

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM OCONEE COUNTY
Court of Common Pleas

HONORABLE R. LAWTON MCINTOSH

2012-CP-37-638

JEFF A WEBB, SCDC # 214186,

APPELLANT,

against

STATE OF SOUTH CAROLINA,

RESPONDENT.

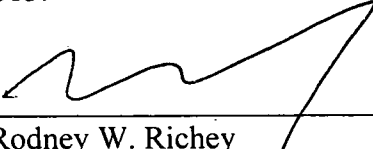
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AUG. - 9 2013

S.C. Supreme Court

NOTICE OF APPEAL

Jeff Webb appeals the denial of his Post Conviction Relief. The Post Conviction Relief Action was heard and denied by the Honorable R. Lawton McIntosh, Circuit Judge on May 5, 2013 and Order issued on July 23, 2013 and filed on August 2, 2013. The Appellant received notice of the judgment on August 5, 2013.



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Other Counsel of Record:
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S.C. Supreme Court

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on the State of South Carolina by depositing copy of it in the United States Mail, postage prepaid, on August 6, 2013, addressed to their attorney of record, Walt Whitmire, Office of Attorney General State of South Carolina, Post Office Box 11549, Columbia, SC 29211-1549.

Dated: August 6, 2012

RICHEY & RICHEY, P.A.



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Jeffrey A. Webb

State of South Carolina

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for : Plaintiff Defendant
or
 Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled); Other
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRPC; Bankruptcy; Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court:

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

s/ R. Lawton McIntosh
Circuit Court Judge

2155
Judge Code

07/23/13
Date

For Clerk of Court Office Use Only

STATE OF SOUTH CAROLINA)
)
 COUNTY OF OCONEE)
)
)
)
 Jeff A. Webb,)
 S.C.D.C. No. 214186,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 FOR THE TENTH JUDICIAL CIRCUIT

Case No. 2012-CP-37-638

FILED OCONEE, SC
 BEVERLY H. WHITFIELD
 CLERK OF COURT
 2013 AUG 2 AM 11 38

ORDER OF DISMISSAL

This matter comes before the Court pursuant to an application for post-conviction relief (PCR) filed July 12, 2012. Respondent made its Return on December 4, 2012. An evidentiary hearing into the matter was convened on May 5, 2013 at the Anderson County Courthouse. The Applicant was present at the hearing and was represented by Rodney W. Richey, Esquire. The Respondent was represented by Walt Whitmire, Esquire, of the South Carolina Attorney General's Office. Applicant and plea counsel testified.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Oconee County Clerk of Court. The Applicant was indicted at the November 2, 2009, term of the Oconee County Grand Jury on two counts of Armed Robbery and of Possession of a Weapon During the Commission of a Violent Crime (2019-GS-37-1279; 2009-GS-37-1282). Applicant was represented by Daniel Day, Esquire. On March 15-16, 2010, the Applicant was tried and convicted of the aforementioned offenses. Applicant was sentenced by the Honorable Alexander S. Macaulay to concurrent sentences of twenty years. Applicant did

appeal his conviction, which was dismissed and remitted to the lower court by the South Carolina Court of Appeals (No. 2011-UP-566).

At the PCR hearing, Applicant moved forward on the following allegations:

1. Ineffective assistance of counsel:
 - a. failure to challenge Applicant's arraignment.
 - b. failure to prepare and investigate Applicant's case for trial.
 - c. failure to communicate a guilty plea offer to Applicant.
 - d. failure to object to an alleged Doyle violation.
 - e. failure to object to the trial judge's improper jury instruction on accomplice liability.

2. Prosecutorial misconduct
 - a. failure to make Brady disclosures

SUMMARY OF TESTIMONY

At the PCR hearing, Applicant testified. Applicant alleged trial counsel was ineffective for not challenging a suspect indictment and arraignment procedure. Applicant stated he discussed the matter with trial counsel during the course of representation. Applicant alleged trial counsel was ineffective in failing to convey the solicitor's guilty plea offer. Applicant stated he was never advised a guilty plea offer materialized. Applicant stated trial counsel promised to work something out but failed to follow through.

