

62903-4

62903-4

NO. 62903-4-I

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

STATE OF WASHINGTON,

Respondent,

v.

JOHN P. HEESE,

Appellant.

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
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ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR SNOHOMISH COUNTY

BRIEF OF APPELLANT

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A. SUMMARY OF THE ARGUMENT

A police officer pulled over Mr. Heese's car because he failed to signal before turning. The officer discovered Mr. Heese had an outstanding warrant for Driving While License Suspended and arrested him. While Mr. Heese was handcuffed and secured in the back of the patrol car, the officer conducted a search of Mr. Heese's vehicle incident to arrest. The officer opened a small container, located within a larger container, and discovered a white, crystal substance that he believed was methamphetamine. Mr. Heese was later charged with Possession of a Controlled Substance (Methamphetamine).

In light of Arizona v. Gant, the search incident to arrest exception does not justify the vehicle search under the Fourth Amendment because Mr. Heese was handcuffed and restrained in the back seat of a police car during the search. And the officer lacked a reasonable belief that he would find evidence inside the vehicle of Driving While License Suspended, the offense for which he was arrested. The search of Mr. Heese's vehicle violated the Fourth Amendment and the court should have suppressed the evidence obtained from the search.

B. ASSIGNMENTS OF ERROR

1. The court erred in finding: "Washington law permits automobile searches incident to arrest immediately subsequent to the suspect's being arrested, handcuffed and placed in a patrol car, even though presumably the exigencies justifying the search no longer exist." CP 31 (Conclusion of Law 2).

2. The court erred in finding that the warrantless search of Mr. Heese's vehicle was lawful. CP 31 (Conclusion of Law 4).

3. The court erred in denying Mr. Heese's motion to suppress the evidence gathered from the illegal search. CP 31 (Conclusion of Law 5).

C. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

The search incident to arrest exception to the warrant requirement under the Fourth Amendment applies only when (1) the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search, or (2) the officer has a reasonable belief that evidence of the crime of arrest might be found in the vehicle. Where Mr. Heese was handcuffed, seat-belted, and secured in the backseat of a locked patrol vehicle during the search and the officer lacked a reasonable belief that he would find evidence relevant to the crime of arrest, did the vehicle

search violate Mr. Heese's Fourth Amendment right against unreasonable searches and seizures?

D. STATEMENT OF THE CASE

Mr. Heese was driving his Ford Tempo along 47th Avenue in Marysville on the morning of February 9, 2008. 10/10/08RP 32.

While driving, Mr. Heese noticed a patrol car behind him.

10/10/08RP 32. Wanting to see if the patrol car was actually following him, Mr. Heese decided to make a turn and see if he would be followed. 10/10/08RP 32-33. He then made a second turn after a few blocks, and the patrol officer continued to follow.

10/10/08RP 33. Mr. Heese then realized the officer was following his car. Aware that his own license was suspended, Mr. Heese pulled over to the side of the road. 10/10/08RP 33.

While following Mr. Heese, Officer Jake Robbins of the Marysville Police Department observed him commit several driving infractions. 10/10/08RP 4; CP 29. Mr. Heese twice failed to signal before making a turn, and crossed the centerline while making a turn. 10/10/08RP 4; CP 29. Officer Robbins ran a check and confirmed a misdemeanor warrant existed based on the car's

license plate. 10/10/08RP 4; CP 30. The officer activated his overhead lights to pull Mr. Heese's car over.¹ 10/10/08RP 4; CP 29.

Mr. Heese got out of his car and started to approach Officer Robbins' patrol vehicle. 10/10/08RP 5; CP 30. Officer Robbins also exited his vehicle and instructed Mr. Heese to return to his car.

10/10/08RP 6; CP 30. Mr. Heese got back into his car and handed the officer his driver's license through the window. 10/10/08RP 7.

