

*Copy mailed
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Supreme Court No. 83327-3

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent

v.

ALLEN FREDRICK REXUS,
Petitioner

PETITION FOR REVIEW OF THE COURT OF APPEALS
DIVISION III
No. 275191

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SUPREME COURT
STATE OF WASHINGTON
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REPLY TO THE STATE'S RESPONSE
TO ALLEN REXUS'S
MOTION FOR DISCRETIONARY REVIEW

Allen F. Rexus
Petitioner Pro Se
DOC # 890703
H5-A8
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, Washington 98520

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1. IDENTITY OF PETITIONER.

Allen Fredrick Rexus, Petitioner Pro Se
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Stafford Creek Corrections Center
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2. STATEMENT OF THE CASE.

Adrian Rexus ("Adrian"), minor son of Petitioner Allen Rexus ("Allen"), after a fight with his father, brought a digital camera to the Kennewick Police Department in Kennewick, Washington.

Adrian gave the camera to a police officer, along with his consent for the officer to search it. Adrian was crying and too emotional to tell the officer what was on the camera's memory. The officer claimed not to know how to turn the camera on, and handed it back to Adrian. The officer then encouraged Adrian to turn the camera on and scroll through the pictures for him while the officer looked over his shoulder at the pictures now displayed on the screen on the back of the camera.

The camera contained pornographic images. The officer then seized the camera from Adrian and obtained a search warrant based on the pictures in the camera. The trial court denied suppression of the evidence, finding that the officers actions were reasonable and the search legal. A stipulated facts trial in January of 2006 resulted in a conviction of Allen Rexus, which the Court of Appeals affirmed in April of 2007, citing the private search doctrine.

This doctrine was found inapplicable under the Washington State Constitution by the Washington Supreme Court in STATE V. EISFELDT, 163 Wn.2d 628, 185 P.3d 580 (2008), in June of 2008. In October of 2008, Allen Rexus timely filed a Personal Restraint Petition pro se which was dismissed in June of 2009 by the Chief Judge of Division III Court of Appeals. In August of 2009, Allen timely filed a Petition for Discretionary Review to the Washington Supreme Court.

On November 9, 2009, Supreme Court Commissioner Steven Goff accepted review of this case on behalf of the Washington Supreme Court. The State was ordered to respond, with specific instructions, by December 10, 2009. The State filed its Response on December 8, 2009. Petitioner received the Response on December 21, 2009, and comes now with this Reply to the State's Response.

3. THE STATE'S ISSUES.

1. Where a third person brings a digital camera to a police station, turns it on, holds it and shows the police officer photos on it, has there been a "search"?
2. If this constitutes a "search", is STATE V. EISFELDT, 163 Wn.2d 628, 185 P.3d 580 (2008) implicated?
 - (a). Did the defendant's son have the authority to show police pictures on the camera?
 - (b). Does STATE V. EISFELDT prohibit the acts of defendant's son, or the responsive actions of the police?

4. ANSWERS TO THE ISSUES ADDRESSED BY THE STATE.

1. The State's position: "The actions of police do not constitute a search."

This is incorrect.

The State opens its Response by contending the actions of the police surrounding the camera do not constitute a "search", and suggests that the use of techniques which enhance a "police officer's powers of detection" (Response at 3), can defeat a person's privacy rights.

Our Supreme Court, in STATE V. FAFORD, 128 Wn.2d 476, 485-86, 910 P.2d 447 (1996), specifically rejected this notion when it held: "As we have repeatedly emphasized in considering constitutional privacy protections, the mere possibility that intrusion on otherwise private activities is technologically feasible will

not strip citizens of their privacy rights. STATE V. YOUNG, 123 Wn.2d 173, 186, 867 P.2d 594 (1994); STATE V. MYRICK, 102 Wn.2d 506, 513-14, 688 P.2d 151 (1984) (the sustainability of our broad privacy act depends on its flexibility in the face of a constantly changing technological landscape.)".