Applicant alleged trial counsel was ineffective in failing to prepare his case. Applicant testified to his version of the events that led to his arrest. Applicant stated he was in the victims' home during the commission of the offense. Applicant stated one of the victims, Nathan McCall, owed him money. Applicant stated he pistol-whipped Nathan McCall during the commission of the offense. Applicant asserted he was falsely accused of firing shots. Applicant stated trial counsel failed to review discovery with him. Applicant alleged trial counsel was ineffective for failing to investigate evidence that corroborated his version of the facts of the offense. Applicant

stated he requested Brady materials in September of 2009. Applicant stated he received no response to this request.

Applicant alleged trial counsel was ineffective for failing to object to the solicitor's comments during his closing argument. Applicant stated the solicitor improperly commentated on Applicant's silence. Applicant stated he was prejudiced because solicitor's impropriety constituted a burden shift. Applicant stated trial counsel failed to object and request a curative instruction to remedy the harm.

Applicant alleges trial counsel was ineffective for failing to object to the trial judge's instruction on accomplice liability. Applicant stated the facts of his case did not support a "hand-of-one" jury instruction. Applicant alleged the trial judge erred on the matter because his primary co-defendant was only charged with strong armed robbery while Applicant was charged and convicted for armed robbery. Thus, Applicant argued the trial judge should have not sanctioned the jury imputing criminal liability for armed robbery.

Last, Applicant alleges prosecutorial misconduct. Applicant stated the solicitor failed to disclose favorable evidence pursuant to Brady. Applicant stated the solicitor failed to provide him with a statement made by Jason McCall. Applicant submitted an exculpatory statement from Jason McCall. Applicant stated Jason McCall originally claimed he was assaulted by someone other than Applicant during the commission of the offense. Applicant stated the victim's statement was inconsistent with his trial testimony. Applicant also stated the solicitor failed to provide him with a handwritten list of money owed to him.

At the PCR hearing, trial counsel testified. In anticipation of the hearing, trial counsel reviewed his case file. Trial counsel filed discovery. Trial counsel reviewed all of the evidence in the case with Applicant and made notations in his file to that effect. Trial counsel stated he

ultimately relinquished all discovery materials to Applicant subsequent to his conviction. Trial counsel discussed Applicant's version of the facts with him prior to trial. Trial counsel summarized the solicitor's case against Applicant. Applicant was charged with committing an armed robbery with three other persons. Applicant's co-defendant, Shane Elliott, implicated Applicant as the ringleader. Additionally, four eyewitnesses implicated Applicant. Applicant's girlfriend provided a statement as to Applicant's motive. Applicant also made a statement to police. Trial counsel investigated the credibility of the probable witnesses and investigated inconsistencies in their statements. Trial counsel testified he discussed Applicant's version of the facts with him. Applicant claimed the offense resulted from a dispute regarding drug money with the victims. During the course of representation, trial counsel obtained a guilty plea offer to the lesser-included offense of strong armed robbery. Trial counsel conveyed the offer to Applicant. Ultimately Applicant rejected the offer and subsequent negotiations because he desired a jury trial. Trial counsel testified the solicitor offered a ten-year term of imprisonment. Trial counsel personally conveyed the offer to Applicant. Ultimately Applicant rejected the offer and subsequent negotiations because he desired a jury trial. Trial counsel testified Applicant was indicted well before trial. Trial counsel recalled Applicant was well aware of the indictments and pending trial date.

In preparation for trial, trial counsel testified Applicant asked him to investigate several auxiliary witnesses. Inevitably, trial counsel was unable to compel their attendance at trial. Trial counsel testified an objection would have been appropriate to the solicitor's reference that "Applicant presented no evidence to the contrary" during closing arguments. Trial counsel testified he personally disliked accomplice liability in Applicant's case because the co-defendants were not on trial. Trial counsel requested a jury instruction for strong armed robbery.