Officer Robbins then confirmed with dispatch that Mr. Heese was indeed the registered owner of the vehicle with the misdemeanor warrant for Driving While License Suspended, Third Degree.

10/10/08RP 7-8; CP 30.

Officer Robbins immediately placed Mr. Heese under arrest for the crime of Driving While License Suspended, Third Degree and for the outstanding misdemeanor warrant. 10/10/08RP 8; CP 30. With the assistance of Officer Elton, Officer Robbins walked Mr. Heese, in handcuffs, to the back of the patrol vehicle, approximately 25 feet from Mr. Heese's car. 10/10/08RP 8-9. At that point, the officers searched Mr. Heese's person. 10/10/08RP 10. After finding no contraband or evidence of any crime, Officer

¹ Mr. Heese contended that he did not see the emergency lights until after he pulled his car over. 10/10/08RP 33; CP 29.

Robbins placed Mr. Heese in the back of the patrol vehicle, seat-belted him in, and closed the door. 10/10/08RP 10, 24, 35; CP 30.

While Mr. Heese was secured in handcuffs, and seat-belted in the back of the locked patrol vehicle, Officer Robbins searched the vehicle incident to arrest. 10/10/08RP 10-11, 24; CP 30. He found a soft, black briefcase on the front passenger seat.

10/10/08RP 11-12; CP 30. After unzipping the briefcase's outer compartment, Officer Robbins saw a small, black zippered pouch. 10/10/08RP 14; CP 30. Inside, Officer Robbins discovered a small baggy of white, crystal substance and a digital scale. 10/10/08RP 15; CP 30. Officer Robbins thought the substance was methamphetamine. Mr. Heese was subsequently booked and charged with Possession of a Controlled Substance (Methamphetamine). 10/10/08RP 15; CP 30.

Mr. Heese moved to suppress the evidence obtained from the search of the car incident to his arrest. 10/10/08RP 1. Mr. Heese argued a warrantless search is per se unreasonable unless it falls within a narrow exception to the warrant requirement. 10/10/08RP 47. He explained that a search incident to arrest was an exception that was traditionally justified because it allowed officers to search for weapons or evidence that a suspect may grab

or destroy during the time of the arrest. 10/10/08RP 47. However, Mr. Heese was in handcuffs, and seat-belted in the back of a locked patrol vehicle at the time of the search; he could not grab any weapon or destroy any evidence located in his car. 10/10/08RP 47. Ultimately, Mr. Heese contended that the traditional rationale behind the exception was not present in this situation, and the methamphetamine was discovered pursuant to an illegal search. 10/10/08RP 47.

The State responded by arguing that this Court's opinion in State v. Adams² applied. 10/10/08RP 51. The State claimed that Adams allows the search of a vehicle if at the time of arrest the defendant was in close proximity to his or her vehicle. 10/10/08RP 52. Consequently, because Mr. Heese was near his vehicle at the time of arrest, the State believed the officer was justified in his search. 10/10/08RP 54.

The court relied on Adams, and State v. Stroud³ in making its decision. 10/10/08RP 58; CP 31. The court explained that Stroud rejected Mr. Heese's argument that an officer may only search a vehicle for weapons an arrestee might use, or evidence

² 146 Wn. App. 595, 191 P.3d 93 (2008).

³ 106 Wn.2d 144, 720 P.2d 436 (1986).

an arrest might destroy. 10/10/08RP 58. Relying on Adams and Stroud, the court found:

Washington law permits automobile searches incident to arrest immediately subsequent to the suspect's being arrested, handcuffed, and placed in a patrol car, even though presumably the exigencies justifying the search no longer exist.

CP 31. Finding that Mr. Heese was in close proximity to his vehicle when he was arrested, and relying on Adams and Stroud, the court denied the motion to suppress. 10/10/08RP 64; CP 31.

