WALLER LAW GROUP

February 6, 2018

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

Re: Donald R. Dollard vs. State of South Carolina
C/A No: 2015-CP-21-1992

Dear Mr. Shearouse:

Please find enclosed one (1) original and one (1) copy each of Applicant's Notice of Appeal and Certificate of Service in the above referenced case. I would appreciate you filing the original and returning the clocked copies in the enclosed envelope.

I was appointed to represent Mr. Dollard in this matter and am also enclosing a copy of the Order of Dismissal. If you have any questions, please do not hesitate to ask. My telephone number is 803-520-7278.

Sincerely,

Jonathan D. Waller

Cc: Lindsey A. McCallister, South Carolina Office of Attorney General

Enclosures

1116 Blanding Street, Suite 2B, Columbia, South Carolina 29201
(P) 803-520-7278
WALLERLAWGROUP.COM

STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
FEB 09 2018
S.C. SUPREME COURT

APPEAL FROM FLORENCE COUNTY
Thomas A. Russo, Circuit Court Judge

2015-CP-21-1992

Donald R. Dollard, #361803,

Appellant,

v.

STATE OF SOUTH CAROLINA,

Respondent.

NOTICE OF APPEAL

Donald R. Dollard, #361803, appeals the Order of Dismissal denying his Application for Post-Conviction Relief filed January 29, 2018, issued by the Honorable Thomas A. Russo, Presiding Judge, Twelfth Judicial Circuit.

Jonathan D. Waller

Waller Law Group
SC Bar No.: 76290
1116 Blanding Street
Suite 2B
Columbia, SC 29201
803-520-7278 (phone)
jonathan@wallergroupsc.com
ATTORNEY FOR PETITIONER

February 6, 2018

Other Counsel of Record:

Lindsey A. McCallister, Assistant Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3319

RECEIVED
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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM FLORENCE COUNTY
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Donald R. Dollard, #361803,

Appellant,

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STATE OF SOUTH CAROLINA,

Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of the Appellant's Notice of Appeal in the above-entitled case has been served upon opposing counsel, Lindsey A. McCallister, Assistant Attorney General, by mailing in an envelope properly addressed with postage prepaid on this 6th day of ~~January~~ February 2018, to her office located at P.O. Box 11549, Columbia, SC 29211.

M. David Scott

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF FLORENCE
IN THE COURT OF COMMON PLEAS

FILED
2018 JAN 30 AM 10:01
DORIS POULOS O'HARA
CCCP & GS
FflorENCE COUNTY, SC

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2015CP2101992

Donald R Dollard	**South Carolina State Of**
PLAINTIFF(S)	**DEFENDANT(S)**
Submitted by:	**Attorney for:** ☐ Plaintiff ☐ Defendant ☐ 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), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____

☐ **STAYED DUE TO BANKRUPTCY**

☐ **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.
E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

Circuit Court Judge	**Judge Code**	1/30/2018 **Date**

For Clerk of Court Office Use Only

This judgment was entered on **January 29, 2018**, and a copy mailed first class or placed in the appropriate attorney's box on **January 30, 2018**, to attorneys of record or to parties (when appearing pro se) as follows:

CERTIFIED: A TRUE COPY
Doris Poulos O'Hara
CLERK OF COURT C.P. & G.S.
FLORENCE COUNTY, S.C.

Jonathan D Waller 1116 Blanding Street Suite 2B
Columbia, SC 29201

Lindsey Ann McCallister PO Box 11549 Columbia, SC
29211-1549

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Doris P. O'Hara

Court Reporter

Doris Poulos O'Hara - Clerk of Court

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA COUNTY OF FLORENCE	)	IN THE COURT OF COMMON PLEAS TWELTH JUDICIAL CIRCUIT
Donald R. Dollard, #361803, Applicant, v. State of South Carolina, Respondent.	)	C.A. No. 2015-CP-21-1992 **ORDER OF DISMISSAL**

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed by Donald R. Dollard (Applicant) on July 6, 2015. Respondent made its Return on November 4, 2016. An evidentiary hearing into the matter was convened on August 29, 2017, at the Florence County Courthouse before the Honorable Thomas A. Russo. Jonathan Waller, Esquire, represented Applicant. Lindsey McCallister, Esquire, of the South Carolina Attorney General's Office, represented Respondent. At the hearing, Applicant testified on his own behalf. H. Steven Deberry, IV (Counsel) also testified. This Court had before it a copy of the records of the Florence County Clerk of Court, records from the South Carolina Department of Corrections, the application, the State's Return, and the guilty transcript.