Trial counsel made a motion on the matter and did not believe the jury instructions prejudiced Applicant.

APPLICABLE LAW

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 692 (1984); Butler, 286 S.C. at 441, 334 S.E.2d at 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 668. 104 S.Ct. at 2064. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, (citing Strickland). Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court reviewed the Clerk of Court's records regarding the subject convictions, the Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, the transcripts and documents from the prior proceedings, and legal arguments of counsel. Pursuant to S.C. Code Ann. §17-27-80 (2003), this Court makes the following findings of fact based upon all of the probative evidence presented.

A.

This Court finds Applicant's allegation that trial counsel was ineffective for not challenging the arraignment or requesting a continuance on the matter is without merit. "When that indictment is presented, that accusation made, that pleading filed, the accused has two courses of procedure open to him. He may question the propriety of the accusation, the manner in which it has been presented, the source from which it proceeds, and have these matters promptly and properly determined; or waiving them, he may put in issue the truth of the accusation, and demand the judgment of his peers on the merits of the charge." Evans v. State, 363 S.C. 495, 509, 611 S.E.2d 510, 517 (2005) (citing State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005)). This Court finds trial counsel's testimony credible and Applicant's testimony not credible. At trial, the solicitor informed the trial judge that Applicant had been personally notified of the pending armed robbery indictment at a preliminary hearing the year prior to trial. (Trial Tr. pp.107-9). The circumstances surrounding service of process were put on the record. (Trial Tr. pp.107-15). This Court finds Applicant was adequately apprised of the armed robbery indictment. Therefore, this allegation is denied and dismissed.

B.

This Court finds Applicant failed to meet his burden to prove trial counsel was ineffective for not preparing his case. Without a doubt, “[a] criminal defense attorney has a duty to investigate, but this duty is limited to reasonable investigation.” Thompson v. Wainwright, 787 F.2d 1447, 1450 (11th Cir.1986). “Moreover, while the scope of a reasonable investigation depends upon a number of issues; at a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case. Troedel v. Wainwright, 667 F.Supp. 1456, 1461 (S.D.Fla.1986), aff’d, 828 F.2d 670 (11th Cir.1987). This Court finds trial counsel’s testimony credible and Applicant’s testimony not credible. Trial counsel adequately investigated the State’s evidence, probable witnesses, and kept Applicant apprised of developments in the case. Applicant did not present this Court with credible evidence to support a deficiency argument on the matter. This Court finds trial counsel reasonably fashioned a defense based upon the circumstances of the case. Applicant’s version of facts told to trial counsel did not comport with the statement he made to the police. In the statement, Applicant admitted to taking the victim’s “ice,” not money. (Trial Tr. p.185). See Strickland, 466 U.S. at 691, 104 S. Ct. at 2066 (The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions.). Therefore, these allegations are denied and dismissed.

This Court also finds Applicant failed to prove trial counsel was ineffective for not communicating a plea offer. “Pursuant to these professional standards, counsel is required to fully communicate with the client so that the client can make an informed decision regarding any proposals by the State.” Davie v. State, 381 S.C. 601, 609, 675 S.E.2d 416, 420 (2009). This Court finds trial counsel’s testimony credible and Applicant’s testimony not credible. This Court finds the guilty plea offer was conveyed to and subsequently rejected by Applicant. See Lafler v.

Cooper, 132 S. Ct. 1376, 182 L. Ed. 2d 398 (2012). Therefore, this allegation is denied and dismissed.

C.

This Court finds Applicant failed to meet his burden to prove trial counsel was ineffective for not objecting to an alleged Doyle violation during the solicitor's closing argument. "An accused has a right to remain silent and the exercise of that right cannot be used against him." Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240 (1976). "Specifically, the solicitor must not comment, either directly or indirectly, on a defendant's silence, failure to testify, or failure to present a defense." State v. Cooper, 334 S.C. 540, 514 S.E.2d 584 (1999). "A solicitor's closing argument must stay within the record and has reasonable inferences to it." Id. The solicitor did not explicitly comment on Applicant's silence nor did he implicitly comment on it. The solicitor's comment "there is no evidence to the contrary" was made in the context of the solicitor's argument that the eyewitness and co-defendant testimony presented at trial denoted Applicant as the causal connection to the victims and scene of the offense.