Additionally, in STATE V. MCKINNEY, 148 Wn.2d 20, 29-30, 60 P.3d 46 (2002), the Court stated: "The key is whether the subject matter of the claimed privacy interest would provide discreet information about the individual's activities, intimate details of his or her life ...". Also, in STATE V. YOUNG, supra, the Court held: "... the device discloses information about the activities occurring within the confines of the home, and which a person is entitled to keep from disclosure absent a warrant. Thus, this information falls within the "private affairs" language of Const. article 1, § 7." Id. at 184.

The Petitioner Allen Rexus (hereinafter "Allen") had a distinct privacy interest in the contents of his digital camera, as it indeed contained discreet information about the activities inside his home and intimate details of his life.

The State contends there are only two possible "private affairs" that Allen could claim police violated. Response at 3. The first is the police asking Allen's son Adrian Rexus (hereinafter "Adrian") "to turn on the camera". Id. at 3. It argues that activating the camera could be accomplished by reference to a user's manual which could be obtained by the public. This is also a veiled reference to the police's assertion that they were technologically challenged. See CP at 11, 18.

Because user's manuals for electronic devices are publically available, all the police had to do was hold on to the camera after Adrian handed it to them, obtain a warrant and manual, and figure out how to open the camera themselves. They chose instead to obtain neither and encouraged Adrian to open it for them.

This position, correct in the fact that user's manuals for electronics are publically available, ignores the widely held legal fact that turning on a digital camera (as well as turning on and/or looking at the contents of a computer, pager, cellphone, compact disk, or videotape) is the same as opening a closed container. Closed containers are subject to the warrant requirement. See Petition for Discretionary Review (hereinafter "PDR"), at 15-18, and the Reply to the Response to the Personal Restraint Petition (hereinafter "PRP Res. Reply"), at 12.

Electronic media storage devices as closed containers is not addressed by the State at any time in these proceedings, other than a cursory discussion in the Direct Appeal ruling in April of 2007. The State has had ample opportunity since then to discuss this issue, but to date has declined to do so.

The Petitioner has addressed this issue extensively in the PDR at 15-18. In asking Adrian to turn the camera on and display its contents for them, the police had him open a closed container, making him their agent. This is in direct conflict with Conclusions of Law No. 3.

The second "private affair" the State offers is the police "looking at the photos as Adrian held the camera and scrolled through them." Response at 3. This action exceeds the scope of the plain view doctrine. See PDR at 4. That aside, the photos on the camera were Allen's private affairs. The Court in *STATE V. EISFELDT*, 163 Wn.2d 628, 185 P.3d 580 (2008) stated that "the individual's privacy interest protected by article 1, § 7 survives the exposure that occurs when it is intruded upon by a private actor." *Id.* at 638. As established since the suppression hearing through two statements from Adrian (PRP at 19, PRP Res. Reply at 15), and police reports in the Appendix of the PDR that show the police are in possession of the camera's purchase receipt in Allen's name, the camera was Allen's sole possession, was kept in his private bedroom, and was not used by Adrian without his father's

express permission. Since Adrian had no such permission to use or possess the camera on the night in question, the photos on the camera were his father's private affairs. Allen still had an expectation of privacy in the contents of the camera when Adrian took it to police.

In *STATE V. SURGE*, 160 Wn.2d 65, 71-72, 156 P.3d 208 (2007), the Supreme Court held that "... the protections of article 1, § 7 and authority of law inquiry are triggered ... when a person's private affairs are disturbed or the person's home invaded. *STATE V. CARTER*, 151 Wn.2d 118, 126, 85 P.3d 887 (2004)." Police viewing of the photos without a warrant disturbed Allen's private affairs.

The State concludes this part of its argument by saying: "Further, the police did not ... do anything to view the photos on the digital camera. [They] merely looked at a camera which a third person displayed to them." Response at 3. This point of view ignores the fact that the police encouraged Adrian to operate the camera and display its contents (open the container) for them (making him their agent), because they supposedly lacked technical knowledge (CP at 11,18), probable cause to do it themselves (CP at 30-31), and a valid exception to the warrant requirement (private search doctrine out with *EISFELDT*, authority to consent, PDR at 9-14, and plain view, PDR at 4-5).