PROCEDURAL HISTORY

Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Florence County Clerk of Court's orders of commitment. Applicant was indicted at the June 2014 term of the Florence County Grand Jury for murder, armed robbery, conspiracy, and kidnapping (2013-GS-21-00691). H. Steven DeBerry, IV, Esquire, represented him. On October 21, 2014, Applicant pleaded guilty to armed robbery and accessory before the fact of a felony. Applicant was sentenced by Honorable Benjamin H. Culbertson to twenty-five years

imprisonment for each offense, with the sentences to be served concurrently. Applicant did not appeal his conviction or sentence.

ALLEGATIONS

In his current application, Applicant alleges that he is being held unlawfully for the following reasons:

1. Ineffective Assistance of Counsel
    a. "Plea counsel promise (sic) I would receive 10 years for plea."
    b. "Plea counsel failed to mount a defense based on the premise of accomplice liability, nor did counsel discuss with Applicant his right to appeal."

At the evidentiary hearing, counsel for Applicant informed the Court he was also proceeding on an allegation of ineffective assistance of counsel for failure to file a notice of appeal.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusion of law as required by S.C. Code Ann. Sec. 17-27-80 (2003).

Ineffective Assistance of Counsel/Involuntary Guilty Plea

In a PCR action, the applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (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." Id. at 443, 334 S.E.2d at

814. The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland v. Washington, 466 U.S. 668, 689 (1984). Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of trial counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove that counsel's performance was deficient. Id. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Id. (quoting Strickland, 466 U.S. at 688). 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. With respect to guilty plea counsel, Applicant must show there is a reasonable probability that, but for counsel's alleged errors, he would not have pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 (1985).

Further, the record must establish the defendant had a full understanding of the consequences of his plea and the charges against him. Dalton v. State, 376 S.C. 130, 138, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing Boykin v. Alabama, 395 U.S. 238, 242 (1969)). A defendant's knowing and voluntary waiver of statutory or constitutional rights must be established by a complete record, and "may be accomplished by colloquy between the court and defendant, between the court and defendant's counsel, or both." Roddy v. State, 339 S.C. 29, 34, 528 S.E.2d 418, 421 (2000) (citing State v. Ray, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993)).

"A guilty plea is a solemn, judicial admission of the truth of the charges" against the applicant; thus, an applicant's right to contest the validity of such a plea is usually foreclosed. Dalton, at 137–38, 654 S.E.2d at 874 (citing Blackledge v. Allison, 431 U.S. 63 (1977)). Therefore, admissions "made during a guilty plea should be considered conclusive unless [an applicant] presents valid reasons why he should be allowed to depart from the truth of his statements." Id. (citing Crawford v. United States, 519 F.2d 347 (4th Cir. 1975); Edmonds v. Lewis, 546 F.2d 566 (4th Cir. 1976)). Additionally, "the transcript of the guilty plea hearing will be considered to determine whether any possible error by counsel was cured by the information conveyed at the plea hearing." Id. at 138–39, 654 S.E.2d at 874 (citing Wolfe v. State, 326 S.C. 158, 165, 485 S.E.2d 367, 370 (1997)).

Applicant testified he was 58 years old when he was arrested, and he was originally charged solely with armed robbery. Applicant testified Counsel was appointed to represent him on the charges, and their first meeting occurred when Counsel visited Applicant. Applicant testified he and Counsel only discussed a plea to an accessory charge, and Counsel told him he would receive ten years. However, Applicant testified he and Counsel never discussed the other four charges. Applicant testified he cooperated with law enforcement and tried to help himself based on advice from Counsel.

Applicant testified he decided to plead guilty because his attorney told him he would receive a ten-year sentence on the accessory charge. Applicant further testified he had no knowledge he was charged with conspiracy, kidnapping, and murder, and he and Counsel only met twice prior to the plea. Applicant testified Counsel only told him about the armed robbery charge and the accessory charge. Applicant testified he was not aware he was going to court for a plea until he was woken up by an officer at the jail that morning, and he had not agreed to

plead guilty until after he arrived at the courthouse. Applicant also testified Counsel discussed the questions the judge would ask during the plea colloquy and showed Applicant some papers to sign, which Applicant did, though Applicant testified he didn't understand them. Applicant further testified he has been treated for mental health issues in the past and had been on suicide watch in the jail. Applicant testified he told his attorney about this, but Counsel never had him evaluated. However, on cross-examination, after reviewing the transcript, Applicant agreed the judge explained the minimum and maximum sentences he could receive, and Applicant stated he understood.

Applicant testified he did not have a weapon during the incident, but he and Counsel never discussed how Applicant could be charged with these crimes without having a weapon. Applicant testified he and Counsel watched a video from the incident location, which showed Applicant did not carry the gun. However, Applicant testified Counsel only explained the "hand of one, hand of all" concept after Applicant had already been sentenced, and Applicant asked Counsel why he had received a twenty-five year sentence. Applicant averred he never asked Counsel to explain accomplice liability or how he could be charged with murder if he did not carry the weapon. Applicant testified he was not aware of any defenses he may have had, and he and Counsel did not discuss any. On cross-examination, Applicant testified he understood he waived his right to present a defense by entering the guilty plea.

