IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

RANDY SHON HOWARD — APPELLANT

VS. — NO. 2007-KA-0799

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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III. The trial court correctly overruled Howard's objection to the State's redirect examination of Mississippi Crime Lab forensic examiner Brandi Goodman.

SUMMARY OF THE ARGUMENT

The trial court did not err in removing Juror Evelyn Burkes and seating the alternate juror. In the instant case, the trial court clearly expressed to the jury the court's expectations regarding disclosure of relationships to the defendant. Juror Burkes did not disclose her relationship with Howard's father despite the clarity of the judge's directions and his reiteration of the request. This lack of candor with the court is clearly good cause and there is no error. Further, Howard does not allege that he was in any way prejudiced by the removal of juror Burkes and her replacement with the alternate juror. A defendant is not entitled to a particular jury or any particular juror. This issue is without merit.

The trial court correctly denied Howard's motion to suppress the evidence obtained after Officers Myers and Sistrunk stopped Howard and the evidence obtained by the search of Howard's fanny pack after his marijuana was seen in plain view. The resulting evidence, the pack of marijuana and two packs of crystal meth were correctly admitted into evidence. Myers and Sistrunk clearly had probably cause to stop Howard. He was traveling so fast that they had difficulty catching him at 80 miles per hour. He was on a vehicle that was not authorized to travel on the roads. After Myers and Sistrunk stopped Howard, when he opened his fanny pack, the marijuana was in plain sight. The search of the remaining contents of the fanny pack was therefor lawful and all the evidence resulting from the stop and the search of the fanny pack was correctly admitted into evidence.

The trial court correctly overruled Howard's objection to the State's redirect examination of Mississippi Crime Lab forensic examiner Brandi Goodman. By questioning the calibration of

the scales Ms. Goodman used to weight the drugs, defense counsel clearly opened up a line of inquiry into whether the machine was functioning correction. The question was in the scope of the cross examination and the trial court correctly overruled the objection. Further, Howard is unable to show any prejudice.

ARGUMENT

I. The trial court did not err in removing Juror Evelyn Burkes and seating the alternate juror.

Immediately after the jury was chosen and seated, but before any testimony was heard, the State requested to put on testimony regarding new information about a connection between Juror Evelyn Burkes and the Howard's father, Randolph Howard. (Tr. 40) Mr. Howard was called to testify and stated the he and Ms. Burkes had both worked for Philadelphia Utilities. He testified that he

During voir dire the trial judge asked the panel if any of them knew Randy Howard, and requested that they stand if they did. Ms. Burkes did not respond to the question. (Tr.15) Juror Scotty Vowell stated that the defendant, Randy Howard, had been a customer at his store . (Tr. 15) Juror Horace Griffith stated that he had grown up with Howard's father and lives across the river from the elder Mr. Howard. (Tr. 15) The court questioned Mr. Griffith, querying "If later on you saw his father, and you had voted to find him guilty, would that keep you from being objective today." Mr. Griffith stated that it would be like sending one of his own children to jail. (Tr. 16) The trial court then repeated its request to the jury panel, stating,

> Okay, now ladies and gentlemen, that's the kind of response we want. Now, let me press you again. You see the defendant. Does anyone, after further consideration, do you know the defendant? Do you think you know him? This is important.
>
> (Tr. 17)

There were no further responses from the jury panel.

Based on the trial judge's affirmation of Juror Griffith's detailed description of his

relationship with Defendant Howard's father, it was abundantly clear that the court wanted jurors to disclose connections with the Defendant Howard such as a longstanding employment relationship with Defendant Howard's father. In *McCoy v. State*, 820 So.2d 25 (Miss. Ct. App. 2002), the Mississippi Court of Appeals opined as follows:

> McCoy next argues that the circuit court erred when, after the defense rested its case but prior to deliberations, it dismissed a juror and substituted him with an alternate. Conversely, the State argues that the dismissal and replacement of a juror with an alternate is within the trial court's discretion and there is an abundance of evidence in the record to support the court's ultimate decision to excuse the juror. We find that the trial court did not abuse its discretion.
>
> The replacement of regular jurors with alternates is governed by section 13-5-67 of the Mississippi Code which states that "[a]lternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become unable or disqualified to perform their duties." Miss.Code Ann. § 13-5-67 (Supp.2001). The decision to dismiss a juror for good cause and the subsequent replacement with an alternate is completely within the trial court's discretion. *Stevens v. State*, 513 So.2d 603, 604 (Miss.1987). See also *Myers v. State*, 565 So.2d 554, 557 (Miss.1990) (noting that "good cause" is merely a euphemism for "disqualified"); *Horton v. State*, 726 So.2d 238, 247 (Miss.Ct.App.1998). The Mississippi Supreme Court, however, has made it clear that the trial courts do not have the authority to remove and replace jurors arbitrarily. *Myers*, 565 So.2d at 557. The court has even suggested that the trial court should articulate into the record the exact reasons for excusing a juror. *Stevens*, 513 So.2d at 605. Nonetheless, the court in Stevens upheld the trial court's decision to exclude and replace the juror even where its specific reasons for dismissal were not included in the record. Id. The court reasoned that even though the trial court did not follow the proper procedure for excusing and replacing a juror, the aggrieved party was not entitled to reversal because he could not prove that the trial court's decision resulted in any prejudice. *Id.* See also *Vaughn v. State*, 712 So.2d 721, 724 (1998) (holding that "[a]bsent a showing of prejudice, we will not find

that a trial court abused its discretion in replacing a juror with an alternate"); *Shaw v. State*, 540 So.2d 26, 28 (Miss.1989); *Horton*, 726 So.2d at 247.

As the record shows, the trial judge was concerned by the interruptions and constant talking by Juror No. 11; however, he disregarded his suspicions until both the prosecutor and the court reporter complained of the disruptions. Upon these complaints, the judge called both parties into his chambers and held a conference regarding Juror No. 11's conduct. During this conference, the trial judge questioned the court reporter and two bailiffs as to the juror's conduct. The court reporter, although unable to state with precision the content of the juror's interruptions, did note that the juror was being very disruptive. Likewise, Ms. Wilson, one of the bailiffs, stated that she witnessed Juror No. 11 talking with another juror throughout the course of the trial. The judge concluded, stating:

The court wishes to say that not only today, but on yesterday as well, I heard comments from the jury box, and I would look up to see. And I, too, observed this juror, number 11. I dismissed it until this morning. And I still did not take any action until after the prosecuting attorney, Glenn Rossi, spoke of his observations. Then inquiry was made here in chambers of the bailiff, Ms. Sarah Wilson. This tends to suggest bias, predisposition and that kind of thing. And as a result of that, the Court hereby replaces the 11th juror with our first alternate juror.

Given that four people in the courtroom all witnessed Juror No. 11 being disruptive and talking to another juror throughout the trial, we find that the trial judge did not abuse his discretion by replacing her with an alternate prior to deliberation.

We must also note that McCoy made no attempt to prove that the replacement of Juror No. 11 with an alternate in any way caused him prejudice. As our case law makes clear, McCoy had the burden of proving that the dismissal of Juror No. 11 and subsequent replacement with an alternate resulted in some form of prejudice. Even when viewing McCoy's argument in the best light, this Court cannot find a demonstration of prejudice other than McCoy's assumption that this juror would have been good for his defense; an assumption that has been rejected as a basis for prejudice. See *Horton*, 726 So.2d at 247 (noting that although one has a right to a

> fair and impartial jury, one does not have "a vested right to any particular juror"). Therefore, even if the trial judge had abused his discretion in replacing Juror No. 11 with an alternate, McCoy's argument would fail as he made no attempt to show that the judge's decision resulted in prejudice.
>
> *McCoy v. State*, 820 So.2d 25 (Miss. Ct. App. 2002)

In *Smith v. State*, 956 So.2d 997 (Miss. Ct. App. 2007), the Mississippi Court of Appeal opined:

> Mississippi Code Annotated section 13-5-67 (Rev.2002) governs the impaneling and substitution of alternate jurors. In pertinent part, this statute provides that "[a]lternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become unable or disqualified to perform their duties." Miss.Code Ann. § 13-5-67. Although trial courts have complete discretion in replacing a regular juror with an alternate, the Mississippi Supreme Court has made it clear that this discretion should not be arbitrarily exercised. *McCoy v. State*, 820 So.2d 25, 29 (Miss.Ct.App.2002) (*citing Myers v. State*, 565 So.2d 554, 557 (Miss.1990)). To avoid an abuse of discretion charge, our supreme court has suggested that the trial court record should reflect the exact reasons for a juror's dismissal. *Id.* (citing *Stevens v. State*, 513 So.2d 603, 605 (Miss.1987)). However, even where no valid reasons are evident from the record, an aggrieved party must demonstrate actual prejudice by the trial court's decision before we will reverse on this ground. *Id.* at 29-30 (citing *Vaughn v. State*, 712 So.2d 721, 724 (Miss.1998)).
>
> According to the record, the trial court in the instant case expressed concern over several attributes and actions of the dismissed juror. The juror had been late to court on two occasions. In addition, the juror had received mental treatment in the past, and the court expressed its concern that the juror may have been mentally retarded. The juror had been seen sleeping in the jury box. He had also been seen taking notes completely out of sync with the presentation of testimony. Despite the court's concern over the preceding allegations, it was not until the court recalled that this particular juror had been a victim of a crime-and had therefore been involved in a criminal case-that the court finally decided to dismiss this juror. These concerns were discussed in the presence

> of both parties. Over the objection of Smith's counsel, the court decided to replace the regular juror with an alternate. Jury deliberations had not yet begun when the court made this substitution.
>
> "Questions about juror competency are considered against the backdrop of the general principle that a judge is empowered with broad discretion to determine whether a prospective juror can be impartial." *Green v. State*, 644 So.2d 860, 863 (Miss.1994) (*citing Myers*, 565 So.2d at 558). In light of the reasons articulated by the trial judge for replacing the juror in this case, we cannot conclude that the trial judge abused his "broad discretion" in replacing the regular juror with the alternate. Accordingly, this assignment of error is without merit.
>
> *Smith v. State*, 956 So.2d 997 (Miss. Ct. App. 2007)

In *Gray v. State*, 846 So.2d 260 (Miss. Ct. App. 2002), the Mississippi Court of Appeals held that:

> "The dismissal of a juror for good cause and her replacement with an alternate is within the sound discretion of the trial judge." *Horton v. State*, 726 So.2d 238 (Miss.Ct.App.1998). This was a judgment call on the judge's part. It is unfortunate that this information was not available pre-trial when there would have been little or no question but to exclude Williams from the panel. However, caselaw mandates that Gray must prove that he was prejudiced by the court's decision to replace Williams with an alternate. *Vaughn v. State*, 712 So.2d 721(Miss.1998). Gray has failed to make such showing, and we find no error with the judge's decision to remove the juror.
>
> *Gray v. State,* 846 So.2d 260 (Miss.Ct.App. 2002)

In the instant case, the trial court clearly expressed to the jury the court's expectations regarding disclosure of relationships to the defendant. Juror Burkes did not disclose her relationship with Howard's father despite the clarity of the judge's directions and his reiteration of the request. This lack of candor with the court is clearly good cause and there is no error.

Further, Howard does not allege that he was in any way prejudiced by the removal of juror Burkes and her replacement with the alternate juror. A defendant is not entitled to a particular jury or any particular juror. This issue is without merit.

II. The trial court correctly denied Howard's motion to suppress the results of the search and the results of the search were correctly admitted into evidence.

Richard Sistrunk, drug officer for the Neshoba County Sheriff's Office testified that on October 19, 2005, between 3:00 and 4:00 p.m. he was patrolling Road 759 in Neshoba County. Deputy Grant Myers was with him on that patrol. Officers Sistrunk and Myers noticed a red four-wheeler traveling at a high rate of speed on Road 759. The off-road vehicle was ridden by one individual and did not lave a license tag. Sistrunk attempted to catch the four-wheeler as it turn onto County Road 743 in order stop it from riding on a public road, but he was unable to catch it. Officer Sistrunk traveled at 80 miles per hour in his attempt to catch the four-wheeler. When Officer Sistrunk caught up with the four-wheeler he had his sirens and blue lights on attempting to stop the driver. The four-wheeler slowed at the 610 intersection but then took off again. He was forced to slow down when he encountered two motorcycles. He was unable to pass the motor cycles and Officer Sistrunk was finally able to catch up with him. Sistrunk had on his blue lights and siren at the time he pulled Howard over. Howard pulled over to the side of the road. Sistrunk got out of the car and walked up to the four wheeler. He asked Howard for his drivers license. Howard unzipped a fanny pack. Sistrunk saw a plastic bag containing a green leafy substance in the fanny pack. He pulled the bag from the fanny pack.