The pictures contained in the camera's memory were "discreet information about [Allen's] activities, intimate details of his ... life." *McKINNEY*, supra, at 29-30, and thus a private affair that was not a defeated expectation of privacy. Furthermore, digital cameras are closed containers subject to a warrant or a viable exception to one. There is no viable exception here. Opening of a closed container, either by police or a private citizen doing so at the behest of police, is a government search, and thus an intrusion into the Petitioner's private affairs. See PDR at 8.

2. (a). The State's position: "Adrian Rexus had the authority to consent to the camera's search."

This is also incorrect.

The State emphasizes that the testimony before the trial court was that Adrian stated the camera was the family's. On its own, this gives the impression of mutual use by virtue of joint access. The only place the camera was said to be the family's was at the 3.6 hearing, by Officer Davis. CP at 13, lines 13-16.

Adrian was subpoenaed to the suppression hearing, where he would have been asked about the status of the camera. He did not show up. Nowhere in the police reports or in the statement Adrian gave to police the night of the incident is it shown or even suggested that the status of the camera even came up. Petitioner had erroneously reported that police asked about the status of the camera after seizing and searching it. See PDR at 5.

In a second statement dated December 18, 2008 (PRP Res. Reply at 15), Adrian acknowledges that the police "suggested that the camera was the family's. I may have nodded yes, I don't quite remember. But this is not the truth." (Emphasis added). Adrian then makes it clear that he "did not actually say to the police that the camera was the family's ...". (Emphasis added). Yet the testimony at the 3.6 hearing from Officer Davis was that Adrian "said" the camera was the family's.

Consequently, because of Officer Davis's testimony, words he stumbled over woefully in delivering (see PRP Res. Reply at 6, 11, PDR at 12, and CP at 13), three courts now have justified Adrian's authority to consent. The State continues to hang on to this now, even after evidence to the contrary has been introduced and entered into the record.

The evidence before the trial court on January 5, 2006 was undisputed through a series of unfortunate events, and the Court ruled as it did. However, the issue of Adrian's authority to

consent never specifically came up at the 3.6 hearing. There is nothing about this in the Findings of Fact or Conclusions of Law. The first formal mention of this was in the Direct Appeal opinion issued in April of 2007.

While it is proper procedure for a trial court to enter Findings of Fact, an appellate court may supply a missing finding of fact if there is ample evidence to support it. STATE V. ARMENTA, 134 Wn.2d 1, 948 P.2d 1280 (1997), at 22 n.10. (Emphasis added).

It must be clear, though, that "the seriousness of the crime will heighten the burden placed on the government to show that an exception to the warrant requirement applies." STATE V. HATCHIE, 133 Wn. App. 100, 112, 135 P.3d 519 (2005) (citing STATE V. CHRISMAN, 100 Wn.2d 814, 822, 676 P.2d 419 (1984)). Also, "the State bears the burden of showing by clear and convincing evidence the validity of the consent." STATE V. FAFORD, supra, at 489 (citing STATE V. SMITH, 115 Wn.2d 775, 789, 801 P.2d 975 (1990)).

In ARMENTA, supra, a police officer (Randles) testified that the defendant made a statement to him that implied he could consent to a search and seizure. The defendant claimed he never said the words attributed to him by the officer. The trial court made no finding on this. On appeal, our Supreme Court ruled that the State failed to carry its burden of proof on the validity of the consent. ARMENTA, 134 Wn.2d at 14.

Though the trial court in the instant case made a finding that Adrian "stated that this was the family's camera" (Findings of Fact No.3), this alone is not enough. Footnote 9 in ARMENTA clarifies the Court's reasoning: "... the testimony of Officer Randles does not qualify as ample evidence in light of the fact that the police report and affidavit for search warrant that Officer Randles filled out ... does not support his testimony." Id. at 14 n.9. (Emphasis added).

It is of interest to note that this case and ARMENTA were handled by the same police force (Kennewick Police Department), prosecutor (Andrew Miller, Benton County) and trial judge (Dennis Yule, Benton County). Here, as in ARMENTA, a police officer's testimony was the main source to prove the validity of consent. Here, as in ARMENTA, the officer's testimony was not backed up by any reports or affidavits. An officer's testimony, standing alone, that someone said something that could even be construed as authority to grant consent does not qualify as "ample evidence" of proof of validity of the right to grant consent.

