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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Newberry County

Frank R. Addy, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JEFFREY GLENN MCCOY,

APPELLANT

APPELLATE CASE NO. 2013-000921

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the court erred in denying Appellant's motion to suppress evidence seized from his vehicle and his hotel room in violation of the Fourth Amendment where law enforcement searched Appellant's car without a warrant and without probable cause and subsequently searched his hotel room based on evidence obtained in the unlawful search of his vehicle?

STATEMENT OF THE CASE

A Newberry County Grand Jury indicted Appellant at the August 24, 2012 term of General Sessions for safecracking, five counts of second degree burglary (violent), grand larceny, two counts of petit larceny, and possession of burglary tools. R. 371 - 394. His case was called to trial on April 22, 2013 before the Honorable Frank R. Addy, and a jury. R. 1.[1] Charles Verner represented Appellant. C. Dale Scott and Yates Brown were the assistant solicitors. R. 1.

At the conclusion of the trial on April 24, 2013, the jury found Appellant guilty. R. 356, l. 8 – 357, l. 25. Judge Addy sentenced Appellant to fifteen years imprisonment for safecracking, ten years consecutive for one count of second degree burglary (violent), ten years concurrent for each of the remaining four counts of second degree burglary (violent), five years concurrent for grand larceny, five years concurrent for possession of burglary tools, and thirty days concurrent for each count of petit larceny. R. 359, l. 19 – 361, l. 4.

This appeal follows.

[1] The supplemental transcript refers to the transcript dated April 22, 2013.

ARGUMENT

The court erred in denying Appellant's motion to suppress evidence seized from his vehicle and his hotel room in violation of the Fourth Amendment where law enforcement searched Appellant's car without a warrant and without probable cause and subsequently searched his hotel room based on evidence obtained in the unlawful search of his vehicle.

Motion to Suppress

Appellant moved pretrial to suppress evidence seized from the unlawful search of his car and the subsequent search of his hotel room on Fourth Amendment grounds. R. 5, 18-23. In response to Appellant's motion, the state called various law enforcement officers to the stand.

Officer Boris Alvarado of the Newberry Police Department testified that when he started his shift at six o'clock on the evening of Sunday, May 27, 2012, he "was informed by the off-going sheriff that a burglary had occurred at Shoppes on Wilson," a local shopping center, and that "all those businesses were broken into by an individual." Alvarado explained that he was told that the suspect made entry through the back of El-Amin, a barbershop, and then "they went through the walls adjacent to all the businesses. Jackson-Hewitt was the next, and Boost Mobile being the next business in line, and then Regional Finance. Also, I was told that [the suspect was] going to attempt to go through the side wall from Regional Finance to the Check Into Cash. But I believe they couldn't make it through, but they then went outside and went in through the back wall [of Check Into Cash]." R. 7, l. 4 – 9, l. 1. Alvarado also explained that he was told some tools had been left at Check Into Cash by the suspect including a grinder, grinder wheels, blades, and power tools, and that the suspect attempted to break into a safe at Check Into Cash.

This burglary occurred during the late hours of Saturday, May 26, 2012 or the early morning hours of Sunday, May 27, 2012. R. 9, ll. 2-25. As a result of this incident, law enforcement "increased patrols" that Sunday night and were instructed to "check all properties throughout the night." R. 8, l. 13; R. 10, ll. 10-17.

Alvarado said that around 8:45 pm that Sunday, "[he] went to the Bear Village Plaza to do a property check." He explained that he parked his vehicle in the parking lot and went on foot to the back side of the businesses. He testified, "I notice[d] that one of the storage facilities was open. I checked that facility. When I went around, I encountered [Appellant]. He was kneeled down behind an air-conditioning unit. As I turned around, he stood up and walked towards me." R. 10, l. 18 – 11, l. 6. Alvarado said that Appellant provided his name and date of birth and "[Alvarado] ran it with dispatch, ran his information. It came back to [Appellant] out of Tennessee." R. 11, l. 15 – 12, l. 3. Alvarado then requested backup and Officer Desiree Busko arrived. "[He] also requested Sergeant Malloy to come by as well." R. 12, ll. 4-10.