Howard argues that the stop was pretextual since Officer Sistrunk is employed by the Philadelphia Police Department as a narcotics officer and not as a traffic officer. [T]he test for

probable cause in Mississippi is the totality of the circumstances.... It arises when the facts and circumstances with an officer's knowledge, or of which he has reasonably trustworthy information, are sufficient in themselves to justify a man of average caution in the belief that a crime has been committed and that a particular individual committed it.' *Harrison v. State*, 800 So.2d 1134, 1138 (Miss.2001) (quoting *Conway v. State*, 397 So.2d 1095, 1098 (Miss.1980)). In *Adams v. City of Booneville*, 910 So.2d 720 (Miss.Ct.App. 2005), that court opined that:

> In Harrison, the court declared that a good faith, reasonable belief that a traffic law has been violated may give an officer probable cause to stop a vehicle, even though, in hindsight, a mistake of law was made and the defendant is acquitted of the traffic violation. Id. at 1138-39. The issue is not whether the defendant is ultimately found guilty of the traffic violation; rather, the issue is whether or not the officer reasonably, and objectively believed that a traffic violation had occurred. *Id.* at 1139. Put another way, the issue is not what the officer discovers later, but rather what the officer reasonably believed at the time of the stop. Id. Thus, based upon the holding in Harrison, in the case sub judice the State correctly argues that Adams's acquittal on the careless driving charge does not, by itself, settle the issue of probable cause for the stop. Adams's argument in this regard, therefore, lacks merit.
>
> *Adams v. City of Booneville*, 910 So.2d 720 (Miss.Ct.App. 2005).

In *Walker v. State*, the court clearly held that a stop needs only to be objectively valid and that there is no requirement that the officer issue a traffic citation, stating:

> [U]nder *Whren v. United States*, [517 U.S. 806, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996)], a traffic stop, even if pretextual, does not violate the Fourth Amendment if the officer making the stop has "probable cause to believe that a traffic violation has occurred." This is an objective test based on the facts known to the officer at the time of the stop, not on the motivations of the officer in making the stop. On the other hand, if it is clear that what the police observed did not constitute a violation of the cited traffic law, there is no "objective basis" for the stop, and the stop is illegal. (Footnotes omitted) (emphasis added).

> Officer Kennedy testified that Walker was speeding as he was exiting the construction zone. Walker never contested, and does not now contest, Kennedy's testimony that he was speeding. Because Walker failed to contradict Kennedy's testimony that he was speeding, the testimony of Kennedy shall be taken as true. *See Hearin-Miller Transporters, Inc. v. Currie*, 248 So.2d 451, 454 (Miss.1971). Therefore, it cannot be said that Kennedy's stop was pretextual.
>
> Walker further claims that "pretext" is shown from the fact that he never was issued a speeding citation. Although this Court has never addressed the present issue, the Court of Appeals has stated: "There is no requirement that an officer issue a citation for the predicate traffic violation to have a valid stop or search." *McCollins v. State*, 798 So.2d 624, 628 (Miss.Ct.App.2001). *See also Allenbrand v. State*, 217 Ga.App. 609, 610, 458 S.E.2d 382, 383-84 (1995) (citing *Hines v. State*, 214 Ga.App. 476, 477-78, 448 S.E.2d 226, 228 (1994)) ("Whether a citation is issued is 'of no consequence' in determining the officer's probable cause to stop the vehicle."). Walker's claim is without merit.
>
> We hold that Walker has no standing to allege a Fourth Amendment violation because he has no reasonable expectation of privacy in a car he stole and did not own. Further, Walker never disputed that he was in fact speeding-a valid reason for the stop-immediately preceding him being pulled over by Kennedy. Walker has presented no evidence that Kennedy was without probable cause to stop him and no evidence to suggest that any failure to issue a ticket was the result of an alleged pretextual stop. The evidence before us shows that the stop was objectively valid and, thus, notwithstanding the procedural bars, this issue is devoid of merit.
>
> *Walker v. State*, 913 So.2d 198 (Miss. 2005).