Relying on a "roundabout" Finding of Fact (No.3) is not enough. A specific finding should have been made. The appellate court has erred twice now in not acting on their responsibility to hold the State accountable for not following proper procedure to make specific findings of fact that will support their conclusions of law. "... in reviewing the findings from a suppression hearing, the appellate court will presume that the state has failed to prove a factual issue if the trial court fails to make a finding on that issue. ARMENTA, 134 Wn.2d at 14." STATE V. KULL, 155 Wn.2d 80, 118 P.3d 307 (2005), at 86 n.5.

Furthermore, the presumption of control that can give rise to the authority to consent is rebuttable. Petitioner has addressed this extensively. See PDR at 12. In the December 2008 statement, Adrian says that he did not use his father's camera without his father's express permission. There was also an agreement in place between Adrian and his father that Adrian was not to enter his father's bedroom, with the lock on its door, without permission.

Petitioner, now for the third time, requests an evidentiary hearing if the Court deems it necessary, where these facts can be entered into the record. See PDR at 12, and the header on page one of the PRP.

Commissioner Goff has recognized the camera as Allen's sole

possession. This is evidenced by Adrian's December 2008 statement, and the inclusion in the Appendix of the PDR of the police report noting the camera's purchase receipt, in Allen's name alone, that was taken into evidence by police in their search of Allen's home.

The State has specifically objected to the Commissioner's reference to the camera as "his", meaning Allen Rexus. The State is correct that "there was no evidence before the trial court contradicting [the] statement that it was the family camera." Response at 4, n.3. It was Officer Davis that said Adrian said it was the family camera. Without Adrian there to contradict this statement, the trial court was free to rule as it did.

However, since the 3.6 hearing, evidence to the contrary has been introduced. The whole "family camera" contention was an intentional invention by the police to justify a warrantless search, and the only place this contention is supported is at the suppression hearing.

Adrian never told police that the camera was the family's. He knew it was his father's alone. He knew he could not use it without his father's permission. He knew his father kept his bedroom locked, that he was not allowed to enter the bedroom without permission. He knew that the only way to get into his father's bedroom to look for the camera was to create a ruse, using his friends to draw his father to the back door, and out of his bedroom. See the July 2008 statement, PRP at 19; CP at 23; and the police reports.

Adrian did not have "the right [or] privilege ... to use the camera", (Response at 5) on the night in question. Consequently, Adrian did not have the right to consent to the camera's search. The trial court made no express finding to support its conclusion that he did have the right to consent. Because Adrian did not have the right to consent, EISFELDT is implicated. The State's contention that EISFELDT is not implicated and that Adrian had the right to consent are wrong.

2. (b). The State's position: "STATE V. EISFELDT, 163 Wn.2d 628, 185 P.3d 580 (2008) specifically allows the actions of the defendant's son."

This is true to a point, but this argument ultimately fails.

The State argues that footnote 9 in EISFELDT, at 638, allows a private actor to give evidence of a crime to the police. The State points out that this is exactly what Adrian did. The Petitioner does not dispute that this is what happened, and has addressed this. See PDR at 8. Adrian brought evidence to police that was in a closed container. He handed it to them and said they could search it, though he did not have that right. This was previously argued here, and see PDR at 11.

The police, knowing they did not have probable cause to search the camera themselves (CP at 30-31; PDR at 6-7), claimed technical ignorance and handed it back to Adrian. Police then encouraged him to search it for them. See CP at 23-25; PDR at 8.

While EISFELDT may authorize a private citizen to bring incriminating evidence to police, it does not allow a subsequent warrantless search by police. Having Adrian open the camera (container) and display its contents for them made him a state actor. Thus, a subsequent warrantless search by the government was conducted. EISFELDT does not allow this.

Furthermore, there was no Finding of Fact or Conclusion of Law that says Adrian searched the camera to any extent or at all. This creates the distinct possibility that the police exceeded the scope of any prior private search. Exceeding the scope of a private search is not allowed by the private search doctrine. If the scope of a private search is exceeded, a warrant to do so is required. WALTER V. UNITED STATES, 447 U.S. 649, 100 S.Ct. 2395, 65 L.Ed.2d 410 (1980).

