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STATE OF WASHINGTON

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NO. 64194-8-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

APRIL DAVIS,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Andrea Darvas, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred by ordering restitution for amounts resulting from non-criminal bookkeeping errors, not the result of any crime, and certainly not the result of this charged crime.

2. The trial court erred by ordering restitution for a dentist's lost income when the evidence was insufficient to show patients would have paid the fees but for this crime.

3. The trial court erred by ordering restitution for investigation costs and legal fees when the work encompassed auditing for many negligent bookkeeping errors, not merely for criminal actions.

Issues Pertaining to Assignments of Error

1. Where the state charged and the defendant pled guilty to attempting to file false insurance claims, may the court order restitution to the defendant's employer for amounts that were not the result of criminal activity but merely improper bookkeeping?

2. Where the employer claimed restitution for fees she claimed should have been billed to patients, which the defendant failed to bill, was

there sufficient evidence to show the employer would have received payment of all the bills had they been sent?

3. Where the bulk of the restitution order was for investigation into the improper bookkeeping and private attorney's fees, should that amount have been apportioned according to the amounts of loss from a crime and the loss from non-criminal negligence on the job?

B. STATEMENT OF THE CASE

Appellant pled guilty to a single count of attempting to file a false insurance claim, a gross misdemeanor in violation of RCW 48.30.230. The court imposed a suspended sentence. CP 30-32. After an evidentiary hearing, the court ordered restitution in the amount of \$212,955.13 payable to appellant's employer, and other smaller amounts payable to various insurance companies. CP 33-36.

This appeal challenges only the restitution ordered to the employer.

1. Substantive Facts

April Davis began working for Dr. Butterfield's dental practice in April, 2002. Although Ms. Davis had very little experience in

insurance billing matters, the dentist promoted her a month later to be office manager. She was given full responsibility for billing insurance companies and patients for work done by the dental office, as well as scheduling patients and keeping the books. RP(6/5) at 5-6.

When patients came for appointments, Ms. Davis was responsible for getting their insurance information. The office notified the patient that they were responsible for the full cost of treatment, but that the office would bill the insurance as a courtesy. Before a procedure, Dr. Butterfield expected Ms. Davis to determine from the insurance company how much it would cover, and to charge the patient for the expected balance at the time of treatment. After the insurance company paid the claim, she expected Ms. Davis to bill the patient for any remaining balance. RP(6/5) 4-9, 58-61.

Dr. Butterfield treated hundreds of patients and dealt with at least 27 different insurance companies. RP(6/5) 10; Exh. 2. Each policy might differ from every other patient's as to policy limits during a specified time period or to

treatments that were covered. RP(6/5) 58-61; Exh. 5 at 2-3.

Dr. Butterfield had contracts with some insurance companies to accept the company's discounted amount for a particular procedure, regardless of what she otherwise would bill. She then would write off the difference on the patient's account. RP(6/5) 20-21, 26; Exh. 5 at 2-3.

From the beginning of her employment, Ms. Davis made some errors. She occasionally miscalculated the likelihood of patients' insurance companies paying for the services provided. The patients then became responsible for the balance of the bill. Dr. Butterfield chose to write off these amounts rather than upset those patients with additional bills; but she took out her anger on Ms. Davis, berating and belittling her. CP 43.

Over time, Ms. Davis sought methods of billing the insurance to be sure of payment for services provided, to avoid Dr. Butterfield's ire. She used different billing codes that didn't accurately reflect the service provided. For example, she

would code for fillings when sealants were actually applied. CP 43.

Ms. Davis also made adjustments to patients' accounts, "writing off" amounts to bring them to zero rather than billing the patient for the balance. RP(6/5) 26-27.

In 2007, when Ms. Davis was gone from the office, Dr. Butterfield brought in a former office manager to cover. They discovered a file of bills that had not gone out from the beginning of the month. A closer review of some files showed discrepancies in services provided and codes for insurance. RP(6/5) 6-7.

