

IN THE SUPREME COURT OF IOWA

SUPREME COURT NO. 19-0849

STATE OF IOWA,
Plaintiff- Appellee
vs.

THOMAS CHRISTOPHOR CASPER,
Defendant- Appellant

APPEAL FROM THE DISTRICT COURT
OF CERRO GORDO COUNTY
THE HONORABLE ADAM SAUER

APPELLANT'S APPLICATION FOR FURTHER REVIEW OF IOWA
COURT OF APPEALS DECISION ENTERED MAY 13, 2020
AND
REQUEST FOR ORAL ARGUMENT

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QUESTION PRESENTED FOR REVIEW

- I.** WHETHER THE COURT OF APPEALS ERRED IN RULING THAT THE TROOPER'S FAILURE TO ADVISE APPELLANT OF HIS RIGHT TO AN INDEPENDENT CHEMICAL TEST WAS HARMLESS ERROR.

- II.** WHETHER IOWA CODE SECTION 321J.11 IS VIOLATED WHEN A TROOPER RELEASES AN INDIVIDUAL WHO HAS MADE A STATEMENT INVOKING THEIR RIGHT TO AN INDEPENDENT CHEMICAL TEST WITHOUT ADVISING THAT PERSON THEY HAVE THE RIGHT TO AN INDEPENDENT CHEMICAL TEST AT THEIR OWN EXPENSE.

III. CERTIFICATE OF FILING

I, Scott A. Michels, hereby certify that I filed the attached Brief with the Clerk of the Supreme Court, Judicial Branch Building, 1111 East Court Avenue, Des Moines, Iowa, on June 2, 2020, via the Iowa Electronic Document Management System.

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CERTIFICATE OF SERVICE

I, Scott A. Michels, hereby certify that on June 2, 2020, I served a copy of the attached brief on all other parties to this appeal by filing a copy of this brief with Iowa EDMS: Iowa Attorney General, Criminal Appeals Division, Hoover State Office Building, 2nd Floor, Des Moines, Iowa 50319.

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STATEMENT SUPPORTING FURTHER REVIEW

Appellant specifically requests further review to answer the question of whether Iowa Code section 321J.11 is violated when an officer releases an individual who has made a valid invocation of his right to an independent test without advising that individual of their right to an independent test.

Iowa Code section 321J.11 states, in relevant part:

The person [whose breath, blood, or urine is being examined to determine blood alcohol concentration] may have an independent chemical test or tests administered at the person's own expense in addition to any administered at the direction of a peace officer.

It is well established that an officer need not advise a suspect of his or her right to an independent chemical test. *State v. Wootten*, 577 N.W.2d 654, 655 (Iowa 1998); *State v. Epperson*, 264 N.W.2d 753, 756 (Iowa 1978). However, if a suspect implicates the statute, the officer is required to inform the detainee of his or her right to an independent chemical test pursuant to Iowa Code section 321J.11. *State v. Lukins*, 846 N.W.2d 902, 909-10 (Iowa 2014).

The Court of Appeals decision needs to be revisited by the Iowa Supreme Court because the Court of Appeals failed to address the issue, ruling, “[a]ccordingly, we conclude that, even if the trooper had an obligation to advise Casper about his entitlement to an independent test at

his own expense, his failure to do so amounted to harmless error.” *State v. Casper*, No. 19-0849, *4, (Iowa App. 2020).

APPELLANT’S BRIEF

Course of Proceedings

Mr. Casper was charged by way of Trial Information, filed on September 25, 2018, with Operating While Intoxicated, First Offense, in violation of Iowa Code section 321J.2. Trial Information; App. 4-5. The offense was alleged to have occurred on or about August 11, 2018. Trial Information; App. 4-5. Prior to trial, Mr. Casper filed a timely motion to suppress evidence alleging that Trooper Sneider violated Iowa Code section 321J.11 when he failed to advise Mr. Casper of his independent test rights after Mr. Casper requested a second attempt at the Datamaster. Motion to Suppress Evidence; App. 28-31. The trial court denied the motion, ruling that the Mr. Casper’s request for an independent test was untimely. Ruling on Motion to Suppress; App. 32-35.

