.

Shamell Holland, the complainant's brother, testified that appellant was not the person who hit the complainant. This testimony departed in some ways from earlier statements that Holland gave to police. In an interview with an officer, Holland said that the complainant's attacker was a man named Quinton Randall. The officer showed Holland a photospread containing a picture of Quinton Randall, but Holland was unable to identify him. When the officer showed Holland another photospread, Holland selected a picture of appellant, believing that appellant was Quinton Randall. When the officer advised Holland that the person selected was not named Quinton Randall, Holland still said that he was sure that appellant was the person who hit the complainant with a brick.

Appellant testified that, before going to the party, he went to Walmart with his girlfriend Victoria Sexton, her sister Olivia Sexton, and their friend Whitney Montgomery. Appellant claimed that they all then went to his house and, later, they were picked up by Donald Koontz and Marcellus Burgin, who drove them to the party.

Appellant said that he was turned away at the party because of fighting that had previously broken out. As he was returning to the car, appellant said that he was attacked. Appellant also said that the cellphone video showed him being jumped by Shamell Holland, the complainant's brother. Appellant denied that he ever picked up a brick in this fight.

Appellant testified that Gaiser encouraged him to accept a plea bargain of deferred adjudication because appellant was already on probation for a juvenile delinquency case. According to appellant, Gaiser said that the State had witnesses who would testify against him and that he would lose if the case ever went to trial. Gaiser also alluded to surveillance footage that allegedly showed appellant purchasing bullets from Walmart just before the party, which suggested that appellant's credibility could be subject to challenge.

Indeed, an offense report containing the statement of Marcellus Burgin revealed that appellant went to Walmart to purchase bullets just before the party. At the habeas hearing, Burgin's testimony qualified this earlier statement. Burgin testified that only four men were involved in the purchase of the bullets: Burgin, Donald Koontz, and two others who went by the names "Boomy" and "Dewayne." Burgin suggested that appellant was not part of this group. In a separate audio statement, Burgin said that, while the bullets were being purchased, appellant was waiting in the car with Victoria Sexton, Olivia Sexton, and Whitney Montgomery.

Whitney Montgomery testified that Burgin and Koontz fired shots once the fighting broke out. Montgomery admitted to firing a gun too, and she indicated that the fighting may have been gang related. She referred to the "59 Bounty Hunters" and the "Swaggas," which were two rival gangs. Appellant was a member of the former, and according to Burgin, appellant got into a fight with a member of the latter.

Monica Branch, appellant's mother, testified that she gave Gaiser the five written statements and an enhanced copy of the cellphone video. She also said that a man named Jacolbie, last name unknown, admitted to hitting the complainant with a brick, but that Jacolbie expected appellant to take the blame.

Gaiser testified that he was asked to represent appellant in the assault case because he had also represented appellant in the juvenile delinquency case. Gaiser said that he was aware of the five written statements and of the cellphone video. Gaiser said that he remembered interviewing just one of the witnesses, Victoria Sexton, and he believed that her facts, though exculpatory, were not consistent with appellant's own story. Gaiser said, "I didn't find her at all credible."

Gaiser believed that there were other problems with appellant's case. He said that some witnesses had denied going to Walmart, when there was video evidence showing the contrary. Also, Gaiser said that he knew that appellant was affiliated with a gang, and Gaiser "didn't think a jury would think too kindly on people going to buy bullets before they go to a party where a gang fight was about to occur."

Gaiser testified that he saw an offense report in which Shamell Holland had identified the complainant's attacker as "Whitney's brother"—referring to the same Whitney Montgomery who admitted to firing shots at the party. Gaiser knew that appellant and Whitney Montgomery did not have a familial relationship, but Gaiser said that appellant has occasionally been mistaken for Whitney Montgomery's brother.

Gaiser also testified that he saw a separate offense report in which Tangela Jones, the mother of the birthday girl, directly identified appellant as the person who hit the complainant with a brick.

Gaiser testified that he did not recommend that appellant accept a plea. Rather, Gaiser testified that he merely explained to appellant his options. Gaiser advised that appellant could plead guilty and accept an offer of deferred adjudication, or, because Gaiser knew that the State was not ready for trial at the time of the plea hearing, appellant could plead not guilty and the case would be reset for trial. Gaiser also

advised appellant that if he pleaded not guilty, then the facts would be more thoroughly investigated.