Dr. Butterfield called the police. A detective instructed her that she must herself hire a forensic accountant to perform an audit. The detective "explained to us that they couldn't go any further into the investigation unless there was a professional forensic audit completed." Dr. Butterfield testified the detective emailed her, saying the statute of limitations was approaching, he needed the audit as soon as possible. RP(6/5) 11-12. She also testified the detective required two copies of everything, one for him and one for

the prosecutor. She paid for these copies and claimed them for restitution. RP(6/5) 33-34.

Dr. Butterfield hired a forensic accounting firm. She and her staff conducted the first several stages of the audit, then had the accounting firm do a final review. RP(6/5) 12-14.

2. Procedural Facts

The state originally charged April Davis with one count of filing a Fraudulent Insurance Claim, a violation of RCW 48.30.230(1) and (2). CP 1.

The Certification for Determination of Probable Cause referred to a forensic accounting showing "inaccurate" or "misallocated" entries totaling \$77,386.47, although it specified this accounting did not itself demonstrate criminal activity. CP 20-21. It later referred to Dr. Butterfield not recovering about \$71,500 that was owed to her by her patients. CP 26.

Ms. Davis pled guilty to a single count of attempting to make a false claim for insurance, a gross misdemeanor. CP 11-17. Her statement said:

During a period of time between 6/24/02 and 2/12/07 I made a substantial step toward the commission of the crime of Making False Claims (RCW 48.30.230) by knowing it to be such, presenting or causing to be presented, a false or

fraudulent claim, or any proof in support of such claim and for the payment of a loss under a contract of insurance.

CP 16.¹

Although the bookkeeping was in major disarray, Ms. Davis did not personally receive any money from the insurance or from Dr. Butterfield. Dr. Butterfield testified the possible "benefit" Ms. Davis derived was "feeling good" about telling a patient who called about a bill, "Don't worry about it, I'll take care of it." RP(6/5) 53-54.²

Pursuant to the plea agreement, Ms. Davis paid \$40,000 toward restitution prior to the plea. CP

¹ RCW 48.30.230 provides:

(1) It is unlawful for any person, knowing it to be such, to:

(a) Present, or cause to be presented, a false or fraudulent claim, or any proof in support of such a claim, for the payment of a loss under a contract of insurance;

(2)(a) Except as provided in (b) of this subsection, a violation of this section is a gross misdemeanor.

(b) If the claim is in excess of one thousand five hundred dollars, the violation is a class C felony punishable according to chapter 9A.20 RCW.

² Even in the civil action Dr. Butterfield later filed against Ms. Davis, there is no claim of theft. She claims civil actions of fraud, violation of the consumer protection act, and negligence. See King County Superior Court No. 09-2-38238-7 SEA.

18, 29. The parties agreed the court would determine any balance of restitution. CP 29.

The court imposed a 12-month sentence and suspended it for two years on the condition that Ms. Davis complete 480 hours of community service. CP 30-32.

3. Restitution Issues

The defense disputed restitution amounts claimed by Dr. Butterfield. CP 42-58.

Dr. Butterfield's privately retained counsel, Jonah Harrison, submitted a five-page letter to Judge Darvas responding directly to the defense memorandum. Exh. 5. Dr. Butterfield testified that her lawyer's letter was the clearer explanation of the accounting results and her claim than her own testimony. RP(6/5) 26.

Dr. Butterfield's attorney attended at least two of the three restitution hearings. He did not present any evidence other than what the prosecutor presented via Dr. Butterfield's testimony. He did not participate in argument. RP(6/5) 2; RP(8/14) 2.

a. Bookkeeping Errors

Dr. Butterfield claimed \$52,978.49 as restitution for what was titled "theft loss." She testified, relying on her lawyer's letter, that the audit identified within this amount five categories of **errors** Ms. Davis made:

1. Inaccurate insurance adjustment
2. Inaccurate finance charge
3. Inaccurate "posting error"
4. Inaccurate "paid by insurance" postings
5. Deleted treatment

Exh. 5.

Only one of these five categories was connected to any false reports to insurance companies. The remaining errors all occurred within the dentist's bookkeeping systems, resulting in some bills not being sent to patients, and other amounts being written off to benefit patients.

Appellant discusses these categories in more detail in the argument below.

b. Legal and Investigation Costs

Dr. Butterfield also claimed restitution for her investigation and audit fees; and for her attorney's fees.