"[Officer Arnold] talked to every single one of them, and like I say, every single one of them was fairly consistent in what they say happened. And the finger on every single one of them was fairly consistent in what they say happened. And the finger on every single one of them, it did not point at [co-defendant] they all blamed [co-defendant]. But the big finger pointed right back at the defendant right there, [Applicant]. He was the mastermind, he was the ringleader. I'm not excusing what [co-defendant] did, but [Applicant's] the one that did it (pointing to defendant). And there was no evidence to the contrary. They all saw it. Even though, like I saw, some of them have sketchy memories.

(Tr. 218, lines 7-18). Therefore, the alleged Doyle violation was nothing more than the solicitor's specific argument confined to summarizing the eyewitness testimony.

Furthermore, this Court finds the alleged error did not constitute prejudice. The reviewing

court applies enumerated factors to determine if the error is harmless: “(1) the reference to the defendant’s right to remain silent was a single reference, which was not repeated or alluded to; (2) the solicitor did not tie the defendant’s silence directly with his exculpatory story; (3) the exculpatory story was totally implausible; (4) the evidence of guilt is overwhelming. McFadden v. State, 342 S.C. 637, 641, 539 S.E.2d 391, 393 (2000). The alleged implicit Doyle violation occurred only once. Second, the solicitor distinguished his summary and version of the eyewitness and co-defendant testimony from Applicant’s exculpatory statement. Applicant’s exculpatory statement was introduced at trial. (Trial Tr. pp.185-6). The solicitor’s closing argument addressed the statement separate and apart from his summary of the eyewitness and co-defendant testimony. (Trial Tr. p.220). Third, Applicant gave a statement that was inconsistent to testimony provided by the co-defendant, two eyewitnesses, the two victims, and Applicant’s girlfriend. Fourth, Applicant’s conviction was supported by overwhelming evidence of guilt. Numerous witnesses and the victims implicated Applicant in the commission of the offense. Last, the trial judge gave thorough jury instructions regarding the matter prior and subsequent to the solicitor’s closing argument. (Trial Tr. p.212; p.246). Thus this Court finds any purported error on the matter would have constituted harmless error. Therefore this allegation is denied and dismissed.

D.

This Court finds Applicant failed to prove trial counsel was ineffective for not objecting to the trial judge’s jury instructions on accomplice liability. “One who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design or purpose.” State v. Langley, 334 S.C. 643, 515 S.E.2d 98 (1999). “To warrant reversal, a trial judge’s refusal to give a requested jury charge

must be both erroneous and prejudicial to the defendant.” State v. Burkhart, 350 S.C. 252, 261, 565 S.E.2d 298, 303 (2002). “Failure to give requested jury instructions is not prejudicial error where the instructions given afford the proper test for determining the issues.” Id. at 263, 565 S.E.2d at 304. This Court finds the facts of the case clearly supported the jury charge. See State v. Peeler, 320 S.C. 546, 553, 466 S.E.2d 375, 380 (Ct. App. 1996). Applicant presents a novel restrictive interpretation of accomplice liability predicated upon the actual charges brought by the State and not on the underlying facts presented at trial. See Thornes v. State, 310 S.C. 306, 309-10, 426 S.E.2d 764, 765 (1993) (“This Court has never required an attorney to anticipate or discover changes in the law, or facts which did not exist, at the time of trial.”). Therefore, this allegation is denied and dismissed.

E.