The matter proceeded to a stipulated trial on the minutes of testimony on March 27, 2019. Written Waiver of Jury Trial and Stipulation to Trial on the Minutes; App. 36-41. On April 19, 2019, the District Associate Court announced its verdict, finding Mr. Casper guilty of Operating While Intoxicated, First Offense, in violation of Iowa Code section 321J.2. Ruling

Following Trial To The Court And Order Setting Sentencing; App. 42-45. The District Associate Court sentenced Mr. Casper on May 13, 2019. Judgment and Sentence; App. 46-48. Notice of Appeal was timely filed on May 20, 2019. Notice of Appeal; App. 49-50.

Statement of Facts

On August 11, 2018, at approximately 12:21 a.m., Trooper Nathan Snieder, of the Iowa State Patrol stopped Thomas Casper's motorcycle for speeding. Supp. Tr. p. 5-6. Trooper Snieder made observations that led him to believe Mr. Casper was intoxicated and initiated an OWI investigation. Supp. Tr. p. 6. Trooper Snieder administered the horizontal gaze nystagmus (HGN) and observed clues of possible impairment. Supp. Tr. p. 7. Neither the walk and turn nor the one leg stand were administered due to Mr. Casper's medical conditions. Supp. Tr. p. 7.

At approximately 12:36 a.m., Mr. Casper submitted to a preliminary breath test, which indicated an alcohol concentration exceeding the legal limit. Supp. Tr. p. 7. Trooper Snieder placed Mr. Casper under arrest for OWI. Supp. Tr. p. 7. Mr. Casper was subsequently transported to the Cerro Gordo County Sheriff's Office for chemical testing. Supp. Tr. p. 7. Implied consent was invoked upon arrival at the sheriff's office. Supp. Tr. p. 7-8. Trooper Snieder requested a sample of Mr. Casper's breath for chemical

testing. Supp. Tr. p. 8. Mr. Casper provided a breath sample for the Datamaster at 1:19 a.m. which tested .113. Supp. Tr. p. 8.

Mr. Casper was turned over to jail staff for booking. Supp. Tr. p. 8. During this process, Mr. Casper's wife arrived at the sheriff's office and paid the bond for Mr. Casper's release. Supp. Tr. p. 9. At approximately 2:15 a.m., while still in the locked booking room, Mr. Casper asked Trooper Snieder if he could take the Datamaster test again. Supp. Tr. p. 9, 14. Trooper Snieder said, "sure" and asked Mr. Casper for his driver's license. Supp. Tr. p. 10. Mr. Casper refused to provide his driver's license to Trooper Snieder so the test was not administered and the jail staff released Mr. Casper to his wife. Supp. Tr. p. 10. Mr. Casper was released from custody without Trooper Snieder ever advising Mr. Casper of his right to an independent test pursuant to Iowa Code section 321J.11. Supp. Tr. p. 12-13. Mr. Casper was charged by way of Trial Information with Operating While Intoxicated, First Offense. Trial Information; App. 4-5.

Further facts will be set forth as necessary in this brief.

Legal Argument

I. Whether The Court Of Appeals Erred In Ruling That The Trooper's Failure To Advise Appellant Of His Right To An Independent Chemical Test Was Harmless Error.

Preservation of Error: Mr. Casper preserved error by timely filing a Motion to Suppress Evidence, obtaining a ruling on same, timely filing his Notice of Appeal, and filing this Application for Further Review.

Standard of Review: Mr. Casper alleges a violation of his statutory rights pursuant to Iowa Code section 321J.11. Review of a district court's decision to deny a motion to suppress based on its interpretation of a statute is for correction of errors at law. *State v. Madison*, 785 N.W.2d 706, 707-08 (Iowa 2010).

Argument: "In cases of nonconstitutional error, reversal is required if it appears the complaining party has suffered a miscarriage of justice or his rights have been injuriously affected. (citations omitted). We presume prejudice unless the record affirmatively establishes otherwise. (citations omitted)." *State v. Moorehead*, 699 N.W.2d 667, 672-73 (Iowa 2005). "A breath test result is important evidence in prosecutions for drunk driving." *Id.* at 673. (citations omitted). In *Moorehead*, the Iowa Supreme Court held that the "it cannot be fairly said that the breath test result did not injuriously affect Moorehead's rights." *Id.* The Iowa Supreme Court held this despite

the district court noting that Moorehead was “speeding, did not immediately stop for the deputy, swerved over the center line twice, had an odor of alcohol, slurred speech, and glazed eyes, failed all field sobriety test, and admitted he was ‘drunk as hell’ at the station.” *Id.* at 672.