When the restitution hearing began on June 5, she claimed \$7,895.50 for attorney's fees and

\$15,969.32 for forensic accounting. Exh. 1. Dr. Butterfield completed her testimony on that date. Nonetheless, on August 14, the state submitted an "Amended" document, now claiming \$19,263.00 for legal fees and \$19,699.22 for accounting fees. CP 74. See RP(8/14) at 4 (prosecutor hands the Court "an amended version of the Attachment A because it has slightly been changed").

The only changes were the increased legal and accounting fees. No explanation was given for the increase in these amounts. In fact, the accounting firm's statements attached to the court's correspondence totals to the original amount claimed: \$15,969.32. CP 76-81.

Dr. Butterfield also claimed \$119,040.18 in costs of investigation, which she calculated for her own time and her staff's time in reviewing the books; \$174.24 for making copies at Kinko's and \$1,800 for making copies at her own office, to provide the detective and the prosecutor each their own copies of records. Exh. 1 at 1.

c. Order of Restitution

The court ordered restitution as requested by the state. It ordered Ms. Davis to pay Dr.

Butterfield \$212,955.13 in restitution, as specified in this Amended Attachment A. CP 33. In addition, she was ordered to reimburse various insurance companies a total of \$18,763.65. CP 33-36.

Appellant does not challenge the amounts owed to the insurance companies.

C. ARGUMENT

1. THE COURT ORDERED RESTITUTION FOR LOSSES RESULTING FROM IMPROPER BOOKKEEPING BUT NOT THE RESULT OF THIS OR ANY CRIME.

- a. Restitution Permitted by Statute

"A court's power to impose restitution is statutory, not inherent." State v. Davison, 116 Wn.2d 917, 919, 809 P.2d 1374 (1991).

Ms. Davis was convicted of a gross misdemeanor and received a suspended sentence.³

As a condition to suspension of sentence, the superior court shall require the payment of the penalty assessment required by RCW 7.68.035. In addition, the superior court may require the convicted person to make such monetary payments ... as are necessary: ... (2) to make restitution to any person or persons who may have suffered loss or damage **by reason of the commission of the**

³ The parties incorrectly relied on the SRA restitution provisions until the state's supplemental brief on restitution. See CP 60 (RCW 9.94A.750); Exh. 5 at 1 (RCW 9.94A.753).

crime in question or when the offender pleads guilty to a lesser offense or fewer offenses and **agrees** with the prosecutor's recommendation that the offender be required to pay restitution to a victim of an offense or offenses which are not prosecuted pursuant to a plea agreement

RCW 9.92.060(2) (emphases added).⁴

An award of restitution for a misdemeanor offense is authorized under RCW 9.92.060(2) and RCW 9.95.210(2), both of which allow the court to require the defendant "to make restitution to any person or persons who may have suffered loss or damage **by reason of the commission of the crime in question ...**"

State v. Marks, 95 Wn. App. 537, 539-40, 977 P.2d 606 (1999) (emphases added).

Ordering restitution in the absence of statutory authority is an abuse of discretion. State v. Dauenhauer, 103 Wn. App. 373, 377, 379-80, 12 P.3d 661 (2000), review denied, 143 Wn.2d 1011 (2001).

This statutory language is read strictly: there must be a causal relationship between "the crime in question" and the loss claimed for restitution.

⁴ RCW 9.95.210(2) provides the identical language for restitution.

b. "The Crime in Question"

In State v. Griffith, 164 Wn.2d 960, 195 P.3d 506 (2008), the Supreme Court reversed a restitution order for \$11,500, the total value of jewelry taken in a burglary, when the defendant was convicted only of possession of stolen property. The Court held the evidence at the restitution hearing was legally insufficient to show the defendant had "possessed" more than a couple of items from that burglary.

Griffith did not plead guilty to burglary. She pleaded guilty to possessing \$250-\$1,500 worth of stolen property. "Culpability for possession of stolen property does not necessarily include culpability for the stealing of the property. The actual thief is guilty of a different crime." ... Because Griffith did not agree to pay for the Linscotts' loss from the burglary, she is responsible only for the value of the Linscotts' unrecovered property proved to be causally related to **her crime**.