According to Gaiser, appellant "made the decision as to what he wanted to do," which was plead guilty. Gaiser also added: "I didn't try to argue him out of it because I felt the evidence, he knew more about whether he went to Walmart. He knew more about what happened at that party than I did, and I wasn't about to try to talk him into pleading not guilty if he was going to accept the deferred."

David Wilson, an officer with the Harris County Sheriff's Office, was the last witness to testify. He said that Tangela Jones, the mother of the birthday girl, named appellant as the person who hit the complainant with a brick. Wilson also said that, in the early stages of the investigation, Shamell Holland had also identified appellant as the complainant's attacker.

The Ruling. The judge rendered an order denying habeas relief. He also entered several findings of fact. Among those findings, the judge determined that Gaiser and Wilson were credible, and that all other witnesses were not credible. The judge also found that the cellphone video of the fight "has no probative value due to the poor quality of the video."

ANALYSIS

To prevail on his claim of ineffectiveness, appellant had the burden of proving by a preponderance of the evidence that (1) Gaiser's performance was deficient, in that it fell below an objective standard of reasonableness; and (2) but for Gaiser's deficient performance, the plea would have been different. *See Ex parte Reedy*, 282 S.W.3d 492, 500 (Tex. Crim. App. 2009). The judge ruled that appellant did not satisfy this burden. To the extent that the judge's ruling was based on an evaluation of credibility and demeanor, we review that ruling for an abuse of discretion,

affording almost total deference to the judge's findings when they are supported by the record. *See Ex parte Torres*, 483 S.W.3d 35, 42 (Tex. Crim. App. 2016). To the extent that the ruling was based on a pure question of law, or upon a mixed question of law and fact not depending on an evaluation of credibility and demeanor, our review is de novo. *See Ex parte De La Cruz*, 466 S.W.3d 855, 866 (Tex. Crim. App. 2015).

Appellant's claim invokes certain obligations of a criminal defense attorney. Counsel "must have a firm command of the facts of the case" before he can render reasonably effective assistance to his client. *See Ex parte Harrington*, 310 S.W.3d 452, 458 (Tex. Crim. App. 2010). Counsel also has a duty "to provide advice to his client about what plea to enter, and that advice should be informed by an adequate investigation of the facts of the case or be based on a reasonable decision that investigation was unnecessary." *Id.* If counsel's representation falls below this standard, any resulting guilty plea is involuntary and must be set aside. *Id.* at 458–59.

Appellant claimed that Gaiser failed in his duties because Gaiser did not investigate the facts of the case and Gaiser did not make an informed recommendation about the available plea options. The trial court rejected these claims in several findings of fact, which we reproduce here:

> 10. The Court finds, based on the credible writ hearing testimony of Terry Gaiser, that Gaiser conducted an investigation which included reviewing the State's prosecution file in cause number 1193080 and the Harris County Sheriff's Office (HCSO) incident report as well as interviewing Victoria Sexton, the applicant's friend, who provided a pre-trial statement that the applicant did not participate in the assault.
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> 14. The Court finds, based on the HCSO incident report and the credible writ hearing testimony of Terry Gaiser, that Gaiser was aware that there was a group of people along with the applicant who went to

Walmart to purchase bullets prior to going to the party where the aggravated assault incident occurred.

15. The Court finds, based on the credible writ hearing testimony of Terry Gaiser, that Gaiser possessed in his file the written statements of Caylynn [Guerra], Alaysha [Justice], Victoria Sexton, Michelle Ramsey, and Brandon Farnsworth, all of which reflected their assertions that the applicant did not participate in the aggravated assault.

16. The Court finds, based on the police offense report and the credible writ hearing testimony of Terry Gaiser, that Gaiser was concerned about the risks of presenting trial testimony from Whitney Montgomery, Marcellus Burgin, and Victoria Sexton because Gaiser did not want the jury to hear evidence that Montgomery, Burgin, and Sexton, and the applicant went to Walmart to illegally purchase bullets prior to going to the party.