In the case before this Court, the error was clearly not harmless. The district court did not articulate that it completely disregarded Mr. Casper’s breath test result of .113 when it made its finding of under the influence. *See Ruling Following Trial To The Court And Setting Sentencing*; App. 42-45. Unless the record establishes clear proof that the breath test result was not a factor in the district court’s determination prejudice must be presumed. *See State v. Moorehead*, 699 N.W.2d at 672. The district court’s failure to specifically state that the breath test result was not a factor in its determination means it cannot be “fairly said that the breath test result did not injuriously affect [Casper’s] rights.” *Id.* at 673.

II. Whether Iowa Code Section 321J.11 Is Violated When A Trooper Releases An Individual Who Has Made A Statement Invoking Their Right To An Independent Chemical Test Without Advising That Person They Have The Right To An Independent Chemical Test At Their Own Expense.

Preservation of Error: Appellant preserved error by timely filing a Motion to Suppress Evidence and Motion to Reconsider and Request for

Expanded Findings of Fact and Conclusions of Law, obtaining rulings on the same, and timely filing his Notice of Appeal.

Standard of Review: Mr. Casper alleges a violation of his statutory rights pursuant to Iowa Code section 321J.11. Review of a district court's decision to deny a motion to suppress based on its interpretation of a statute is for correction of errors at law. *State v. Madison*, 785 N.W.2d 706, 707-08 (Iowa 2010).

Argument: Iowa Code section 321J.11 states, in relevant part:

The person [whose breath, blood, or urine is being examined to determine blood alcohol concentration] may have an independent chemical test or tests administered at the person's own expense in addition to any administered at the direction of a peace officer.

It is well established that an officer need not advise a suspect of his or her right to an independent chemical test. *State v. Wootten*, 577 N.W.2d at 655; *State v. Epperson*, 264 N.W.2d at 756. However, if a suspect implicates the statute, the officer is required to inform the detainee of his or her right to an independent chemical test pursuant to Iowa Code section 321J.11. *State v. Lukins*, 846 N.W.2d at 909-10.

The scenario presented in this case is nearly identical to that presented in *Lukins*. Just as occurred in *Lukins*, Mr. Casper requested a second attempt at the Datamaster. Supp Tr. p. 9, 14; *Id.* at 904-05. The *Lukins* Court held a

detainee's statements should be liberally construed and that the request for a second attempt at the Datamaster was sufficient to invoke the right to an independent test pursuant to Iowa Code section 321J.11. *Id.* at 909-10. "[L]ike under Iowa Code section 804.20, any statement that can be reasonably construed as a request for an independent chemical test is adequate to invoke the detainee's right to such a test under Iowa Code section 321J.11. As with officers who fielded phone call requests in *Didonato*, an officer who fields a legally imprecise request for an independent test cannot stand mute and deny the request." *Id.* at 909; citing *Didonato v. Iowa Department of Transportation*, 456 N.W.2d 367, 371 (Iowa 1990). The Court held that the request for a second attempt at the Datamaster did "not closely track with the language of Iowa Code section 321J.11," but was similar to the requests for phone calls set forth in the *Didonato* and *Garrity* cases. *See State v. Garrity*, 765 N.W.2d 592, 597 (Iowa 2009) (holding an officer must inform a detainee of the individuals to whom a call is permitted when the detainee requests to call someone outside the statute's permissible scope); *see also, Didonato v. Iowa Department of Transportation* 456 N.W.2d at 371 (holding when a detainee asks to call a friend the officer must inform the detainee the purpose for which a call is permitted).

As with the statutorily impermissible requests in those cases, Lukins was not entitled under Iowa Code section 321J.11 to take a second crack at the Breathalyzer machine. Nevertheless, his statements, reasonably construed, indicated he wanted another test, even if he was mistaken, unsure, or unaware of the way in which the additional test would be conducted. His statements, like those of the detainees in *Didonato* and *Garrity*, were adequate to implicate the statute.