Officer Busko checked the area where Appellant had originally been found kneeling and the back of the businesses at Bear Village to make sure that nothing had been tampered with or was out of place. Alvarado claimed that Busko found a bag containing various tools on the ground where Appellant had been kneeling. R. 12, ll. 14-24; R. 13, ll. 5-22. Appellant was also patted down for weapons and, while the officers did not find any weapons, Appellant allegedly had a ratchet and four adaptors for the tool on his person. Appellant was also allegedly wearing a pair of work gloves at the time. R. 15, ll. 4-12.

Alvarado testified that Appellant was placed under arrest for attempted burglary and possession of burglary tools and transported from the scene. R. 14, ll. 6-13; R. 15, ll. 23-25.

On cross-examination, Alvarado admitted that when Appellant was placed in investigative detention and then later arrested, he was not in possession of a vehicle. R. 18, ll. 22-25. Alvarado explained that while he was assisting Investigator Kevin Goodman with processing the scene at Bear Village, Sergeant Malloy located a green Ford Taurus with a Tennessee license plate in the BI-LO parking lot, which is adjacent to shopping center at Bear Village Plaza. R. 19, l. 1 – 21, l. 4. Sergeant Malloy ran the vehicle tag with the Department of Motor Vehicles (DMV) and discovered that the car was owned by Appellant. Alvarado conceded that the vehicle was lawfully parked and that the only reason it was of interest to law enforcement was because it was owned by Appellant. R. 21, ll. 5-24.

Alvarado testified that Sergeant Malloy conducted surveillance on the vehicle for about an hour until BI-LO closed at 10:00 pm. He explained that law enforcement waited until BI-LO closed to make sure "there was nobody else that would approach the vehicle." The officers then took the vehicle into custody and Sergeant Malloy inventoried the car "before the towing service arrived." The keys to the car were allegedly taken from Appellant after he was arrested and therefore the officers did not have to break into the vehicle. Alvarado conceded that the only reason the vehicle was taken into custody was because Appellant was the owner and had been arrested. According to Alvarado, the car was seized incident to Appellant's arrest. R. 22, l. 14 – 25, l. 5.

Sergeant Randy Malloy testified that Alvarado called him by radio and asked him to respond to Bear Village because he was the "shift patrol investigator." When he arrived, Appellant was in custody. Alvarado told Malloy Appellant's name and that he was from Tennessee. R. 28, l. 6 – 29, l. 9. Malloy testified that because there were no cars parked in the Bear Village parking lot, he searched the surrounding area for a vehicle that could be

associated with Appellant. Malloy explained that he went to the BI-LO parking lot and found a vehicle with a Tennessee tag. He "ran the tag through the DMV, and the vehicle came back to [Appellant]." Bear Village Plaza and BI-LO are on the same side of the road, but a Mexican restaurant is located in between the two shopping centers. There were no cars in the parking lot at the Mexican restaurant. R. 29, l. 10 – 31, l. 23.

Malloy explained that he walked around the car to see if there was anybody inside. When he walked around the vehicle, he "could clearly see inside bags of tools or tool items such as saw blades, power tools, those type items." In the center console, he also saw "a mixture of change, coins." Malloy and Lieutenant Stuhr conducted surveillance on the car to see whether there was another participant who might approach the car. R. 32, l. 12 – 33, l. 19. They waited until BI-LO closed and then searched the vehicle. Malloy testified that they searched the vehicle because "we had already placed [Appellant] under arrest. And per policy, we went over to seize the vehicle and inventory the vehicle." Malloy further stated that in every situation where "we make a custodial arrest and we know that the person has a vehicle," his agency seizes the car and conducts an inventory. R. 33, l. 24 – 35, l. 13.

Malloy listed the items found in Appellant's car when it was inventoried. Some of the more notable items included a black and gray tool bag found on the backseat of the car containing several saw blades, a grinding wheel, an orange extension cord, a Phillips screwdriver, a reciprocating saw, a black grinder, and other miscellaneous tools; an undetermined amount of quarters and gold dollar coins found in the center console; a red hotel key also found in the center console; and rolls of stamps found in the glove compartment. After Malloy had finished searching the car, it was towed. R. 36, l. 1 – 37, l. 12.