Searches may compromise an individual's interest in privacy; however, if an article is in plain view, neither its observation nor seizure would involve an invasion of privacy for Fourth Amendment purposes. *Jackson v. State*, 935 So.2d 1108 (Miss.Ct.App. 2006) (citing, *Horton v. California*, 496 U.S. 128, 133-35, 110 S.Ct. 2301, 110 L.Ed.2d 112 (1990)).

The plain view doctrine is an understanding that if a law enforcement officer has a right to be where he is and observes evidence that can be seized, that evidence may be seized and introduced into evidence. *Harris v. U.S.*, 390 U.S. 234, 236, 88 S.Ct. 992, 19 L.Ed.2d 1067 (1968).

> A probable cause determination should be based on the totality of the circumstances. *Illinois v. Gates*, 462 U.S. 213, 238, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). The evidence in support of probable cause "must be viewed in light of the observations, knowledge, and training of the law enforcement officers involved in the warrantless search." *United States v. Muniz-Melchor*, 894 F.2d 1430, 1438 (5th Cir.1990). While a warrant is generally required before the search for or seizure of evidence may be conducted, no warrant is required to seize an object in plain view when viewed by an officer from a place he has the lawful right to be, its incriminating character is readily apparent and the officer has a lawful right of access to the evidence. *Minnesota v. Dickerson*, 508 U.S. 366, 375, 113 S.Ct. 2130, 124 L.Ed.2d 334 (1993). However, this exception only forgives the lack of a warrant. There must still be probable cause before such a search or seizure can be made. *Arizona v. Hicks*, 480 U.S. 321, 326-27, 107 S.Ct. 1149, 94 L.Ed.2d 347 (1987).
>
> *Comby v. State,* 901 So.2d 1282 (Miss.Ct.App. 2004)

Whether Myers and Sistrunk were narcotics officers is of no consequence. They were patrolling and were responsible for responding to any criminal activity they observed. Speeding in a vehicle that has no license tag and is not even permitted on the roads is not a "minor offense" but a dangerous activity that requires intervention by any law enforcement officer who observes it. Myers and Sistrunk clearly had probably cause to stop Howard. He was traveling so fast that they had difficulty catching him at 80 miles per hour. He was on a vehicle that was not authorized to travel on the roads. After Myers and Sistrunk stopped Howard, when he opened his fanny pack, the marijuana was in plain sight. The search of the remaining contents of the fanny pack was therefor lawful and all the evidence resulting from the stop and the search of the

fanny pack was correctly admitted into evidence.

III. The trial court correctly overruled Howard's objection to the State's redirect examination of Mississippi Crime Lab forensic examiner Brandi Goodman.

The Mississippi Court of Appeals has held that it will not reverse the decision of a trial court regarding evidentiary matters unless the discretion of the trial court "so abused as to be prejudicial to a party." *Farris v. State*, 906 So.2d 113, 119-20 (Miss.Ct.App.2004) (citing *Beech v. Leaf River Forest Prods.*, 691 So.2d 446, 448 (Miss.1997)). "[T]rial courts have broad discretion in allowing or disallowing redirect examination of witnesses and when the defense attorney inquires into a subject on cross-examination of the State's witness, the prosecutor on redirect is unquestionably entitled to elaborate on the matter." *Manning v. State*, 835 So.2d 94, 99-100 (Miss.Ct.App.2002) (citing *Greer v. State*, 755 So.2d 511, 516 (Miss.Ct.App.1999)). Consequently, we will not disturb a trial court's ruling on matters pertaining to redirect examination unless there has been a clear abuse of discretion. *Farris*, 906 So.2d at 119-20) (citing *Lloyd v. State*, 755 So.2d 12, 14 (Miss.Ct.App.1999)).