Counsel testified he met with Applicant for the first time on January 24, 2014, and then appeared with Applicant at Applicant's bond hearing on February 7, 2014, at which time Applicant waived bond. Counsel testified Applicant did so because Applicant did not deny his involvement in the crimes, they had discussed the pros and cons of accruing some time-served credit, and Applicant had an opportunity to cooperate with law enforcement, which he did.

Counsel testified he and Applicant discussed the charges at the January meeting, Applicant gave Counsel contact information for Applicant's wife, and they discussed Applicant's prior record. Counsel further testified he received discovery from the solicitor the day before the bond hearing in February.

Counsel testified he had been practicing approximately eight years at the time of his representation of Applicant, with about 85% of his practice in criminal court. Counsel testified he and Applicant met and discussed the case, including possible defenses, on January 24, February 7, April 1, June 2, and July 29, and then again on the day of the plea. Counsel testified Applicant never asked for a trial, and Counsel engaged in plea negotiations with the State very early on due to Applicant's cooperation with law enforcement. Counsel also testified there was no question Applicant knew he was pleading guilty to accessory before the fact, not after the fact, and Applicant knew the armed robbery charge carried a sentence of at least ten years. Counsel testified the State agreed to dismiss the murder, kidnapping, and conspiracy charges.

Counsel further testified these were serious charges, and he never promised Applicant a sentence of ten years. Counsel testified Applicant's codefendant had pleaded guilty sometime earlier and was sentenced to thirty years, and the solicitor offered to make the judge aware of the State's belief that Applicant did not deserve the same sentence. Counsel testified he relayed this conversation to Applicant, but told him the decision would be up to the judge. Further, Counsel testified he and Applicant discussed the plea prior to Applicant's arrival at the courthouse, and Counsel explained the date of Applicant's plea would be dependent on when the codefendant pleaded guilty. Counsel additionally testified he and Applicant discussed accomplice liability, and Applicant understood the concept. Finally, Counsel testified he went over the sentencing

sheet with Applicant, possible defenses, and also explained the rights Applicant would be giving up.

Counsel also testified he believed Applicant understood all of their conversations as he asked appropriate questions, talked about ways he could help himself, and provided useful information to law enforcement to try to find the third person involved. Counsel testified he was aware Applicant was on suicide watch one time, but he had no concerns about Applicant's ability to understand the criminal process. Counsel further testified Applicant was taken off suicide watch about half way through the course of the representation. Counsel testified he and Applicant had a good working relationship.

Regarding Applicant's claim his guilty plea was induced by ineffective assistance of counsel, namely Counsel's promise of a ten-year sentence and failure to pursue a defense based on accomplice liability, this Court finds Applicant has failed to meet his burden of proof. This Court finds Applicant's testimony regarding Counsel's ineffectiveness is not credible, while also finding Counsel's testimony is credible. This Court finds Counsel provided effective assistance in this case and Applicant's decision to plead guilty was made freely and voluntarily. Counsel reviewed the video from the incident with Applicant and met with him on multiple occasions to discuss possible defenses, Applicant's constitutional rights, and the State's burden of proof, including the concept of accomplice liability. This Court finds credible Counsel's assertion Applicant understood the charges he was pleading guilty to, the possible range of sentences, and the concept of accomplice liability. Additionally, even if Applicant believed he had been promised a ten-year sentence, the plea court questioned Applicant at length regarding the possible sentence, and Applicant indicated he understood.

This Court finds the record reflects Applicant's plea was entered freely, voluntarily, knowingly, and intelligently. Applicant told the plea judge he was satisfied with Counsel's representation and had no complaints. Tr. p. 32. Importantly, the plea court specifically asked if anyone had made any promises to Applicant, and Applicant said no and never mentioned the ten-year issue. Tr. p. 32. Additionally, this Court finds even if Applicant believed he would receive a ten-year sentence prior to the plea, that belief was corrected by the thorough colloquy conducted by the plea court. Roddy, 339 S.C. at 34, 528 S.E.2d at 421 (holding a defendant's knowing and voluntary waiver of statutory or constitutional rights "may be accomplished by colloquy between the court and defendant, between the court and defendant's counsel, or both."); see also Tr. pp. 30-32. Accordingly, this Court finds Applicant understood the terms of the plea and entered into it freely and voluntarily.