After the court ruled that the evidence obtained from the search of Mr. Heese's vehicle was admissible, Mr. Heese waived his right to trial and entered a stipulation for a bench trial on agreed documentary evidence. 11/10/08RP 3-4. Based on the documentary evidence presented at the 3.6 hearing, the court found Mr. Heese guilty of Possession of a Controlled Substance (Methamphetamine). 11/10/08RP 5.

Mr. Heese's timely appeal follows.

E. ARGUMENT

THE OFFICER'S UNLAWFUL VEHICLE SEARCH VIOLATED MR. HEESE'S RIGHTS UNDER THE FOURTH AMENDMENT

1. Under the Fourth Amendment, an officer may not search a vehicle incident to arrest unless the arrestee is unsecured and able

to reach into the vehicle during the search, or the officer has a reasonable belief that evidence of the arresting offense is located in the vehicle. The Fourth Amendment to the United States

Constitution provides:

[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV. Moreover, “searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment – subject only to a few specifically established and well-delineated exceptions.”

Arizona v. Gant, 556 U.S. ___, 129 S. Ct. 1710, 1716, 173 L. Ed. 2d 485 (2009) (quoting Katz v. United States, 389 U.S. 347, 357, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967)). Warrantless searches are presumptively unreasonable, and will be deemed improper absent a valid exception. Chimel v. California, 395 U.S. 752, 764-65, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969). One exception to the warrant requirement is a search incident to a lawful arrest. Gant, 129 S. Ct. at 1716 (citing Weeks v. United States, 232 U.S. 383, 392, 34 S. Ct. 341, 58 L. Ed. 652 (1914)). This exception stems from the

officers' interest in his or her safety and preserving evidence of the crime. Id. (citing Chimel, 395 U.S. at 763).

The United States Supreme Court's decision in Gant held that under the Fourth Amendment, the police may search a vehicle incident to arrest only if the arrestee is unsecured and able to reach into the passenger compartment of the vehicle at the time of the search, or the police have a reasonable believe that evidence of the crime exists in the vehicle. 129 S. Ct. at 1719. In Gant, the defendant was arrested for driving with a suspended license and for an outstanding warrant also for driving with a suspended license. Id. at 1715. The police subsequently handcuffed him and locked him the back of a patrol car. Id. at 1714. The police then conducted a search incident to arrest and discovered cocaine in a jacket pocket and a gun, both located within the car's passenger compartment. Id. at 1715. The defendant filed a motion to suppress the evidence seized from the car as a violation of his Fourth Amendment rights. Id. The Court held:

Police may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest. When these justifications are absent, a search of an arrestee's vehicle will be unreasonable unless police

obtain a warrant or show that another exception to the warrant requirement applies.

Id. at 1723-24. Because the defendant in Gant was handcuffed and locked in the back of a patrol car, he was not within reaching distance of his car at the time of the search. Id. at 1719. Furthermore, because he was arrested for driving with a suspended license, the police could not have reasonably expected to obtain any additional evidence of that crime. Id. The Court ultimately declared:

Because police would not reasonably have believed either that [the defendant] could have accessed his car at the time of the search or that evidence of the offense for which he was arrested might have been found therein, the search in this case was unreasonable.

Id. In sum, Gant held that officers may not search a vehicle incident to arrest unless (1) the arrestee is unsecured and within reaching distance of the vehicle, or (2) it is reasonable to believe evidence of the crime of arrest is in the vehicle. Id. at 1723.