Griffith at 967 (emphasis added).⁵

Thus in State v. Woods, 90 Wn. App. 904, 953 P.2d 834, review denied, 136 Wn.2d 1021 (1998), the

⁵ Compare: State v. Roberts, 142 Wn.2d 471, 14 P.3d 713 (2000), and State v. Cronin, 142 Wn.2d 568, 14 P.3d 752 (2000) (accomplice liability statute requires proof that defendant knew he was promoting or facilitating "the crime" for which he was eventually charged, not any crime at all).

court reversed a restitution order for items missing from a truck stolen August 17 where the defendant was convicted only of possessing the stolen vehicle in September.

The State attempted to show through the letter that Woods stole and possessed the vehicle in August. The State did not amend the charge or include in the plea agreement a promise by Woods to pay for the items. The State essentially asked the trial court to impose restitution on Woods's "general scheme," or based on acts "connected with" the crime charged that **were not part of the crime charged.**

Woods, 90 Wn. App. at 908. The Court of Appeals held the trial court could not impose restitution for other uncharged offenses because she did not expressly agree to it in the plea agreement.

Similarly in State v. Dauenhauer, supra, the Court of Appeals reversed a restitution order on a burglary conviction for damages to a fence and a truck. The defendant ran his car through the fence and collided with the truck as he fled from the scene of the burglary. The court reversed despite trial counsel's "incorrect concession to liability for those damages."

The facts of this case give rise to no statutory authority for the court to order such restitution for Mr. Dauenhauer's "general scheme" or acts merely "connected with" the burglaries.

Id. at 379-80.

In this case, Ms. Davis pled guilty to attempting to file a false insurance claim. She concedes that restitution is appropriate for amounts the insurance companies paid on any false claim she submitted. That includes the amounts listed in Exh. 2, and accordingly itemized in the Order Setting Restitution payable to the insurance companies. That amount totals \$18,412.10. Exh. 2 at 6. Other amounts ordered, however, were not the result of "the crime in question."

c. Causal Relationship

Restitution is allowed only for losses that are causally connected to a crime, and may not be imposed for a "general scheme," acts "connected with" the crime charged, or uncharged crimes unless the defendant enters into an express agreement to pay restitution in the case of uncharged crimes.

State v. Kinneman, 155 Wn.2d 272, 286, 119 P.3d 350 (2005).

"A restitution order must be based on the existence of a causal relationship between the crime charged and proven and the victim's damages." ...

... Here it cannot be said that "but for" Woods's possession of the stolen vehicle in September, the owner would not have lost the personal property located in the vehicle when it was stolen in August.

Woods, 90 Wn. App. at 907, 909-10.

To the extent the court ordered amounts for Ms. Davis's inaccurate bookkeeping, those claims were not caused by the crime of conviction.

d. The Audit's Categories Demonstrate the Claimed Losses are Not the Result of This or Any Crime.

The forensic audit separated the accounting errors into several categories perhaps relevant to accounting, but not specifically designed to address criminal restitution. Dr. Butterfield's attorney described the categories as "five types of wrongful accounting actions," which he calculated to total \$52,978.49.

i. "Inaccurate Insurance Adjustments"

Dr. Butterfield charges a set fee for each of the services she performs for her dental patients. The patient, the patient's insurance provider or both is responsible for payment. Dr. Butterfield, as is common in the health care industry, has contracts with certain insurance providers whereby a discount is applied to the amount the provider otherwise would have paid. Dr. Butterfield's services are initially recorded in patient records at the full billing rate. Then, if the patient uses an insurance provider with whom Dr. Butterfield has a contract, a contractually agreed upon discount rate is applied to the patient's final bill. This is recorded in Dr. Butterfield's records as an "Insurance Adjustment."

Clark Nuber⁶ found **numerous instances in which Ms. Davis inappropriately posted such "insurance adjustments" where no contract with a provider existed, thereby writing down the total patient bill.** The total of such losses was **\$24,298.24.**

Exh. 5 at 2-3 (emphases added).

These inaccuracies did not involve any false statements in any insurance claims. Dr. Butterfield is claiming Ms. Davis credited patients' accounts instead of billing them for a balance when the insurance paid less than Dr. Butterfield billed. Although Dr. Butterfield had agreed with some insurance companies to accept the lower amounts, she expected those patients with a different insurance to pay more.

