

RICHEY AND RICHEY
ATTORNEYS AT LAW

A PROFESSIONAL ASSOCIATION

RODNEY W. RICHEY
LOLA S. RICHEY

POST OFFICE BOX 10916
GREENVILLE, SOUTH CAROLINA 29603

(864) 467-0503
(864) 467-0646 FAX

October 9, 2019

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

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OCT 17 2019

RE: Kelly E. Bruton vs. The State of South Carolina
Case No: 2018-CP-42-00161

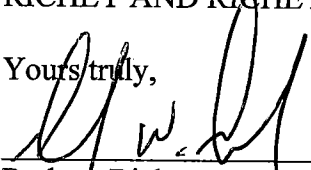
S.C. SUPREME COURT

Dear Mr. Shearouse:

Please find enclosed a Notice of Appeal and an affidavit of service for the same. Also, I have enclosed a copy of the Order from which the appeal is taken. Please clock and file the copies and return them to me. 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/
Enclosures
cc: Brianna L. Schill, Esquire

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT
APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas
HONORABLE J. DERHAM COLE
2019-CP-42-00161

KELLY E. BRUTON, SCDC# 227598

APPELLANT,

vs.

STATE OF SOUTH CAROLINA,

RESPONDENT.

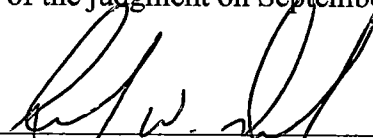
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S.C. SUPREME COURT

NOTICE OF APPEAL

Kelly E. Bruton appeals the denial of his Post Conviction Relief. The Post Conviction Relief Action was heard and denied by the Honorable J. Derham Cole, Circuit Judge on July 15, 2019 an Order issued on September 20, 2019 and filed on September 20, 2019. The Appellant received notice of the judgment on September 30, 2019.



Rodney Richey, Esquire
Attorney for the Appellant
33 Market Point Drive
Post Office Box 10916
Greenville, SC 29603
(864) 467-0503
(864) 467-0646 fax

Other Counsel of Record:
Brianna L. Schill, Esquire
Office of Attorney General State of SC
Post Office Box 11549
Columbia, SC 29211-1549

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT
APPEAL FROM SPARTANBURG COUNTY

Court of Common Pleas

HONORABLE J. DERHAM COLE

2019-CP-42-00161

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S.C. SUPREME COURT

KELLY E. BRUTON, SCDC# 227598

APPELLANT,

vs.

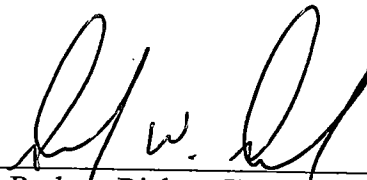
STATE OF SOUTH CAROLINA,

RESPONDENT.

AFFIDAVIT 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 October 9, 2019, addressed to their attorney of record, Brianna L. Schill, Esquire Office of Attorney General State of South Carolina, Post Office Box 11549, Columbia, SC 29211-1549.

Dated: October 8, 2019



Rodney Richey, Esquire
Attorney for the Appellant
33 Market Point Drive
Post Office Box 10916
Greenville, SC 29603
(864) 467-0503
(864) 467-0646 fax

STATE OF SOUTH CAROLINA)
)
COUNTY OF SPARTANBURG)

IN THE COURT OF COMMON PLEAS
FOR THE SEVENTH JUDICIAL CIRCUIT

Kelly E. Bruton,)
S.C.D.C. No. 227598,)

Case No.: 2019-CP-42-00161

Applicant,)

ORDER OF DISMISSAL

v.)

State of South Carolina,)

Respondent.)

This matter comes before the Court by way of Applicant's post-conviction relief (PCR) application filed January 14, 2019. Respondent made its return and motion to dismiss March 20, 2019. On May 14, 2019, the Honorable Grace G. Knie issued a Conditional Order of Dismissal. On June 14, 2019, Judge Knie issued an Order to Vacate Conditional Order of Dismissal due to the fact that Judge Knie presided over Applicant's plea hearing. An evidentiary hearing on the matter was convened on July 15, 2019, at the Spartanburg County Courthouse. Rodney W. Richey, Esquire, represented Applicant. Assistant Attorney General Brianna L. Schill, Esquire, of the South Carolina Attorney General's Office, represented Respondent.