The Gant Court relied on its previous holding in Chimel. Id. at 1719. In Chimel, the court identified the exigencies permitting a search incident to arrest: (1) “in order to remove any weapons that the [arrestee] might seek to use in order to resist arrest or effect his escape” and (2) “to search for and seize any evidence on the

arrestee's person in order to prevent its concealment or destruction." 395 U.S. at 763. The scope of a search "must be "strictly tied to and justified by' the circumstances which rendered its initiation permissible." Id. at 761-62 (quoting Terry v. Ohio, 392 U.S. 1, 29, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)). Furthermore, the search may only include "a search of the arrestee's person and the area 'within his immediate control' – construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence." Id. at 763 (citation omitted). The Gant Court commented on Chimel, and held that if the arrestee could not reach into the area the officers sought to search, then the exigencies permitting the search incident to arrest do not exist, and the exception to the warrant requirement does not apply. Gant, 129 S. Ct. at 1716.

a. Mr. Heese was secured in the back of the patrol vehicle and unable to reach any items in his vehicle at the time of the search; therefore, the first exception of *Gant* does not apply. The first exception to the warrant requirement in Gant is not satisfied in this case. Similar to the defendant in Gant, Mr. Heese was arrested for Driving While License Suspended and for an outstanding misdemeanor warrant, which was also for Driving While License

Suspended. 10/10/08RP 8; CP 30. Like the defendant in Gant, Mr. Heese was secured in handcuffs and locked in the back of a patrol vehicle when the officer conducted the search of his vehicle. 10/10/08RP 10-11, 24; CP 30. Mr. Heese was not in “reaching distance of the passenger compartment at the time of the search.” Gant, 129 S. Ct. at 1719. At the time of the search, it would have taken “the skill of Houdini and strength of Hercules” for Mr. Heese to access his vehicle for weapons or evidence. Thornton v. United States, 541 U.S. 615, 626, 124 S. Ct. 2127, 158 L. Ed. 2d 905 (2004) (Scalia, J., concurring).

During the 3.6 hearing, the officer testified that he was only searching the vehicle for weapons that Mr. Heese could have used against him. The following dialogue occurred during the hearing:

[Officer Robbins:] I’m searching for the search and lunge area of the vehicle.

[Defense Counsel:] Is there any area at that point that he can lunge or reach while he’s secured in your car?

[Officer Robbins:] Not any more.

. . .

[Defense Counsel:] Okay. Are you then conducting a random search for any other potential evidence of criminal activity?

[Officer Robbins:] No. Possibly a weapon, something he could have used.

[Defense Counsel:] Something he could have used?

[Officer Robbins:] Possibly.

[Defense Counsel:] But not something that he could use at the time you were conducting that search.

[Officer Robbins:] No.
10/10/08RP 25-26.

The officer claimed that at the time of the search, the methamphetamine posed a present danger to him. 10/10/08RP 26. The officer testified that methamphetamine was “pretty dangerous” and “they could become accidentally ingested” by him during his search. 10/10/08RP 26. Despite this fact, no one contended that methamphetamine residue permeated the air.

At the time of the search, Mr. Heese was secured in the patrol vehicle and unable “to remove any weapons that [he] might seek to use in order to resist arrest or effect his escape.” Chimel, 395 U.S. at 763. Mr. Heese “clearly was not within reaching distance of his car at the time of the search.” Gant, 129 S. Ct. at 1719. As the Court held in Gant, “[b]ecause [the] police could not reasonably have believed . . . that [the defendant] could have accessed his car at the time of the search . . . the search in this case was unreasonable.” Id. The search of Mr. Heese’s vehicle was unreasonable. The court should have suppressed the evidence discovered from the search and not have relied on it during the bench trial.

b. The officer had no reasonable belief that evidence of the crime, Driving While License Suspended, was in Mr. Heese's vehicle; therefore, the second exception of Gant does not apply.

The second exception to the warrant requirement in Gant is also not satisfied in this case. Gant provides that a car may be searched incident to arrest, when it is “reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.” 129 S. Ct. at 1719 (quoting Thornton, 541 U.S. at 632 (Scalia, J., concurring opinion)). The scope of the vehicle search is limited to the type of evidence the officer believes he or she will find that is relevant to the crime of arrest. Id. (citing Thornton, 541 U.S. at 632 (Scalia, J., concurring opinion)). The officer must, therefore, be required to articulate what evidence may be relevant to the crime of arrest before the search, or else the search is nothing more than a fishing expedition. As Justice O'Connor stated in Thornton, “lower court decisions seem now to treat the ability to search a vehicle incident to arrest of a recent occupant as a police entitlement rather than as an exception justified by the twin rationales of Chimel.” 541 U.S. at 624 (O'Connor, J., concurring in part). Therefore, this new exception must require that the officer articulate facts supporting his

own subjective belief that a vehicle search will reveal evidence relevant to the crime of arrest, and what that evidence might be.