Sergeant Malloy stressed on cross-examination that Appellant's car was seized and inventoried incident to his arrest. Malloy conceded that the car was lawfully parked in the BI-LO parking lot and was not an abandoned vehicle. He also admitted that at the time the car was seized, it was not impeding traffic or creating a safety hazard. The only reason the car was seized was because it was tied to Appellant. Malloy testified that his agency would not normally seize a vehicle that was left overnight in the BI-LO parking lot. R. 42, l. 6 – 43, l. 25.

Malloy also admitted that at the time he searched the car, law enforcement did not have a search warrant. R. 44, ll. 21-23.

Officer Desiree Busko testified that she responded to Bear Village on the night of May 27, 2012. When she arrived, Officer Alvarado was standing with Appellant. Alvarado asked her to look around the area. She allegedly found "a black bag and some tools on the ground near the power blocks and the AC unit." This was about five feet from where Appellant and Alvarado were standing. She later transported Appellant to jail. R. 50, l. 11 – 51, l. 10.

After transporting Appellant to the jail, Busko was told that law enforcement had found a hotel key in Appellant's car. She was instructed to "start checking all local hotels to see if [Appellant] had registered" at any of them. She explained that she "got a list of hotels from the phone book and started checking. [She] actually went to the locations." The innkeeper at the Budget Inn, which was the second hotel she visited, told her that Appellant had checked into the hotel the day before and was staying in Room 125. R. 51, l. 15 – 52, l. 20; R. 55, ll. 16-23. Busko testified that Lieutenant Stuher instructed her to watch the room until a search warrant was obtained. R. 52, l. 21 – 53, l. 1.

A warrant was eventually obtained and executed by Investigator Goodman. R. 53, ll. 2-9. Busko testified that she "participated in the clearing of the hotel room" and that "[w]hen [they] opened the door, a lot of the items were in plain view." R. 56, ll. 18-23.

Investigator Kevin Goodman testified that he was called out to the Shoppes on Wilson around 8:30 am on Sunday, May 27, 2012 to assist in the investigation. Goodman said, "The first thing I observed was Check Into Cash. There was a large hole in the back center block wall. Inside the building, inside of Check Into Cash, there were several tools, burglary tools, grinders, pry bars, random blades, wire snips. I remember a hammer being there, different things like that." Goodman explained that besides Check Into Cash, other businesses, including El-Amin, Jackson-Hewitt, and Regional Finance, were broken into as well. R. 60, l. 2 – 61, l. 6.

Later that night, Goodman testified that he "was contacted by Lieutenant Stuhr, who advised [him] that they had in custody a young man who had been caught behind Bear Village, and they believed him to be attempting to break into the businesses there." Goodman explained that he responded to Bear Village to meet with Officer Alvarado and "to see if he needed any help." After walking through the area at Bear Village to make sure nothing was overlooked, Goodman "went over to the BI-LO parking lot to see if they needed anything there." Goodman testified that when he got there, the officers were already searching the vehicle. He claimed that the officers found "some gold coins and some quarters in the vehicle," which was significant to him because "what was reported stolen out of Regional Finance was a bunch of gold dollar coins and some quarters." Goodman said that officers also found tools and coils of stamps, which had also been reported stolen. R. 61, l. 7 – 63, l. 23.

Based on this evidence, Goodman left and "spoke with a judge about getting a search warrant for the vehicle and for" the hotel room. Both warrants were issued at the same time. R. 63, l. 24 – 64, l. 9. Goodman testified that probable cause for the search warrants existed based on the fact that burglary tools and gold dollar coins and quarters were observed in plain view in Appellant's car. He explained that the tools were similar to the tools that were left at Check Into Cash the night before and that the gold dollar coins and quarters were consistent with what was reported stolen from Regional Finance. R. 65, l. 17 – 68, l. 9.