19. The Court finds, based on the credible writ hearing testimony of Terry Gaiser, that Gaiser filed multiple pre-trial motions, including a discovery motion, in cause number 1193080.

20. The Court finds, based on the credible writ hearing testimony of Terry Gaiser, that Gaiser was aware of the State's evidence against the applicant and was aware of the strengths and weaknesses of the State's case.

21. The Court finds, based on the credible writ hearing testimony of Terry Gaiser, that Gaiser had multiple discussions with the applicant, which included the State's evidence, the strengths and weakness of the State's case, the right to proceed to a jury trial, and the benefits and risks associated with pleading guilty and proceeding to trial.

23. The Court finds, based on the credible writ hearing testimony of Terry Gaiser, that on November 5, 2010, the State made a plea offer involving deferred adjudication and Gaiser conveyed the plea offer to the applicant while discussing the potential benefits and consequences of such a plea and the fact that applicant's juvenile determinate sentence probation would run concurrently with this deferred adjudication, if he decided to plead guilty.

We must defer to all of these findings because they are supported by the record. Gaiser testified that his investigation discovered both inculpatory evidence

(e.g., the offense reports, which identified State's witnesses who could testify against appellant) and exculpatory evidence (e.g., the written statements of the party witnesses, the interview of one of those witnesses, and the cellphone video of the fight). Gaiser also testified that he advised appellant of his plea options after having reviewed all of this evidence.

Appellant nonetheless claims that Gaiser's performance was deficient because Gaiser did not conduct a more extensive investigation. This claim raises a question about the reasonableness of Gaiser's investigation.

In assessing the reasonableness of counsel's investigation, a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further. *See Wiggins v. Smith*, 539 U.S. 510, 527 (2003). "Strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland v. Washington*, 466 U.S. 668, 691 (1984). "In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Id*.

Claimed Failure to Investigate Inconsistencies. Appellant asserts that a greater investigation was warranted for several reasons, beginning with a claim that the offense reports revealed "inconsistencies."

Appellant points out that the offense reports showed that the complainant was injured in a gang-related fight, where there was a large number of assailants. The offense reports also showed that several witnesses mentioned that many people were throwing bricks, and some witnesses could not identify who threw the brick that injured the complainant. Based on these statements, appellant argues that there was a potential for other suspects, which required Gaiser's further investigation.

The possibility of other suspects does not establish an inconsistency. It actually exposes a potential weakness in the State's case, because the State had the burden of proving that appellant was the one person among that large number of assailants who threw the brick that injured the complainant. Gaiser had no similar burden of establishing the identity of the complainant's attacker.

Appellant still suggests that a greater investigation may have revealed exculpatory evidence showing that someone else was responsible for injuring the complainant. But at least two witnesses, Tangela Jones and Shamell Holland, were already able to say that appellant was responsible, and Gaiser was aware of their statements.

Appellant suggests that the identification from Tangela Jones was unreliable because it was made approximately three months after the fight and because Jones knew of other witnesses who did not want to cooperate with police. These points do not establish an inconsistency. Instead, they raise an issue about the weight and credibility of Jones's statement.

Appellant could have explored Jones's statement at the habeas hearing, but he did not. Jones was never even called as a witness. Thus, the record does not establish any reason for holding that Gaiser fell below an objective standard of reasonableness by crediting Jones's statement.

Appellant also challenges Shamell Holland's identification because Holland at one point identified the complainant's attacker as "Whitney's brother" and at another point as Quinton Randall. These statements may give rise to an inconsistency, but they do not necessarily establish a reason to compel further investigation. Gaiser knew that appellant is sometimes mistaken as Whitney Montgomery's brother, and the offense reports explained that Holland selected appellant's picture in a photospread believing that appellant was Quinton Randall.

Appellant finally points out that a Walmart employee failed to identify appellant's picture in a photospread. This evidence does not establish an inconsistency, or Gaiser's ineffectiveness. Had the case gone to trial, the ultimate issue would have been whether the State could prove that appellant assaulted the complainant at the party, not whether appellant was noticed by an employee at Walmart. Gaiser could have reasonably decided to not investigate the case further because he knew that appellant attended the party, that appellant was involved in a gang-related fight at that party, and that there were at least two witnesses who could testify that appellant committed the assault as alleged.