At the hearing, Applicant testified on his own behalf. Monier M. Abusaft and James A. Cheek, Esquires, Applicant's plea counsels (collectively Counsel's), testified for the State. For the reasoning below, this Court now denies and dismisses the application with prejudice.

I. PROCEDURAL HISTORY

Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. Applicant was indicted in the January 2018 term of the Spartanburg County Grand Jury for attempted burglary, first degree (2018-GS-

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42-00160), petit larceny (2018-GS-42-00161), and breaking into a motor vehicle (2018-GS-42-00162). Monier M. Abusaft, Esq. and James A. Check, Esq. represented Applicant. Elizabeth McFarland, Esq., of the Seventh Circuit Solicitor's Office, prosecuted the case. On August 7, 2018, Applicant pled guilty as indicted. Accepting terms negotiated between Applicant and the State, the Honorable Grace Gilchrist Knie sentenced Applicant to imprisonment for concurrent terms of fifteen years for attempted burglary, ten years for petit larceny, and five years for breaking into a motor vehicle. Applicant did not appeal his plea or sentence.

II. SUMMARY OF FACTS ADDUCED AT APPLICANT'S GUILTY PLEA HEARING

The underlying facts of the crimes for which Applicant is incarcerated were articulated by the State during the plea proceeding as follows:

As to the [petit] larceny, on May 3rd, 2017, Officer Hayden with the Greer Police Department responded to 410 East Fairview Avenue within the city limits of Greer and in Spartanburg County in response to a petit larceny of a UPS package on a back porch. Upon his arrival, he met with the complainant, Manqual Norman, the spouse of the victim, Shameika Norman.

Manqual stated that his video surveillance system captured the Defendant, Kelly Bruton, walking past his front yard and into his backyard around noon. The video shows the Defendant stealing items out of his wife's package that had just been delivered to the [back] porch. The video shows the Defendant picking up the box, and transferring the items within the box to his plastic bag. The total loss to the victim was \$79.74 for the 17 stolen perfume and lotion items.

As to the burglary and breaking into motor vehicles charge, on February 24th, 2017, at 11:57 PM, Officer Ruize with the Greer Police Department responded to a residence located at 102 Oak Street within the city limits of Greer in Spartanburg County in reference to a burglary in progress.

The victim reported that she had just woken up to someone knocking on her door, and that someone got through her 7-foot tall privacy fence, and was in her back yard. She could hear someone attempting to open the bathroom window, which was connected to her bedroom. She then called the police, and ran to her infant's son room to make sure that he was okay.

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Police arrived on scene minutes later. Upon getting entry to the backyard, Officer Ruize, Ruize found the Defendant, Kelly Bruton, on his hands and knees hiding behind the air conditioning unit, which is in the corner of, of the victim's backyard close to the exit gate. The screen to the bathroom window had been ripped off. Officer Ruize drew his gun, and police detained the Defendant. Upon searching the Defendant, they did find a crack pipe. Police also recovered a package from outside the fence, and the victim stated that it was a package from outside the fence, and the victim stated that it was a package that was in her car. She intended to send it to her mother. It was originally on the passenger seat of her vehicle to be taken to the Post Office.

Fingerprints were taken from the vehicle, and from the bathroom window, and both came back as matching the Defendant, Kelly Bruton. The fingerprints from the window show the positioning of the Defendant's hands as he was attempting to lift it open, and he does have a prior record, Your Honor.

(Tr. 11-13). Upon inquiry by the Court, Applicant confirmed the above articulated facts. (Tr. 13-14).