Goodman explained on cross-examination that the officers found a hotel key in the center console of Appellant's car and that Sergeant Stuhr recognized the key as belonging to the Budget Inn. Stuhr advised other officers to "start checking hotel rooms" and to start with the Budget Inn. R. 70, l. 17 – 71, l. 10. Goodman also clarified that the search warrant for Appellant's hotel room was executed that night, but the search warrant for the car was not executed until several days later. R. 67, ll. 5-10; R. 68, ll. 15-20; R. 64, l. 13 – 65, l. 1.

Appellant testified that he owned the green car found in the BI-LO parking lot by law enforcement. However, he explained that the black bag containing tools found on the back seat was closed and zipped shut. He also explained that his car was locked at the time. R. 76, l. 20 – 77, l. 18.

At the conclusion of the testimony, defense counsel argued that "the burden falls on the state to justify a warrantless search" because "[t]here's no question that the car was searched prior to the search warrants [being obtained]." He maintained that the officers could not search Appellant's car incident to his arrest "because the courts have universally held that once a defendant has been apprehended in custody, then a search of a vehicle is no

longer incident to arrest." Defense counsel argued that the only exceptions to the warrant requirement that could apply in this case are the inventory exception and the automobile exception. R. 79, ll. 3-19.

However, defense counsel argued "that it's not a proper inventory search because the vehicle was not part of the arrest. There was no lawful reason for the police to take separate custody of his property." Defense counsel noted, "The inventory search presupposes that they have taken a car into custody. Usually, that's a driving offense or an abandoned property, or the car is interflowing [sic] with traffic." None of those situations occurred in this case. Appellant's car was lawfully parked and not in the immediate possession of Appellant when he was arrested. R. 80, l. 2 – 81, l. 20; R. 88, ll. 2-5. Defense counsel emphasized that the officers testified that Appellant's car "would not have been a vehicle they would have taken into custody except for the arrest of [Appellant]." R. 83, ll. 16-20. Therefore, law enforcement had no valid reason to take custody of Appellant's vehicle, which made both the seizure of the car and later inventory of its contents unlawful.

Defense counsel then turned to the automobile exception. He noted that this exception is based on the mobility of the car, exigent circumstances, and the diminished rights to privacy in a vehicle. However, defense counsel stressed that under the automobile exception, law enforcement must have probable cause to search the car. He argued that the probable cause requirement under the automobile exception was "the linch pin, which I think my client can win on." R. 82, l. 19 – 83, l. 9; R. 83, ll. 21-23.

Lastly, defense counsel argued "that the search of the hotel room would be fruit of the poisonous tree type. But for the finding of the hotel key after the search of the car . . . [the officers] would not have had the evidence of that key." R. 84, l. 22 – 85, l. 2.

In support of its contention that the search of Appellant's car without a warrant was lawful, the state cited State v. Weaver, 374 S.C. 313, 649 S.E.2d 479 (2007). The solicitor argued the case "stands for the proposition if there's PC [probable cause] to search a vehicle, a warrant is not necessary so long as the search is based on facts that would justify the issuance of a warrant, even though a warrant has not actually been obtained." The solicitor further argued, "[Law enforcement] know he's from Tennessee. They talk about staking out the BI-LO. Nobody came out of the BI-LO, but who's to say they're not hiding in the woods. And [the officers] see evidence in that car in plain view that links [Appellant] to these prior burglaries." The solicitor further noted that "nothing that was gained from what we'll call the inventory search is even referenced in [Investigator Goodman's] affidavit [in support of the search warrant]." The solicitor thus concluded that the officers had probable cause to search Appellant's car based on the evidence observed in plain view through the windows of the car. Lastly, the solicitor maintained that "inevitable discovery would come into play if somehow State v. Weaver wasn't on point as far as there being PC [probable cause] to search the vehicle. There certainly was that." R. 94, l. 7 – R. 96, l. 3.

Ultimately, the court held:

> I've had a chance to review the Weaver decision, and my clerk also found U.S. v. Whitebourne (PH) case, 813 Second 646.[2] The Whitebourne relates to the inevitable discovery doctrine. It does, however, cite the Supreme Court decision in Segura - - S-E-G-U-R-A – at 468 U.S. 795.[3]
>
> Reading those cases together – Weaver, Whitebourne, and Segura - - my understanding is that the current state of the law is that if there's probable cause to search the car and the car is due to its ready ability [sic] and

[2] Presumably, the court is referring to United States v. Whitehorn, 813 F.2d 646 (1987).