Claimed Failure to Review Evidence. Appellant argues next that Gaiser should have reviewed the evidence that was referenced in the offense reports, focusing on three items of evidence in particular.

For his first item, appellant turns to the audio statement of Shamell Holland, the complainant's brother. Holland's audio statement was not admitted into evidence at the habeas hearing, and so it is not in our record on appeal. Notwithstanding this omission, appellant represents that, in the audio statement, Holland tells police that Quinton Randall is the person who hit the complainant with the brick.

Assuming for the sake of argument that appellant's representation is true, the audio statement contains the same information as the offense reports, which were made available to Gaiser. Those offense reports further reveal that when Holland named Quinton Randall, Holland also selected a picture of appellant, believing appellant to be the person who assaulted the complainant. Gaiser could have reasonably determined that review of Holland's statement was unnecessary based on the synopsis of the statement contained within the offense reports.

For his second item, appellant focuses on the surveillance footage from Walmart, which was described in two separate offense reports. According to the

reports, the footage depicts four black males approaching the sporting goods counter and purchasing ammunition. The officers who summarized the footage do not affirmatively name the individuals in this group of four, but statements from other witnesses contained within the reports indicate that Marcellus Burgin and Donald Koontz were included in the group.

The defense produced copies of the surveillance footage at the habeas hearing, but the footage was played outside the presence of the judge and it was never admitted into evidence, which means that the footage is not in our record. However, Gaiser testified that he did not remember seeing any of the footage that was produced by the defense, and the prosecutor stipulated that appellant was not depicted in that footage.

Appellant argues that if Gaiser had reviewed the footage, then he would have seen that appellant was not involved in the purchase of the bullets, as the prosecutor had stipulated. But this oversight does not necessarily demonstrate that Gaiser was deficient. The offense reports, which Gaiser did review, revealed that Marcellus Burgin went to Walmart for the purpose of purchasing bullets on behalf of appellant because appellant was too young to purchase them himself. Thus, Gaiser knew that the bullets were destined for appellant, even if there was no video evidence showing that appellant was directly involved in the purchase of the bullets. Gaiser also knew that appellant's gang affiliation and association with Burgin, who purchased the bullets, would undermine a defensive theory that appellant was just a victim at the party, where a gang fight broke out. For these reasons, Gaiser could have reasonably decided that review of the surveillance footage was unnecessary.

Also, even if Gaiser were deficient for not reviewing the footage, this deficiency does not demonstrate prejudice. Appellant's plea arose out of an assault

with a brick, not the purchase of bullets. The footage would not have been material to the plea.

For his third item, appellant turns to the photospread that Shamell Holland used to identify appellant. Appellant suggests that the photospread was an item worth investigating because, had Gaiser examined it, Gaiser might have challenged the photospread as being impermissibly suggestive. More specifically, appellant believes that the photospread was suggestive because it depicts three men of African-American origin and three men of Hispanic origin.

Gaiser could not remember definitively whether he saw the photospread, but his testimony suggested that he did not. In any event, the record is silent as to Gaiser's reasons for not investigating the photospread. And even if Gaiser had investigated the photospread, appellant did not establish a reasonable probability that a challenge to the photospread would be successful. The photospread depicts six young men with short, buzz-cut hair, and all of the images are printed in black and white, not color, which complicates a determination of skin tone. The officer who prepared the photospread resisted any suggestion that the men were of different races: "Like I said, I don't know what [race] they are, they just look similar to the defendant. We try to get as many characteristics as we can." During his examination of the officer, appellant's habeas counsel also acknowledged that the men whom he suggested were Hispanic could actually be "very light-skinned African American." That acknowledgment, coupled with the similar features of the six men depicted, cuts against any argument that the photospread was impermissibly suggestive. *See Fisher v. State*, 525 S.W.3d 759, 762–63 (Tex. App.—Houston [14th Dist.] 2017, pet. ref'd) ("Every photo array must generally contain photographs of individuals who roughly fit the description of the suspect. However, neither due process nor common sense requires exactitude.").