State v. Lukins, 846 N.W.2d at 909. The Court went on to hold that when Lukins implicated the statute the officer “should have informed [him] that he was entitled to an independent chemical test at his ‘own expense in addition to’ the Breathalyzer test.” *Id.* at 910; *quoting* Iowa Code section 321J.11.

Based upon the holding in *Lukins*, when Mr. Casper requested to retake the Datamaster test, Trooper Snieder was required to advise him that he was entitled to an independent chemical test at his own expense. However, the District Associate Court denied the motion, holding that Mr. Casper’s request was untimely. The District Associate Court’s ruling was based on the decision in *State v. Wootten*, 577 N.W.2d 654 (Iowa 1998). Ruling on Motion to Suppress; App. 32-35. The District Associate Court’s reliance on the *Wootten* decision is misplaced because the facts are drastically different from the present case.

In *Wootten*, the defendant was placed under arrest for OWI and transported to the police department, where he provided a sample for the

intoxilyzer test. *Id.* at 654. After the chemical test, the officers took approximately thirty to forty minutes to complete paperwork. *Id.* The defendant was transported to the county jail and left in the custody of a jailer. *Id.* After arrival at the jail, while being booked in by the jailer, Wootten requested an independent test. *Id.* Wootten's request for an independent test came "approximately an hour after the State's test and well over two hours after his arrest." *Id.* at 656.

Ruling that the request was untimely, the Court noted the significance of the fact that the request came "well over two hours after his arrest" because Iowa Code section 321J.6(2) prohibits an officer from requesting a chemical test beyond two hours following the preliminary breath test or arrest. *Id.* The Court further noted that the timing of the request created a problem for the jailer, who had no means of transporting Wootten to have the test conducted. *Id.* The Court also noted that police officers would have had to have been called away from other duties in order to comply with the request. *Id.* "While inconvenience to officers should not be the controlling factor, the unnecessary diversion of officers from other duties should be considered on the issue of reasonableness, along with the timing of the request and Wootten's ample opportunity at the police station to make the request." *Id.*

The only factual similarity between the present case and *Wootten* is that the request for an independent test was made approximately an hour after the Datamaster test. The factual differences, however, are what is important and what mandate a different outcome. To begin, Mr. Casper's request was made one hour and thirty-nine minutes after his arrest, well within the two-hour window prescribed in Iowa Code section 321J.6(2). As such, the concerns of accuracy of the test are absent. In fact, Mr. Casper's request was made within the two-hour window proscribed in Iowa Code section 321J.2(12)(a), wherein the State is afforded a presumption the alcohol concentration, established by the results of a specimen withdrawn within two hours after the defendant was driving will be presumed to be the alcohol concentration at the time of driving.

Secondly, there was no inconvenience or unnecessary diversion of officers from other duties in the present case. Dissimilar to *Wootten*, the arresting officer was still available and at the place of detention when the request for an independent test was made. Mr. Casper directly asked the arresting officer, Trooper Snieder, for a second attempt at the Datamaster.

Thirdly, Mr. Casper's bond had already been posted, so all that was required of Trooper Snieder was to advise him he could get an independent test at his own expense. Neither Trooper Snieder nor the jailer were

required to take Mr. Casper anywhere to afford him a meaningful opportunity to obtain an independent test. *See Casper v. Iowa Department of Transportation*, 506 N.W.2d 799 (Iowa App. 1993) (suggesting that denying a detainee's right to an independent test was not a "failure" or "inability to obtain" the test, so the statute would not prevent suppression under circumstances where officer's actions prevented a meaningful opportunity to obtain an independent test); *see also State v. Lukins*, 846 N.W.2d at 910-11. Had Mr. Casper been advised of his right to an independent test, once he was released the onus would have rested with him to obtain the test. At that point, if he failed to, or was unable to obtain a test the statute would not preclude the introduction of his State administered test result.