The officer who conducted the search of Mr. Heese's vehicle had no reasonable belief he would recover evidence of the crime of which Mr. Heese was arrested. Again, similar to the defendant in Gant, Mr. Heese was arrested for Driving While License Suspended and for a misdemeanor warrant for the same crime. 10/10/08RP 8; CP 30. There was no other evidence to recover from the vehicle for that crime, as the officer already confirmed Mr. Heese's license was suspended and the officer already observed Mr. Heese driving the vehicle. Additionally, there was no further evidence to obtain for an arrest based on the outstanding warrant. The officer in this case was merely conducting a fishing expedition for evidence, and had no subjective, reasonable belief that the search would reveal evidence of the crime of arrest.

During the 3.6 hearing, the officer testified that he was not searching the vehicle for evidence of the crime, but only for weapons.⁴ 10/10/08RP 26. The officer also made a statement

⁴ [Defense Counsel:] Okay. Are you searching for evidence of the crime of driving while license suspended in the third degree for which you've arrested him?

[Officer Robbins:] Not for that crime, no.
10/10/08RP 26.

directly in line with Justice O'Connor's comment regarding the search incident to arrest as a police entitlement. 10/10/09RP 29-30; Chimel, 541 U.S. at 624 (O'Connor, J., concurring in part). The defense counsel asked the officer: "And you had no probable cause to believe that there was evidence of any crime or items posing a danger to you inside that vehicle prior to searching it, correct?" 10/10/08RP 29-30. The officer then replied: "You never know what you're going to get." 10/10/08RP 30.

The crime Mr. Heese was arrested for was precisely the same crime that initiated the search incident to arrest in Gant. And there, the Gant Court held: "[the defendant] was arrested for driving with a suspended license – an offense for which police could not expect to find evidence in the passenger compartment of [the defendant's] car." 129 S. Ct. at 1719. Therefore, as in Gant, the search of Mr. Heese's vehicle was unreasonable and the evidence discovered should have been suppressed.

2. State v. Stroud is no longer good law in light of Gant. The officer in this case justified the warrantless search of Mr. Heese's vehicle under the search incident to arrest exception. 10/10/08RP 25. This was likely based on the police entitlement that resulted from the Washington Supreme Court's decision in State v. Stroud.

106 Wn.2d 144, 148, 720 P.2d 436 (1986) In Stroud, the Court overruled a part of its earlier decision in State v. Ringer, which held that under article I, section 7:

A warrantless search [incident to arrest] is permissible only to remove any weapons the arrestee might seek to use in order to resist arrest or effect an escape and to avoid destruction of evidence by the arrestee of the crime for which he or she is arrested.

Ringer, 100 Wn.2d 686, 699, 674 P.2d 1240 (1983). In order to “draw a clearer line to aid police enforcement,” the Court followed the rule in New York v. Belton⁵ and held:

During the arrest process, including the time immediately subsequent to the suspect's being arrested, handcuffed, and placed in a patrol car, officers should be allowed to search the passenger compartment of a vehicle for weapons or destructible evidence.

Stroud, 106 Wn.2d at 151-52.

However, the United States Supreme Court recently rejected this interpretation of Belton in Gant, and returned to the rule the Supreme Court outlined in Chimel. Gant, 129 S. Ct. at 1719. The Supreme Court reasoned:

“[Under a] broad reading of Belton, a vehicle search would be authorized incident to every arrest of a recent occupant notwithstanding that in most cases the vehicle's passenger compartment will not be within the arrestee's reach at the time of the search.”