In *Farris v. State*, 906 So.2d 113 (Miss.Ct.App.,2004), the Mississippi Court of Appeals discussed the court's reluctance to overturn the trial court's rulings unless there was a clear abuse of discretion and a showing of prejudice to the objecting party.

> Farris and Frederick assert that the trial court erred in allowing the State to exceed the scope of cross-examination during their redirect examination of Warden Fitch. Defense counsel maintain that they made no reference to any letters during their cross-examination of Warden Fitch, but that regardless, the trial court allowed the State to admit Exhibit S-3 into evidence during its redirect examination of Warden Fitch. Farris and Frederick maintain that *Beech v. Leaf River Forest Prods., Inc.*, 691 So.2d 446 (Miss.1997) is controlling.

> The Beech Court held that it was proper that a witness not be permitted to testify to an exhibit during the redirect examination because the exhibit had not been previously introduced during the direct examination or the cross-examination and, therefore, was not proper subject matter for the redirect examination. *Beech*, 691 So.2d at 452. However, the Beech Court also held that unless the trial judge's discretion in evidentiary rulings is so abused as to be prejudicial to a party, this Court will not reverse his ruling. Beech, 691 So.2d at 448. Additionally, the Supreme Court has held that a trial court's ruling on matters pertaining to redirect examination will not be disturbed unless there has been a clear abuse of discretion. *Lloyd v. State*, 755 So.2d 12, 14 (Miss.Ct.App.1999) (citing *Blue v. State*, 674 So.2d 1184, 1212 (Miss.1996) (overruled on other grounds)).
>
> The record reflects that after the trial court overruled the defense objection, the court allowed each defense counsel another opportunity to cross-examine Warden Fitch regarding the letter. Defense counsel had every opportunity to challenge the credibility and weight of the testimonial and documentary evidence. The documentary and testimonial evidence was subjected to vigorous recross-examination. Furthermore, Farris and Frederick have failed to demonstrate how they were prejudiced by the trial court's ruling. Bearing in mind that defense counsel had every opportunity to cross-examine Warden Fitch after the letter was admitted into evidence, and that Farris and Frederick cannot articulate how they were prejudiced by the trial court's evidentiary ruling, we find that the trial court did not clearly abuse its discretion.
>
> *Farris v. State*, 906 So.2d 113 (Miss.Ct. App. 2004)

The cross examination of Brandi Collins was conducted as follows:

Q. . . . [W]hat sort of scales do you use to get the weights of the substances you analyze?

A. . . . It's a Mettler scale. I know that doesn't give you much information, but –

Q. Well, did somebody with the Agriculture Department come by and calibrate it, or is it a self calibrating machine, too?

A. No, actually we have weights at the laboratory that are calibrated. And once again, on a daily basis, any time evidence is weighted, those sealed, calibrated

weights are used to measure the scales to make sure that they are weighing accurately.

Q. Did you, on the date the date that you analyzed the substances in question, did you calibrate the scales?

A. I made sure that it was weighing correctly. It's not considered calibrating. It's just, you know, placing a known weight on the scale to make sure that it is reading exactly what the weight is supposed to read. So yes, I did do that.

Q. Is that something that you logged that you've done, or is it something that you just did it?

A. No, there's a log book with each scale. And once again, if you ample that day, you will check your scale with the calibrated weights.

After this colloquy on cross, the State then asked Ms. Goodman, "The machinery that you used to conduct the test on the two exhibits we have today, was the machinery working correctly? The defense objected, and after the objection was overruled, the witnessed answered, "Yes, it was." The court then asked, "For the state, and then to the Defendant, can this witness be excused." Both parties agreed that Ms. Goodman could finally be excused. The Defense did not ask to question her further on the question covered on re-direct.

By questioning the calibration of the scales, defense counsel clearly opened up a line of inquiry into whether the machine was functioning correction. The question was in the scope of the cross examination and the trial court correctly overruled the objection. Further, Howard is unable to show any prejudice. This issue is without merit.

CERTIFICATE OF SERVICE

I, Laura H. Tedder, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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