[3] The correct citation is Segura v. United States, 468 U.S. 796 (1984).

> there's probable cause to look into the car, there's no problem with the initial search.
>
> I am really having to read all three of those cases together. And I think here is a reasonable conclusion based on all of these cases. You have numerous items in plain view. Part of the securing the vehicle involves impounding it. If you're impounding the automobile, pursuant to the testimony that we've heard today, an inventory search is part of impounding it.
>
> Clearly, the police had authority to secure this vehicle for the reasons that we've already discussed and the reasons we've already explained. I believe that they also clearly had probable cause to search the vehicle independent of any impounding of the car because of the facts that have been put on the record.
>
> The defendant is from Tennessee. That is known to them. The only car with Tennessee tags is located in a parking lot at a stone's throw of the incident location. When they find the car with Tennessee tags, they check in the windows, they look around in the windows, and they can plainly see in plain view burglary tools.
>
> That is my conclusion that the bag in the back was open. They see other things in the car which gives them reasonable, articulable suspicion to search the car. Apparently at the time the inventory search was taking place or shortly before it began, the lead investigator went to the magistrate and sworn out an affidavit for a search warrant with the magistrate to search the car.
>
> In the affidavit, none of the items which were not in plain view were listed. In short, the items that were in plain view were included in the affidavit for that search warrant.
>
> Accordingly, the inevitable discovery doctrine may very well apply, but it's also entirely possible that at the time that warrant had been signed, I doubt that search had even taken place yet.

R. 96, l. 5 – 98, l. 7.

Discussion

The judge erred in denying Appellant's motion to suppress evidence seized from his car and his hotel room because the officers searched Appellant's car without a warrant and

without probable cause and then later searched his hotel room based on evidence obtained in the unlawful search of his vehicle, specifically the hotel key found in the center console.

"The Fourth Amendment to the United States Constitution protects people from unreasonable searches and seizes and provides that no warrants shall be issued except upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized." State v. Brown, 401 S.C. 82, 88, 736 S.E.2d 263, 266 (2012); U.S. Const. amend. IV.

"Warrantless searches and seizures are unreasonable absent a recognized exception to the warrant requirement. These exceptions include: (1) search incident to a lawful arrest, (2) hot pursuit, (3) stop and frisk, (4) automobile exception, (5) the plain view doctrine, (6) consent, and (7) abandonment." Brown, 401 S.C. at 89, 736 S.E.2d at 266 (internal citations omitted). "Furthermore, if police officers are following their standard procedures, they may inventory impounded property without obtaining a warrant." Robinson v. State, 407 S.C. 169, 754 S.E.2d 862, 870 (2014) (citing Colorado v. Bertine, 479 U.S. 367, 372-373 (1987)).

Despite the law enforcement officers' testimony that they searched Appellant's vehicle incident to his arrest, the search incident to arrest exception to the warrant requirement does not apply in this case. See R. 25, ll. 1-5. "Police may search a vehicle incident to a recent occupant's arrest *only if* [1] the arrestee is within reaching distance of the passenger compartment at the time of the search *or* [2] it is reasonable to believe the vehicle contains evidence of the arrest. Brown, 401 S.C. at 91, 736 S.E.2d at 267 (citing Arizona v. Gant, 556 U.S. 332, 351 (2009)) (internal quotations omitted) (emphasis in original).

Because Appellant was not a recent occupant of the car and was not even in close proximity to the car at the time of his arrest, the officers could not search his car incident to his arrest.