III. ALLEGATIONS

In his post-conviction relief application, Applicant alleges he is being held unlawfully for the following reasons:

1. "Ineffective Assistance of Counsel"
 - a. "Counsel was ineffective for advising client that he would face potential life sentence if he goes to trial, based on plea counsel erroneous advice client plea guilty"
 - b. "Counsel was ineffective for not move to quash the indictment of a 1st degree burglary. S.C. Code Ann. 17-19-90 (2003)"
 - c. "Counsel was ineffective where as counsel advised client to plea guilty to the crime charged in the indictment, but not to a lesser included offense of the crime charged in the indictment."
 - d. "Counsel was ineffective for not object[ing] to the Solicitor read off the [victim] statement when the [victim] wasn't there in court. Review guilty plea transcript."
 - e. "Counsel was ineffective when client request jury trial but for Counsel errors the result of a trial would have been different"
 - f. "Counsel was ineffective for failure to investigate facts of the case. Counsel would know there was never a 1st degree Burglary instead attempted burglary."
2. "Subject Matter Jurisdiction"

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- a. "Circuit Court doesn't have subject matter jurisdiction unless 1. There have been indictment which sufficiently state the offense, 2. There has been a waiver of the indictment, 3. The charged is a lesser included offense of the crime charged in the indictment." Applicant thereafter cites to State v. Knuckles, 348 S.C. 593, 560 S.E.2d 426 (Ct. App. 2002) reversed by 354 S.C. 626, 583 S.E.2d 51 (2003).¹

At the outset of the evidentiary hearing, Respondent indicated PCR counsel previously notified Respondent that Applicant would be amending his allegations to include only an allegation for failure to investigate. PCR counsel confirmed Applicant would be only going forward on a failure to investigate claim.

IV. TESTIMONY

a. *Applicant's Testimony*

Applicant testified Cheek and Abusaft represented him in this case. Applicant testified he believes Cheek and Asbusaft failed to investigate his case, particularly his first-degree burglary charge. Applicant testified this case arises out of an incident in which he was found somewhere near the scene of an alleged attempted burglary. Applicant testified if Cheek and Abusaft properly investigated his case, they would have determined there was never a burglary.

Applicant testified he used to work for the homeowners that were allegedly burglarized, and that they did not have any problems with Applicant when he worked for them. Applicant believes this preexisting relationship would have helped his case and helped him in mitigation. Applicant claimed his purpose for being at the house that night was to sell them "some stuff." Applicant testified he knocked on the front door, but realized no one was home. However, Applicant also testified a light came on within the home so he ran to the back of the house to tell them he was out there.

¹ Applicant cites the case as State v. Bruton, but the reporter citations both pertain to Knuckles.

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AMY W. COX

Applicant testified when the police arrived at the house, officers found him in the backyard. Applicant denied he ran from police. Applicant testified he did not intend to break into the house. Applicant testified he discussed investigating the crime with Cheek and Abusaft, but that they did not investigate. Applicant further testified he believed he faced a sentence that was consistent with first-degree burglary as if he had actually entered the home. Applicant testified if the facts had been presented differently, he would have received a lower sentence.

On cross-examination, Applicant testified he met with Abusaft about three times prior to his plea. Applicant testified he met with Cheek for the first time on the day of his guilty plea hearing. Applicant testified Abusaft did not review discovery with him. Applicant recalled the existence of handprint and video evidence, but denied either Abusaft or Cheeks reviewed this evidence with him.

Applicant testified he went to the house to sell the owners "stuff." Applicant testified the homeowners did not know ahead of time that he was coming, but that he was just in the area and stopped by. Applicant testified he also went to other houses to sell items that day. Applicant reiterated that he ran to the back of the home after he saw light turn on from inside the home. Applicant testified he knocked on the bathroom door window at the back of the home to let the owners know he was there. Applicant testified he had no intentions to open the window. Applicant denied hiding behind the air conditioning unit when police officers arrived at the scene. Applicant testified police officers found him in the open backyard.

Applicant was provided with a copy of his guilty plea transcript. Applicant confirmed the transcript he was given was the transcript from his guilty plea hearing. Applicant testified the transcript accurately reflects what was said at his guilty plea hearing. Applicant testified, according to the transcript, he agreed with the Assistant Solicitor's version of the facts of his guilty

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plea hearing. Applicant testified he recalled telling the judge that no promises were made in exchange for his guilty plea. After reviewing the transcript once again, Applicant testified he told the plea court he was not threatened or coerced into pleading guilty. After reviewing the plea transcript, Applicant testified he gave up his constitutional rights at his plea hearing. Applicant recalled telling the plea court he was satisfied with his representation from Cheek and Abusaft. Applicant recalled telling the plea court he was pleading freely and voluntarily. Applicant recalled telling the judge he did not have any questions about the offenses to which he was pleading guilty. Applicant testified he did not recall the incident occurring at nighttime. Applicant testified the plea transcript indicated the incident occurred at night time, but that he still could not specifically recall that the incident occurred at nighttime.