These "losses" were the result of Ms. Davis failing to bill patients, not filing any false insurance claim. Failing to send bills is not a crime.

ii. "Inaccurate Finance Charge"

A finance charge is a form of interest owed to Dr. Butterfield for past due balances for services already rendered. The charges are calculated based on a set percentage applied to the amount past due. Clark Nuber discovered **numerous instances in which Ms. Davis**

⁶ Clark Nuber, P.S., was the accounting firm Dr. Butterfield retained. CP 76-81.

improperly wrote off finance charges due to Dr. Butterfield. The total of such losses to Dr. Butterfield was **\$1,050.60.**

Exh. 5 at 3 (emphases added).

Again, crediting a patient's account for the amount of the finance charge is something businesses and professionals often do as a courtesy to curry favor with the patient/client. Dr. Butterfield's claim is that Ms. Davis failed to bill patients for this finance charge when she was not authorized to make these adjustments to patients' accounts.

Such a claim may be the basis for a civil action to recover damages, but it is not a crime. It certainly has nothing to do with filing a false insurance claim.

iii. "Inaccurate 'Posting Error'"

Errors in manual recordkeeping, such as that done in Dr. Butterfield's office, are often labeled as posting errors. The proper corrective activity in the accounting records is to record an entry in reverse of the posting error to eliminate the error. In other words, if a patient is mistakenly billed an extra \$10, the solution is to record a corresponding \$10 reduction in the bill and label it a posting error. Clark Nuber discovered **instances in which Ms. Davis recorded write offs to patient bills and labeled them as "posting error" corrections when no initial overbilling**

error occurred. The total of such losses to Dr. Butterfield was **\$2,768.75.**

Exh. 5 at 3 (emphases added).

Again, these bookkeeping errors may be the basis for a civil claim, but they are not a crime.

iv. "Inaccurate 'Paid by Insurance' Postings"

Dr. Butterfield divided this category into two subparts: (1) claims for insurance coverage for services that were never performed; and (2) "misapplications" of insurance payments, apparently to patients who were not insured. These two subcategories totaled \$20,724.90. Exh. 5 at 3-4.

There is no question that payments of insurance claims for services that were never performed are appropriate restitution for the crime of attempting to file a false insurance claim.

However, insurance payments that were received and merely credited to the wrong patient's account are not the result of false insurance claims. They are the result of improper bookkeeping. It may indicate that Ms. Davis should have collected more money from the patients than she did. But it is not the result of a crime.

On this record, there is no way to segregate the amount that resulted from false insurance claims from the poor bookkeeping.

v. "Deleted Treatment"

Clark Nuber also discovered instances in which **Ms. Davis simply deleted treatment records so that the patients would not be billed for services provided.** For instance, if a patient received \$1,000 worth of treatment but their insurance company would only pay \$800, Ms. Davis would simply delete \$200 from the patient's bill and Dr. Butterfield would never recover full payment for her services. The total of such losses to Dr. Butterfield was **\$4,136.00.**

Exh. 5 at 4 (emphases added). Again, this category of activity describes a write-off made in the accounting records after an insurance payment was received, accepting the insurance payment as full satisfaction for the service. It has nothing to do with false insurance claims. In fact, it appears this was Dr. Butterfield's practice with some insurance companies. Erroneously applying this same practice to others may be incorrect, but it is not a crime.

e. Conclusion from Audit

Of these five categories, only one part of one category includes losses from this crime. The

remaining four categories involve disputes over internal bookkeeping and accounting according to the doctor's practices with insurance companies and her patients.

Furthermore, there was no evidence to support that Dr. Butterfield's patients would have paid the full amounts attributed to Ms. Davis's failure to bill them.

Since the proper amount of restitution attributable to attempting to file a false insurance claim cannot be discerned from this record, the case must be remanded to separate out that amount. The balance of restitution ordered is improper.

2. THE COURT ERRED IN GRANTING RESTITUTION FOR ATTORNEYS' AND ACCOUNTING FEES.

a. Legal Fees

Attorney fees and costs may constitute damages on which restitution may be based, depending on the circumstances. ... However, restitution is improper if the fees are not sufficiently causally connected to the offense.