Therefore, this Court finds Applicant has failed to prove the first prong of the Strickland test – that Counsel failed to render reasonably effective assistance under prevailing professional norms. Applicant failed to present compelling evidence that Counsel committed either errors or omissions in his representation of Applicant. This Court also finds Applicant has failed to prove the second prong of Strickland – that he was prejudiced by Counsel's performance. This Court also finds that the record fully supports the knowing and voluntary nature of Applicant's guilty plea, and any misconception Applicant had about the sentence he would receive was corrected during the hearing by the plea court. In addition, Applicant has presented no evidence or valid reasons why he should be allowed to depart from the truth of his statements made at the plea. See Dalton, 376 S.C. at 137, 654 S.E.2d at 874 ("[Admissions] made during a guilty plea should be considered conclusive unless [an applicant] presents valid reasons why he should be allowed to depart from the truth of his statements."). This Court concludes Applicant has not met his

burden of proving Counsel failed to render reasonably effective assistance such that his guilty plea was rendered involuntary. The allegation is hereby denied and dismissed.

Ineffective Assistance of Counsel – Failure to File Timely Notice of Appeal

The Supreme Court of the United States has specifically "reject[ed] a bright-line rule that counsel must always consult with the defendant regarding an appeal." Roe v. Flores-Ortega, 528 U.S. 470, 480 (2000). When a conviction arises out of a guilty plea, Counsel has "a constitutionally imposed duty to consult with defendant about an appeal when there is reason to think either (1) that rational defendant would want to appeal, or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing." Id. The Supreme Court has further noted that "a highly relevant factor in this inquiry will be whether the conviction follows a trial or a guilty plea, both because a guilty plea reduces the scope of potentially appealable issues and because such a plea may indicate that the defendant seeks an end to judicial proceedings." Id. Further, the Supreme Court of South Carolina has expressly stated that "[a]bsent extraordinary circumstances, there is no constitutional requirement that a defendant be informed of the right to a direct appeal from a guilty plea." Turner v. State, 380 S.C. 223, 224, 670 S.E.2d 373, 374 (2008). Extraordinary circumstances arise when a defendant inquires about an appeal, and counsel has a duty to advise him in that instance. See Weathers v. State, 319 S.C. 59, 61, 459 S.E.2d 838, 839 (1995).

Applicant testified Counsel never discussed an appeal until after Applicant's sentence was pronounced. Applicant testified he wrote a note to Counsel several weeks after the plea asking Counsel to file a motion to suppress and a notice of appeal. Applicant testified Counsel visited him in Columbia after Applicant wrote the note. Applicant testified Counsel told him he did not file the appeal because Counsel was out of town.

Counsel testified he had never had a client ask to appeal from a guilty plea before. Counsel testified he remembered having a conversation with Applicant and Applicant's wife in the courthouse after the plea wherein they discussed the possibility of an appeal, but Applicant told Counsel he did not want to appeal. Counsel testified Applicant's wife called him a few days later, and they had a similar conversation. Counsel further testified he received Applicant's letter approximately thirty days after the plea, well after the ten-day window for filing an appeal had lapsed, and he did go visit Applicant to discuss it. Counsel testified when he left the visit, Applicant asked him not to file any appeal, and he never heard anything else from Applicant after that. Further, Counsel denied telling Applicant the appeal was not filed because Counsel was out of town.

This Court finds Applicant has failed to prove the first prong of the Strickland test – that Counsel failed to render reasonably effective assistance under prevailing professional norms. Applicant failed to present compelling evidence that Counsel committed either errors or omissions in his representation of Applicant. This Court also finds Counsel's testimony on this issue to be credible, while also finding Applicant's testimony is not credible. The Court finds Counsel and Applicant discussed the appellate process on multiple occasions, and Applicant did not wish to appeal. Further, the Court finds Applicant never instructed Counsel to file an appeal until at least thirty days after the plea, when the time period to do so had already expired. Further, the Court finds Counsel made the appropriate effort to address the issue by visiting Applicant in jail to discuss the issue, at which time Applicant told Counsel not to file anything, after which Applicant never contacted Counsel again. This allegation is therefore denied and dismissed.

CONCLUSION

Based on all the forgoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations before or during his plea and sentencing proceedings. Counsel was not deficient, nor was Applicant prejudiced by Counsel's representation. Therefore, this PCR application must be denied and dismissed with prejudice.

The Court notes Applicant must file and serve a notice of appeal within thirty days from receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, Applicant must serve and file a notice of appeal on his own behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. The application for post-conviction relief be denied and dismissed with prejudice; and
2. Applicant be remanded to the custody of Respondent.

AND IT IS SO ORDERED this 22 day of January, 2018.

THE HONORABLE THOMAS A. RUSSO
Presiding Judge
Twelfth Judicial Circuit

Florence, South Carolina.

FILED
2018 JAN 29 AM 11:02
DORIS POULOS O'HARA
CCCP & GS
FLORENCE COUNTY, SC

CERTIFIED: A TRUE COPY
Doris Poulos O'Hara
CLERK OF COURT C.P. & G.S.
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