The Court adopted a bright line rule in EISFELDT and held the private search doctrine inapplicable under article 1, § 7 of the

Washington Constitution. EISFELDT, 163 Wn.2d at 638. Justice Madsen, concurring in the result, notes that the majority "reject[s] the doctrine in all cases ...". Id. at 641. The majority said, as quoted earlier: "The individual's privacy interest protected by article 1, § 7 survives the exposure that occurs when it is intruded upon by a private actor." One sentence later the opinion continues this line of thinking when it says: "The private search does not work to destroy the article 1, § 7 interest ...". Id. at 638 ¶16. Footnote 9 follows in the next sentence.

The problem with footnote 9 is that it seems to contradict the statements just made about the retention of privacy interests that the private search doctrine, now inapplicable under Washington's Constitution, formerly destroyed. It makes no sense for the Justices to draw a bright line rule that renders an entire concept inapplicable, and then immediately blur that line with a nonsensical footnote. This has lent a measure of ambiguity to EISFELDT's meaning.

The only logical conclusion that can be drawn from Justice Sanders' meaning in footnote 9 is that the privacy interest a person may have in a given object is lost when a private person conducts a search of that object. Constitutional protections do not apply to private actors, but they do apply to police in the context of a subsequent warrantless search. The same privacy interest that was previously lost to the private search doctrine is now retained as to the police. What remains unchanged is the loss of a privacy interest to a private party when they conduct a search.

Certainly, nothing should prevent private citizens from alerting authorities to evidence of a crime. But in the context of evidence of a crime that is in a closed container, as was the case here, the police should rightly obtain a warrant before performing any search of that closed container. See 10.8 Statement of Additional Authorities at 9, No. 13 (a), (b), and (c) - Efforts by Police to Obtain Warrant.

In any event, there were other factors at work in this case that make this search not purely a private one. The circumstances and findings must indicate a purely private search, and they do not.

First, as mentioned before, there's a lack of Findings of Fact or Conclusions of Law that Adrian searched the camera, partially or at all, before bringing it to police. Police may have exceeded the scope of a prior private search, if there was one. There's also no Findings of Fact that Adrian had the right to consent to any search of that camera. At the least, exceeding the scope of any private search would cancel any rules applicable under the private search doctrine, as doing so requires a warrant.

Second, while Adrian handed the evidence to police, they handed it right back and instigated and encouraged him to open the container and display its contents for them, making it a state search. See CP at 23-25; PDR at 8, 9. Additionally, there is a "voluntariness" factor in EISFELDT, at 631 (Eisfeldt left a key to his house under a mat for Piper [the repairman], thereby authorizing Piper's access to his house), and the same "voluntariness" factor in the case footnote 9 relies on, STATE V. WALTER, 66 Wn. App. 862, 833 P.2d 440 (1992) (defendant voluntarily gave his film negatives to a photo processor for development, thereby forfeiting his expectation of privacy in the film). This voluntary relinquishment factor is considered acquiescence to the possibility of a search by a third party; i.e. assumption of risk. See PDR at 11. Here, Allen did not voluntarily relinquish control or give permission for access to his property and did not assume the risk of a third party search.

Finally, Justice Madsen, in her concurrence, notes that a different question would be posed if the bag of contraband was removed and presented, outside the home, to police. "Although this may fit within the private search doctrine, the question is not presented here." EISFELDT, 163 Wn.2d at 641 n.13. See also PDR at 3. This is exactly what happened in this case. While a privacy interest may have been lost to a private actor, it was not lost as to the police. See EISFELDT, at 638 ¶16.

The State finishes its argument by saying: "If the defendant's son had been snooping in his father's bedroom and came across a camera in a locked safe, and then brought the police into the bedroom to retrieve the camera, EISFELDT would be implicated." Response at 6. (Emphasis in original).