Lastly, the *Wootten* Court was bound by the district court's findings of fact, which concluded that no evidence existed that Wootten would have been denied an opportunity to have an independent test had he made the request to the arresting officers. *State v. Wootten*, 577 N.W.2d at 656. Conversely, even if Mr. Casper would have made his request immediately after being informed of his test result, no advisory was going to be provided. Trooper Snieder testified, "If they ask for an independent test, I would tell them that they can have an independent test." Supp Tr. p. 13. Trooper

Snieder further testified “I didn’t take it as a request for an independent test, no.” Supp. Tr. p. 13. The record is clear that Trooper Snieder had no intention of advising Mr. Casper of his right to an independent test because Trooper Snieder did not deem the vernacular used by Mr. Casper to be a sufficient request for an independent test.

Despite no time limit for a request being set forth in Iowa Code section 321J.11, the *Wootten* Court held that the request must be made within a reasonable time under the circumstances. *State v. Wootten*, 577 N.W.2d at 656. In making that determination the Court cited to Iowa Code section 4.4(3), “in construing a statute, it is presumed that a just and reasonable result is intended.” *Id.* Based on the facts and circumstances of this case, Mr. Casper’s request was reasonable. He made the request to the arresting officer with twenty-one minutes remaining in the two-hour window under Iowa Code section 321J.6(2) and, most importantly, all Trooper Snieder was required to do was advise him of his right to obtain an independent chemical test. Trooper Snieder’s refusal to advise Mr. Casper of this right was unreasonable and in violation of Iowa Code section 321J.11. *See State v. Lukins*, 846 N.W.2d at 910. Allowing the State to benefit from Trooper Snieder’s dereliction of duty is neither a just nor reasonable result.

Conclusion

For the reasons expressed above, it is imperative that the Iowa Supreme Court grant this Application for Further Review and find that Mr. Casper's rights pursuant to Iowa Code section 321J.11 were violated.

Request for Oral Argument

Request is hereby made that upon submission of this case, counsel for Appellant requests to be heard in oral argument.

Certificate of Compliance with Type-Volume Limitations, Typeface Requirements, and Type-Style Requirements.

1. This brief complies with the type-volume limitations of Iowa R. App. P. 6.903(1)(g)(1) because this brief contains 2,990 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1)

2. This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Times New Roman in size 14 font.



June 2, 2020

Scott A. Michels

Date

Attorney's Cost Certificate

I, Scott A. Michels, attorney for the Appellant, hereby certifies that the actual cost of reproducing the necessary copies of this Brief was \$0.00, and that amount has been paid in full by me.

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IN THE COURT OF APPEALS OF IOWA

No. 19-0849
Filed May 13, 2020

STATE OF IOWA,
Plaintiff-Appellee,

vs.

THOMAS C. CASPER,
Defendant-Appellant.

Appeal from the Iowa District Court for Cerro Gordo County, Adam Sauer,
District Associate Judge.

Defendant appeals his conviction for operating a motor vehicle while
intoxicated, first offense. **AFFIRMED.**

Scott A. Michels of Gourley, Rehkemper & Lindholm, P.L.C., West Des
Moines, for appellant.

Thomas J. Miller, Attorney General, and Louis S. Sloven, Assistant Attorney
General, for appellee.

Considered by Vaitheswaran, P.J., and Doyle and May, JJ.

VAITHESWARAN, Presiding Judge.

A state trooper stopped a motorcycle traveling at 110 miles an hour in a fifty-five-mile-per hour zone. The trooper observed signs of intoxication in vehicle operator Thomas Casper and administered a field sobriety and preliminary breath test. The trooper arrested Casper.

At the jail, Casper was given a DataMaster breathalyzer test, which registered blood alcohol content over the legal limit. As Casper was leaving, he asked the trooper if he could take another DataMaster test. The trooper responded, "Sure." He "asked [Casper] for his driver's license," and Casper said, "No, no, I don't want to." Casper left with his wife.

The State charged Casper with operating a motor vehicle while intoxicated, first offense. See Iowa Code § 321J.2(1) (2018). The trial information cited all three alternatives for committing the crime: (a) "[w]hile under the influence of an alcoholic beverage or drugs or a combination of such substances"; (b) "[w]hile having an alcohol concentration of .08 or more; or (c) "[w]hile any amount of a controlled substance is present in the person as measured in the person's blood or urine." *Id.* § 321J.2(1)(a)–(c).