b. Abusaft's Testimony

Abusaft testified he visited the scene of the incident, but otherwise there was not much to investigate. Abusaft testified the case was mostly about dealing with objective evidence including the handprint evidence and the video footage of Applicant stealing packages from the porch. Abusaft testified it is his usual business practice to attempt to find contact information for the victims and contact them. Abusaft testified he likely attempted to do so in this case, but could not recall specifically. Abusaft testified it is usually hard for defense counsel to successfully contact victims because the Solicitor's Office advises them not to answer calls from defense counsel. Abusaft testified he believes he attempted to make contact with the homeowners when he went to visit the scene. Abusaft testified there was no dispute as to whether Applicant went to the house. Abusaft testified he believed he performed an adequate investigation. Abusaft testified he had enough time to speak with Applicant regarding his case. Abusaft testified he spoke with Applicant on multiple occasions about Applicant's belief that he was not guilty of the crime because he did

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not go into the house. Abusaft said he spent a lot of time explaining to Applicant that his belief was not legally correct. Abusaft testified he spent a lot of time discussing possible punishments with Applicant as punishment was the major issue he was having with understanding his case.

On cross-examination, Abusaft testified he has been practicing law for five years, with three years at the public defender's office. Abusaft testified he was appointed to Applicant's case. Abusaft testified he and Applicant discussed Applicant's version of the facts. Abusaft testified Applicant's version revolved around his claim that he was going to sell items to the homeowners. Abusaft testified Applicant's version of the facts was always incoherent.

Abusaft testified he reviewed the discovery many times because he and Applicant were planning to go to trial up until the plea hearing. Abusaft testified he reviewed the evidence with Applicant because he had to explain to Applicant that a full handprint was found on the back window, which contradicted Applicant's assertion that he merely knocked on the window. Abusaft testified he discussed with Applicant the advantages and disadvantages of going to trial versus accepting a plea offer. Abusaft testified Applicant initially took the position that he was not going to plead guilty because he did not go into the house. Abusaft testified he advised Applicant he felt that was the wrong decision, but that if Applicant wanted to go to trial, he would give Applicant the best possible trial he could. Abusaft testified Applicant then spoke with Cheek and had a change of heart.

Abusaft testified he believed it was in his best interest to plead guilty. Applicant testified had Applicant ultimately wanted to go to trial, he would have taken his case to trial.

c. Cheek's Testimony

Cheek testified part of his job is to help the trial attorney if their client wants to plead guilty. Cheek testified he investigates into which plea offers are available. Cheek testified that while

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being held in the jail holding room, Applicant was discussing his case with other inmates although they are told not to. Cheek testified he told Applicant to talk to him, not other detainees, because he was talking too much and he was contradicting himself.

Cheek testified he initially found the Solicitor on the case, got the case file, and read through it. Cheek testified Applicant maintained he used to work for the homeowners. Cheek testified the owners of the home had not been there long enough for Applicant to have been working for them doing lawn work.

Cheek testified he asked Applicant what items he was allegedly selling the owners of the home that day, but Applicant had no answer. Cheek testified he was concerned because entire palm prints were found on the windows, and no one knocks on windows with their entire palm.

Cheek testified he reviewed Applicant's constitutional rights, the facts of the case, Applicant's criminal history, and what Applicant's testimony would have been at trial. Cheek testified Applicant ultimately decided not go to trial. Cheek testified given Applicant circumstances, including Applicant's criminal history, the judge gave him the lowest sentence he could.

V. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the relevant portions of the record and has heard the testimony and arguments presented at the PCR hearing. This Court also had before it the records of the Spartanburg County Clerk of Court regarding the subject conviction, Applicant's records from the South Carolina Department of Corrections, the application, the State's Return, and the plea transcript. This Court has reviewed the plea court record and has heard the testimony of both Applicant and Counsels. The Court finds Counsels' testimony on these issues to be credible, and Applicant's testimony is not credible. This Court has therefore 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).