Claimed Failure to Interview Witnesses. Appellant argues next that Gaiser was ineffective because he only interviewed Victoria Sexton. Appellant believes that Gaiser should have also interviewed the following witnesses: the complainant, Shamell Holland, Caylynn Guerra, Alaysha Justice, Michelle Ramsey, Brandon Farnsworth, Whitney Montgomery, and Marcellus Burgin.

The record does not affirmatively reveal Gaiser's reasons for not interviewing these witnesses, although Gaiser suggested that some of the witnesses may not have presented well in front of a jury because of their likely gang affiliation.

Even if Gaiser fell below an objective standard of reasonableness by not interviewing these witnesses, appellant's claim cannot succeed absent a showing that the interviews would have revealed information that would have reasonably changed his decision to plead guilty. *See Stokes v. State*, 298 S.W.3d 428, 432 (Tex. App.—Houston [14th Dist.] 2009, pet. ref'd). Appellant suggests that he satisfied this burden because the witnesses could have discredited Tangela Jones and provided such exculpatory statements as: (1) appellant did not assault the complainant; (2) someone else assaulted the complainant (e.g., Whitney Montgomery's brother, Quinton Randall, or Donald Koontz); or (3) appellant acted in self-defense.

Appellant bases most of his argument on testimony from the habeas hearing, but the judge rejected that testimony. In fact, with the exception of Brandon Farnsworth, all of the named witnesses testified at the hearing, and the judge specifically found that they were not credible.

Farnsworth provided one of the unsworn statements that were attached to appellant's habeas application. His statement was short—only twelve sentences—and its content matched the written statements (and live testimony) given by Caylynn Guerra, Alaysha Justice, and Michelle Ramsey. The judge did not expressly comment on Farnsworth's credibility, but by denying the habeas application, we can

infer that the judge did not believe Farnsworth's statement. *Cf. Okonkwo v. State*, 398 S.W.3d 689, 694 (Tex. Crim. App. 2013) (holding that a trial court had implicitly found that an affidavit in support of a motion for new trial lacked credibility based on the court's ruling denying the motion). Also, because appellant does not identify any new information in Farnsworth's statement that differs from the statements by Guerra, Justice, and Ramsey, whom the judge expressly found were not credible, appellant did not establish a reasonable probability that his plea would have been different but for Gaiser's failure to interview Farnsworth.

Claimed Failure to Provide an Informed Recommendation. Appellant's next point is related to his previous claims. He contends that, by failing to conduct a more thorough investigation, and by saying that he would only investigate the facts more thoroughly if the case went to trial, Gaiser abdicated his duty to assist his client, which constitutes deficient performance.

Appellant's claim that Gaiser failed to provide him with an informed recommendation is not supported by the record. The judge specifically found that "Gaiser had multiple discussions with the applicant, which included the State's evidence, the strengths and weakness of the State's case, the right to proceed to a jury trial, and the benefits and risks associated with pleading guilty and proceeding to trial." We must defer to this finding because it is supported by Gaiser's testimony. Gaiser said:

> I didn't recommend he plead guilty to this case. I told him what his options were. . . .
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> I did not advise him to accept it or not accept it. I told him what the facts were that I saw in the case and what needed to be done if the case was going to go to trial. . . .
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> I advised him we could either set the case for trial and we would investigate all the facts at that point, or he could take the offer of a

> deferred adjudication at that point in time. That's what I would have told any client. . . .
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> If there was some evidence that was dispositive of the case, I would certainly encourage him not to, to enter a plea, but I didn't see that in this case and he made the ultimate decision, not I.

Appellant also argues that Gaiser's advice could not have been informed without a more thorough investigation, but this argument simply restates appellant's challenge to the reasonableness of Gaiser's investigation, which we rejected above.

CONCLUSION

Viewing the record in the light most favorable to the ruling below, we conclude that appellant did not produce any credible and material evidence in support of his claim that Gaiser's investigation was inadequate. Nor did appellant demonstrate that the judge abused his discretion when he found that Gaiser provided objectively reasonable advice about what plea to enter. Accordingly, appellant's claim of ineffective assistance of counsel must fail.

The order denying the application for writ of habeas corpus is affirmed.

/s/ Tracy Christopher
Justice

Panel consists of Justices Christopher, Brown, and Wise.
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