⁵ 543 U.S. 454, 460, 101 S. Ct. 2860, 69 L. Ed. 2d 768 (1981).

Id. The Gant Court asserted that such a reading of Belton would effectively “untether” the Supreme Court’s justification underlying the exception laid down in Chimel. Id. The Supreme Court concluded:

[W]e reject this [broad] reading of Belton and hold that Chimel rationale authorizes police to search a vehicle incident to a recent occupant’s arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search.

Id.

In abrogating Belton, the Supreme Court essentially abrogated Stroud. The Gant Court held, “Belton does not authorize a vehicle search incident to a recent occupant’s arrest after the arrestee has been secured and cannot access the interior of the vehicle.” 129 S. Ct. at 1714. Gant effectively rescinded Stroud and held that officers may not search a vehicle incident to arrest unless (1) the arrestee is unsecured and within reaching distance of the vehicle, or (2) it is reasonable to believe evidence of the crime of arrest is in the vehicle. Gant, 129 S. Ct. at 1723-24.

3. Because the search incident to arrest exception did not apply to the search of Mr. Heese’s vehicle, the resulting evidence must be suppressed. The search incident to arrest exception under Gant does not apply to the vehicle search in this case, and the

evidence of the methamphetamine was inadmissible against Mr. Heese. Where there has been a violation of the Fourth Amendment, courts must suppress evidence discovered as a direct result of the search, as well as evidence which is derivative of the illegality, the "fruits of the poisonous tree." Nardone v. United States, 308 U.S. 338, 341, 60 S. Ct. 266, 84 L. Ed. 307 (1939); Wong Sun v. United States, 371 U.S. 471, 484, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963). Because the vehicle search violated Mr. Heese's Fourth Amendment rights, the resulting evidence must be suppressed. Wong Sun, 371 U.S. 484.

As the methamphetamine was fruit of the unlawful search of Mr. Heese's vehicle, this Court should reverse the court's order denying suppression of evidence found in the passenger compartment.

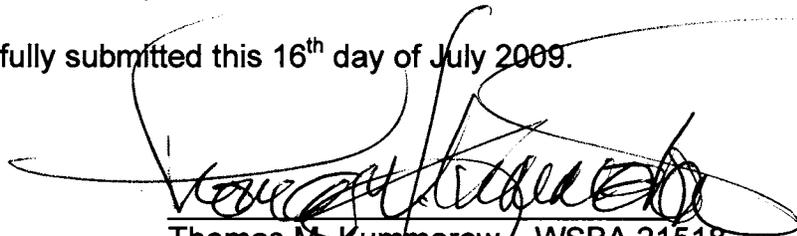
F. CONCLUSION

The Fourth Amendment prevents an officer from automatically searching a vehicle every time he or she arrests the vehicle's driver. Here, Mr. Heese was secured in handcuffs, and seat-belted in the back of the locked patrol vehicle. In such a position, Mr. Heese was not able to reach to the passenger compartment to grab any weapon or destroy any evidence.

Furthermore, the officer had no specific concern that evidence of the offense of arrest, Driving While License Suspended, would be lost or destroyed if he did not conduct an immediate warrantless search. Accordingly, the search was improper, and all evidence seized must be suppressed.

For all of the above reasons, Mr. Heese respectfully requests this Court to reverse his conviction tainted by the improper admission of the methamphetamine.

Respectfully submitted this 16th day of July 2009.



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

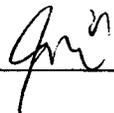
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|----------------------|---|---------------|
| STATE OF WASHINGTON, |) | |
| |) | |
| Respondent, |) | NO. 62903-4-I |
| |) | |
| |) | |
| JOHN HEESE, |) | |
| |) | |
| Appellant. |) | |

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 16TH DAY OF JULY, 2009, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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