In a post-conviction relief action, 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, Applicant must prove "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 (1984); Butler, 286 S.C. 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. Butler, 286 S.C. at 442, 334 S.E.2d at 814. 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 689. A PCR 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. 300 S.C. at 117, 386 S.E.2d at 625. First, Applicant must prove 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 Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. 300 S.C. at 117-18, 386 S.E.2d at 625. When there has been a guilty plea, the applicant must prove that counsel's representation was below the standard of reasonableness and that, but for counsel's unprofessional errors, there is a reasonable probability that he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 58-59 (1985).

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Issue #1: Failure to Investigate Applicant's Case

Applicant alleges Cheeks and Abusaft were ineffective because they did not properly investigate Applicant's case. This Court disagrees and finds Cheeks and Abusaft provided effective assistance in this case.

"[C]riminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an independent investigation of the facts and circumstances of the case." Walker v. State, 397 S.C. 226, 235, 723 S.E.2d 610, 615 (Ct. App. 2012) (reversed on other grounds by Walker v. State, 407 S.C. 400, 756 S.E.2d 144 (2014)). Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to result. Porter v. State, 368 S.C. 378, 385-86, 629 S.E.2d 353, 357 (2006), abrogated on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018) (citing Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998)). 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." Wiggins v. Smith, 539 U.S. 510, 521-22 (2003).

This Court finds credible Abusaft's testimony that he was primarily responsible for conducting the majority of the investigation for Applicant's case. This Court further finds credible Abusaft's testimony that he went to the scene of the incident. Abusaft reviewed the video footage and handprint evidence. Abusaft's usual business practice to attempt to find contact information for the victims and contact them. Abusaft attempted to make contact with the homeowners when he went to visit the scene. Abusaft also attempted to contact the homeowners in other means. This Court finds credible Abusaft's testimony that he performed an adequate investigation.

Additionally, this Court finds credible Cheek's testimony that part of his investigation to help the

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trial attorney if their client wants to plead guilty. Cheek investigated into which plea offers are available. This Court further finds credible Cheek's testimony that he reviewed Applicant's case file and discussed Applicant's case with him several times.

Moreover, to the extent Applicant argues that he should have received a lower sentence because he did not ultimately go inside the house, and that Abusaft and Cheeks failed to investigate this claim, this Court disagrees. A "person guilty of attempt is punishable as if he had committed the underlying offense." Reid, 393 S.C. at 329, 713 S.E.2d at 276. The "investigation" insisted upon would not have changed anything. Applicant was advised of the fact that he was pleading guilty to attempted burglary in the first degree during his plea proceeding. (Tr. 3, ll. 6-14; Tr. 6, ll. 6-22; Tr. 14, ll. 9-18). Both Counsels and Applicant were aware that Applicant was charged with attempting the burglary; there was nothing further to investigate on that point. The record conclusively refutes any merit to this allegation. Applicant cannot meet his burden of showing any deficiency of Counsels. Accordingly, this Court finds neither Cheek nor Abusaft were deficient, and dismisses and denies this Application with prejudice.

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VI. CONCLUSION

Based on all the foregoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant relief. Counsel was not deficient in any manner, nor was Applicant prejudiced by Counsel's representation. Therefore, this application for post-conviction relief is denied and dismissed with prejudice.


Applicant must file and serve a notice of appeal within thirty days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR (providing the appropriate procedure to perfect an appeal). 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. Further, Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to Rule 243, SCACR, for the appropriate procedures for appealing a judgment in a PCR action.

IT IS THEREFORE ORDERED:

1. The Application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. Applicant shall be remanded to the custody of the Respondent.

AND IT IS SO ORDERED.

9/20, 2019.

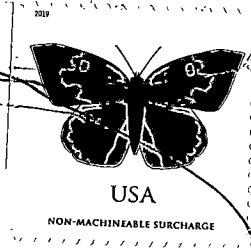

J. DERHAM COLE
Presiding Circuit Court Judge
Seventh Judicial Circuit

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Richey & Richey, PA
Attorneys at Law
Post Office Box 10916
Greenville, South Carolina 29603



The Honorable Daniel E. Shearouse
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