State v. Kinneman, supra, 155 Wn.2d at 288.

As a public official, the prosecutor has an obligation to the public good. He does not represent any particular victim or complaining

witness in any case. He represents the public at large and the public interest in seeing justice done according to the law. See generally Constitution, art. XI, § 5; RCW 56.27.005 (definition of prosecuting attorney); RCW 36.27.020 (duties of prosecuting attorney). No prosecuting attorney shall receive any fee or reward for any of his or her official services. RCW 36.27.050. And no prosecuting attorney or deputy in a county with a population of 18,000 or more may engage in private practice of law. RCW 36.27.060.

In contrast, when an individual party retains counsel, that counsel has a professional commitment to the interest of the individual client, to the exclusion of virtually all other interests. See generally Rules of Professional Conduct.

Dr. Butterfield's initial claim for legal fees, filed June 5, 2009, requested \$7,895.50. Exh. 1 at 1 ("Attachment A" at 1, item 3a). It is reasonable to conclude that Dr. Butterfield properly needed to consult counsel as to her responsibilities to the insurance companies caused by the inaccurate claims Ms. Davis filed. This

record, however, does not demonstrate what services these fees were for.

By the second hearing on August 14, Dr. Butterfield had increased her claim to \$19,263.00 for legal fees. CP 74. There was no explanation on this record for the increase. Nothing occurred during that timeframe except the two hearings, which private counsel attended but did not participate in.

There was no need for private counsel to attend these hearings. It was the prosecutor's duty to appear and represent the state at these hearings. It was the prosecutor's duty to file pleadings in support of the state's claims and in response to the defense memoranda. There is no legal authority for the court to order restitution for the cost of a prosecutor performing these duties.

It also was the prosecutor's job to separate out a proper restitution amount that resulted from "the crime," as permitted by statute, from the much greater amounts claimed by the dentist in this case. This job was not done.

b. Accounting Costs

Dr. Butterfield testified the police instructed her to hire a forensic accountant for an audit or the police would not investigate her claim further. The detective also required her to provide two complete copies of all her records, one for him and one for the prosecuting attorney.

Our society pays law enforcement officials with public tax dollars to investigate crimes. This allocation of what should be a criminal investigation to a private citizen is the primary cause of the errors that occurred here.

Law enforcement recognized that there was little actual crime in Ms. Davis's actions: it admitted as much in the Certificate of Probable Cause. CP 20-21. Had the police conducted this investigation, they probably could have done so much more efficiently by focusing on the insurance claims and the results of those claims. The police have the prosecuting attorney and staff, experts in accounting crimes, to advise them.

Instead, Dr. Butterfield, her staff, and her accounting firm could not, or did not, separate out what was criminal and what was merely erroneous or

negligent. They spent untold hours, believing the police required them to do so, to review several years of bookkeeping. With no professional direction from the experts in criminal law (i.e., the police and the prosecutor), they produced reports that could not distinguish what was criminal and what was not.

The bulk of these exorbitant accounting costs were not causally related to "the crime" and are not proper for a restitution order.

Furthermore, there was no basis at all for Dr. Butterfield's nearly \$4,000 in increased claims for these costs between the first restitution hearing and the last. There is no evidence that any additional work was done in this time.

D. CONCLUSION

The restitution statutes permit restitution for losses resulting from the crime of conviction. The various accounting reports in this case did not separate out bookkeeping errors and negligence from the crime of filing a false insurance claim. The court erred in ordering restitution for claims that were not the result of the crime.

The claims for accounting and legal fees similarly were not segregated into those resulting from this crime and those required by other bookkeeping errors. Given the small proportion of actual loss from the crime, it was an abuse of discretion to award restitution for the full amount claimed for these expenses.

Furthermore, there was utterly no evidence or explanation for why these amounts increased between the first restitution hearing and the last, since no additional work was required or demonstrated in either area.

This Court should vacate the restitution order and remand for a new hearing, at which the trial court shall determine what losses actually resulted from the crime of conviction.

DATED this 5th day of April, 2010.

Respectfully submitted,



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