Additionally, the officers had no valid reason to impound Appellant's vehicle and thus any inventory search of the car was unlawful. Alvarado testified that the Newberry City Police Department has written guidelines about when they may conduct an inventory search. He said, "We do an inventory search every time we take custody of a vehicle and have the vehicle towed." R. 24, ll. 9-16. Alvarado conceded that Appellant's car was lawfully parked and that the only reason it was of interest to law enforcement was because it was owned by Appellant. R. 21, ll. 5-24. Furthermore, Malloy admitted that Appellant's car was lawfully parked in the BI-LO parking lot and was not an abandoned vehicle. He also admitted that at the time the car was seized, it was not impeding traffic or creating a safety hazard. According to Malloy, the only reason the car was seized was because it was tied to Appellant. He testified that his agency would not normally seize a vehicle that was left overnight in the BI-LO parking lot. R. 42, l. 6 – 43, l. 25. Therefore, because the officers had no valid reason to take custody of Appellant's car and did not follow their own standard procedure, any inventory of the vehicle was unlawful. See Robinson, 407 S.C. at 185 – 186, 754 S.E.2d 862 at 870.

The only other exception to the warrant requirement that could apply in this case is the automobile exception. Under the automobile exception, "if there is probable cause to search a vehicle, a warrant is not necessary so long as the search is based on facts that would justify the issuance of a warrant, even though a warrant has not actually been obtained." Weaver, 374 S.C. at 320, 649 S.E.2d at 482. "The automobile exception to the search warrant requirement is based on (1) the ready mobility of automobiles and the potential that

evidence may be lost or destroyed before a warrant is obtained and (2) the lessened expectation of privacy in motor vehicles which are subject to government regulation." Id. at 320, 649 S.E.2d at 482 (citing State v. Cox, 290 S.C. 489, 351 S.E.2d 570 (1986)). "If an automobile is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment permits police to search the vehicle without more." Id. at 320, 649 S.E.2d at 482 (citing Pennsylvania v. Labron, 518 U.S. 938 (1996)).

In this case, Appellant's car was not "readily mobile" since law enforcement already had possession of the keys to the vehicle which they presumably had seized from Appellant's person when he was arrested. Additionally, law enforcement had been conducting surveillance on the car for at least an hour before it was searched and would not have permitted anyone to move the vehicle or destroy any evidence that may have been found inside. Furthermore, law enforcement did not have probable cause to search the vehicle. The only items allegedly seen in plain view by the officers were a black bag containing a number of tools located on the back seat and loose change located in the center console of the car. Those items did not provide the officers with probable cause.

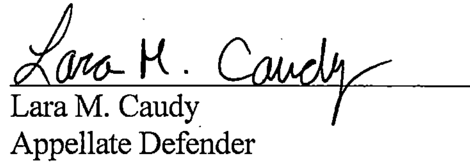
First, tools alone are not suspicious and it is unclear whether the bag of tools found on the backseat was even open at the time law enforcement looked through the windows of Appellant's car. Additionally, loose change is also not suspicious and is an item commonly found in the center console of a car. The only other information law enforcement had at the time was that Appellant was suspected of attempting to break into the shops at Bear Village Plaza and had tools on his person when he was arrested. This information when viewed together falls short of probable cause. See State v. Brannon, 347 S.C. 85, 92-93, 552 S.E.2d 773, 776-777 (App. Ct. 2001).

Therefore, the court erred in denying Appellant's motion to suppress the evidence seized from his vehicle. The court also erred in failing to suppress evidence seized from Appellant's hotel room since the search of the hotel room was based on evidence seized during the unlawful search of the vehicle, specifically the hotel key. See State v. Sachs, 264 S.C. 541, 560, 216 S.E.2d 501, 511 (1975) (The exclusionary rule provides that evidence seized in violation of the Fourth Amendment must be excluded from trial.); see also Wong Sun v. United States, 371 U.S. 471, 484 (1963) (The exclusionary rule prohibits the use of evidence obtained directly or indirectly through an unlawful search or seizure under the fruits of the poisonous tree doctrine.).

CONCLUSION

Based on the foregoing argument, Appellant's convictions should be reserved and this case remanded to the Newberry County Court of General Sessions for a new trial.

Respectfully submitted,



Lara M. Caudy
Appellate Defender

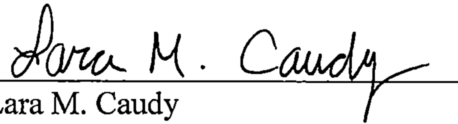
ATTORNEY FOR APPELLANT

This 15th day of August, 2014.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

August 15, 2014



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