This Court finds Applicant’s allegation of prosecutorial misconduct is without merit. “In South Carolina, an individual asserting a Brady violation must demonstrate that the evidence: (1) was favorable to the accused; (2) was in the possession of or known by the prosecution; (3) was suppressed by the State; and (4) was material to the accused's guilt or innocence or was impeaching. State v. Moses, 390 S.C. 502, 515, 702 S.E.2d 395, 402 (Ct. App. 2010). Applicant alleged the solicitor failed to provide him with the victim’s initial statement to police where the victim implicated a co-defendant and not Applicant in the assault. However, the issue of the assault was not in dispute. At the PCR hearing, Applicant admitted to “pistol whipping” the victim. Therefore, a facial analysis of the statement was neither favorable to Applicant nor was it material to Applicant’s guilt or innocence. This Court also finds the list of monies owed to Applicant did not constitute favorable or material evidence. Therefore, this allegation is denied and dismissed.

All Other Claims

Except as discussed above, this Court finds that the Applicant affirmatively waived the remaining allegations set forth in his application at the hearing. A waiver is a voluntary and intentional abandonment or relinquishment of a known right. Janasik v. Fairway Oaks Villas Horizontal Property Regime, 307 S.C. 339, 415 S.E.2d 384 (1992). A waiver may be express or implied. "An implied waiver results from acts and conduct of the party against whom the doctrine is invoked from which an intentional relinquishment of a right is reasonably inferable." Lyles v. BML, Inc., 292 S.C. 153, 158-59, 355 S.E.2d 282 (Ct. App. 1987). The Applicant's failure to address these issues at the hearing indicates a voluntary and intentional relinquishment of his right to do so. Therefore, any and all remaining allegations are denied and dismissed.

CONCLUSION

Based on all the forgoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

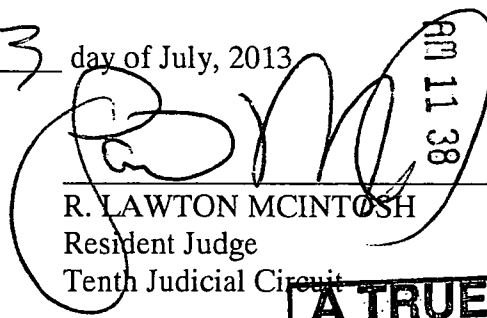
This Court notes that Applicant must file and serve a notice of intent to appeal within thirty (30) days from receipt of this Order to secure the appropriate appellate review. See Rule 203, SCACR; Rule 71.1(g), SCRCP; Bray v. State, 336 S.C. 137, 620 S.E.2d 743 (2005), for the obligation of Applicant's counsel to file and serve notice of appeal. The Applicant's attention is also directed to South Carolina Appellate Court Rule 243 for appropriate procedures after notice has been timely filed.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and

2. Applicant must be remanded to the custody of Respondent.

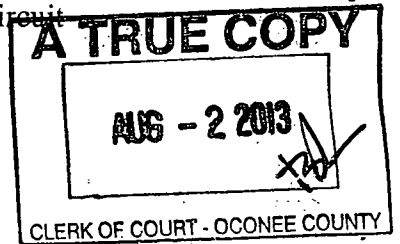
AND IT IS SO ORDERED this 23 day of July, 2013



R. LAWTON MCINTOSH
Resident Judge
Tenth Judicial Circuit

FILED OCOONEE, SC
BEVERLY H. WHITFIELD
CLERK OF COURT
2013 AUG 2 AM 11 38

Anderson, South Carolina



RICHEY AND RICHEY

ATTORNEYS AT LAW

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S.C. Supreme Court

August 5, 2013

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The Honorable Daniel E. Shearouse
The Supreme Court of South Carolina
Post Office Box 11330
Columbia, SC 29211

Re: Jeffrey Webb, SCDC # 214186 vs. The State of South Carolina
Case No: 2012-CP-37-638

Dear Mr. Shearouse:

Please find enclosed a Notice of Appeal and a Proof of Service for the same. Also, I have enclosed a copy of the Order from which the appeal is taken. Thank you for your help and if you should have any questions please feel free to call me.

RICHEY AND RICHEY, P.A.

Yours truly,


Rodney Richey

RWR/tlg
enclosures

cc: Walt Whitmire, Esquire

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The Honorable Daniel E. Shearouse
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