Casper moved to suppress the DataMaster test result on the ground that he was not "advised that he could have an independent chemical test done at his own expense" as authorized by Iowa Code section 321J.11. See *State v. Smith*, 926 N.W.2d 760, 761–63 (Iowa 2019) ("[T]he statute creates a right for a detainee or arrestee to have an 'independent chemical test or tests administered at the person's own expense in addition' to any test administered at the direction of an officer." (citations omitted)). Following a hearing, the district court denied the

motion. Casper waived his right to a jury trial and stipulated to a trial on the minutes of testimony. The district court found him guilty under the first and second alternatives of section 321J.2(1).

On appeal, Casper reprises his argument that the trooper had an obligation to “advise him” of his entitlement “to an independent chemical test at his own expense.” He asserts “[t]he scenario presented in this case is nearly identical to that presented in [*State v.*] *Lukins*, [846 N.W.2d 902 (Iowa 2014)].” Our review is on error. *See Lukins*, 846 N.W.2d at 906 (“We review for correction of errors at law a district court’s ruling on a motion to suppress based on the interpretation of a statute.”).

In *Lukins*, the court held, where the defendant made statements that, “reasonably construed, indicated he wanted another test, even if he was mistaken, unsure, or unaware of the way in which the additional test would be conducted”, the police chief “should have informed [him] that he was entitled to an independent chemical test at his ‘own expense in addition to’ the Breathalyzer test.” *Id.* at 909–10. In the absence of the advice, the court concluded the breathalyzer test result should have been suppressed. *Id.* at 911.

The court proceeded to a harmless error analysis. *Id.* There as here, the State charged the defendant with more than one alternative for committing the crime. The State argued the evidence was sufficient to affirm the conviction under the “under the influence” alternative even without the breathalyzer result. *Id.* at 911–12. The supreme court disagreed. The court noted that the district court’s verdict “did not indicate under which provision it determined [the defendant] was guilty” and the order was “devoid of fact findings.” *Id.* at 912. Because it was

unclear whether the district court “relied on the erroneously admitted test results” or “on all the other circumstances suggesting [the defendant] was operating while intoxicated,” the supreme court reversed and remanded the judgment. *Id.*

The same problem is not present here. The district court applied the “under the influence” alternative of section 232J.2(1)(a), in addition to the “alcohol concentration” alternative of section 232J.2(1)(b). After listing the relevant factors for determining whether a driver is “under the influence,” the court found:

While visiting with the Defendant, [the trooper] noticed that the Defendant had blood shot and watery eyes, appeared unsteady on his feet and spoke with a slur and thick tongue. While in his patrol vehicle, [the trooper] could smell the odor of an alcoholic beverage coming from Defendant. Defendant admitted to consuming a couple alcoholic beverages. Defendant submitted to the horizontal gaze nystagmus field sobriety test, which resulted in six of six clues. Defendant stated that he would not be able to complete the walk and turn and one-leg stand test due to physical restrictions. All of those factors together demonstrate that due to the ingestion of an alcoholic beverage, Defendant’s reason or mental ability was affected, his judgment was impaired and he had to any extent, lost control of his bodily actions or motions.

Based on these findings, the court determined, “At the time of operation of the motorcycle, the Defendant was under the influence of an alcoholic beverage.” The court’s findings and determination are supported by substantial evidence. Accordingly, we conclude that, even if the trooper had an obligation to advise Casper about his entitlement to an independent test at his own expense, his failure to do so amounted to harmless error. *See State v. Poster*, No. 18-0217, 2019 WL 319846, at *4 (Iowa Ct. App. Jan. 23, 2019) (concluding “[a]ny violation of [the defendant’s] rights under section 321J.11 was harmless error” in light of the district court’s “under-the-influence finding,” which was supported by substantial evidence).

We affirm the district court's denial of Casper's suppression motion and the court's imposition of judgment and sentence for operating while intoxicated, first offense.

AFFIRMED.



IOWA APPELLATE COURTS

State of Iowa Courts

Case Number	Case Title
19-0849	State v. Casper

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