This is a misguided notion for several reasons. First, if the camera would have been in a "locked safe", Adrian would not have come across it. Adrian was "snooping in his father's bedroom". PRP at 19. The camera was found in a dresser drawer, in a room that was unlocked and unoccupied because of a ruse deliberately created by Adrian to ensure his snooping would not be impeded or interrupted.

Second, bringing "the police into the bedroom to retrieve the camera" is not a factor necessary to implicate EISFELDT. In STATE V. BOLAND, 55 Wn. App. 657, 781 P.2d 490 (1989), the Court noted that "... Our Supreme Court has expressly stated that the location of the search is not determinative; rather, the appropriate inquiry is whether the state has unreasonably intruded into the person's private affairs. See STATE V. MYRICK, 102 Wn.2d 506, 510-13, 688 P.2d 151 (1984)." BOLAND, 55 Wn. App. at 664-65. See also PDR at 3-4; and discussion of superior rights, PDR at 14.

Third, it is worth mentioning that at least one court has recognized a computer as "the digital equivalent of its owner's home." STATE V. RUPNICK, 125 P.3d 541, 552 (Kan. S.Ct. 2005); and see PDR at 17.

While EISFELDT may specifically allow Adrian's actions, as the State contends, it does not allow a subsequent warrantless search by police. When the police encourage a private person to open a container and display its contents for them, they make that person their agent. This in turn makes that search a subsequent warrantless state search.

Even in the absence of such a finding, under EISFELDT, a private search may cause the loss of a privacy interest to a private party, but that same privacy interest is retained as to the government.

CONCLUSION

Digital cameras are closed containers. Under STATE V. EISFELDT, the privacy expectation in that closed container may be lost to a private party when they search it, but not to the government.

While EISFELDT may allow a private person to bring evidence of a crime to authorities, it does not allow a subsequent warrantless search of that evidence by the state. Absent a valid exception to the warrant requirement, police encouraging a private party to warrantlessly open a closed container and display its contents for them renders that action a government search.

Furthermore, there are two key Findings of Fact missing in this case that casts serious doubt on the Conclusions of Law made by the trial court. The Court of Appeals has erred in not recognizing this.

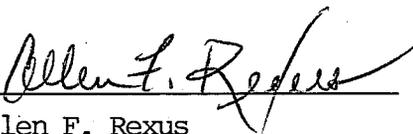
In this state, the location of the search is not determinative, but rather whether the state has unreasonably intruded into a person's private affairs. The Petitioner took every precaution to ensure his private affairs would remain that way. Allen Rexus's son did not have the right to consent to the search of the camera nor to waive his father's Fourth Amendment rights. No matter how the Court may view the search Adrian performed on the camera at the request of the police, it was without any authority of law.

The trial court and Court of Appeals decisions should be reversed. The evidence from the camera and everything that stemmed from it should be suppressed. Allen Rexus's conviction should be overturned, and this matter should be dismissed.

I, Allen Fredrick Rexus, declare under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 29th day of December, 2009, in the City of Aberdeen, County of Grays Harbor, State of Washington.

Respectfully submitted,


Allen F. Rexus
Petitioner Pro Se

DECLARATION OF SERVICE BY MAIL
GR 3.1

I, Allen Fredrick Rexus, declare and say:

That on the 29th day of December, 2009, I deposited the following documents in the Stafford Creek Correction Center Legal Mail system, by First Class Mail pre-paid postage, under cause No. 83327-3:

Reply to the State's Response to the Motion for Discretionary Review

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
2009 DEC 31 AM 8:06
RONALD R. CARPENTER
CLERK

Addressed to the following:

Ronald Carpenter, Supreme Court Clerk

Temple of Justice

Susan Carlson, Deputy Clerk

Washington State Supreme Court

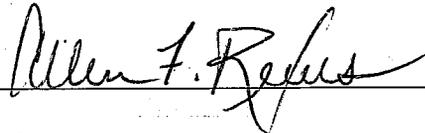
AT:

P.O. Box 40929

Olympia, Washington 98504-0929

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED THIS 29th day of December, 2009, in the City of Aberdeen, County of Grays Harbor, State of Washington.



Allen F. Rexus

DOC #890703. Unit H5-A8
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