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COURT OF APPEALS
STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

NO. 50

ANDREW R. BUSHEY,

Appellant.

20 Eagle Street
Albany, New York
March 29, 2017

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE DIFIORE: The final matter on this
2 afternoon's calendar is appeal number 50, the People of the
3 State of New York v. Andrew R. Bushey.

4 MR. COVERT: Good afternoon, Your Honor. Barry
5 Covert on behalf of defendant-appellant Andrew Bushey.

6 I would respectfully request two minutes for
7 rebuttal.

8 CHIEF JUDGE DIFIORE: You may have two minutes,
9 sir.

10 MR. COVERT: Your Honors, we are respectfully
11 asking that the court find that Article I, Section 12 of
12 the New York State Constitution requires that law
13 enforcement officers have an objective credible reason, not
14 necessarily indicative of criminality before - - -

15 JUDGE RIVERA: What - - - what's - - - what's the
16 defendant's expectation of privacy in the information
17 related to that plate? I mean, the plate - - - you don't
18 think - - - you're not arguing he has an expectation of
19 privacy in the plate number.

20 MR. COVERT: No.

21 JUDGE RIVERA: Okay. So what's his expectation
22 of privacy in anything that can be accessed based on the
23 plate number?

24 MR. COVERT: We believe that he has an
25 expectation of privacy, and we all do, in the personal

1 information that the DMV or any other governmental entity
2 has in a database.

3 JUDGE GARCIA: But what personal information is
4 it? It's whether your car is registered or not. I mean -
5 - -

6 MR. COVERT: And your date of birth - - -

7 JUDGE GARCIA: - - - isn't that the entire
8 purpose of having a license plate?

9 MR. COVERT: Also your date of birth, Social
10 Security Number - - -

11 JUDGE GARCIA: But that's not what happened here.
12 He ran the plate, he got a license plate hit back saying
13 the car is not registered. It wasn't that they used his
14 personal information for something.

15 MR. COVERT: No, but he did testify that he did
16 receive his personal information. And the average person
17 who is on the roadway should not be concerned that a police
18 officer - - -

19 JUDGE GARCIA: Should that be a personal lawsuit
20 then, instead of suppression of the running of the plate
21 for legitimate purpose of getting registration or not? I
22 mean, wouldn't that be, you improperly accessed my date of
23 birth, so you have to do some kind of right of action based
24 on invasion of privacy?

25 MR. COVERT: Well, I don't think that there is a

1 deterrent effect then. If you just have the ability to sue
2 somebody, then - - - then - - - then any case where we have
3 an exclusionary rule would be undermined, and we would take
4 the position that you can always just sue as a civil rights
5 violation, so why bother having it suppressed. In this
6 case - - -

7 JUDGE RIVERA: If he - - - if he ran the plate -
8 - - runs the plate, he sees the violations but doesn't go
9 after him; is there a violation of the defendant's
10 Constitutional rights?

11 MR. COVERT: I would argue that there is. His
12 right to privacy, because you have that individual's date
13 of birth, home address, phone number, personal information
14 - - -

15 JUDGE RIVERA: Just by looking at it, we'll
16 assume for purposes of my hypothetical, the officer does
17 nothing with that information.

18 MR. COVERT: Well, if he doesn't - - -

19 JUDGE RIVERA: Just out of curiosity, I looked at
20 it.

21 MR. COVERT: Yeah, then - - - then it's a minimal
22 violation of expectation of privacy, but there's still an
23 expectation of privacy that individuals have in their
24 personal information that they require - - -

25 JUDGE WILSON: To get a driver's license, he

1 voluntarily provided his date of birth to the Department of
2 Motor Vehicles, and they can use, I mean, so as if - - -
3 what expectation of privacy does he have in that?

4 MR. COVERT: In order to get a driver's license,
5 you have to give that information - - -

6 JUDGE WILSON: And he did.

7 MR. COVERT: - - - to the Department of Motor
8 Vehicles.

9 JUDGE WILSON: He chose to.

10 MR. COVERT: And there is - - -

11 JUDGE WILSON: He didn't have to get a driver's
12 license.

13 MR. COVERT: That's correct. And then we have a
14 Federal Statute, 18 United States Code, Section 2721 that
15 indicates that there are criminal and civil remedies if
16 anybody at DMV's state - - - nationwide violates that
17 confidentiality of those DMV records unless there's a
18 lawful reason to do so.

19 And in this instance, we believe that there was
20 no lawful reason to do so.

21 JUDGE WILSON: So the officer violated that
22 statute?

23 MR. COVERT: I believe he did. And there are
24 lawsuits across the country where there are people - - -

25 JUDGE WILSON: Then to - - -

1 MR. COVERT: - - - believe that there are - - -

2 JUDGE WILSON: - - - Judge Garcia's point, you
3 have a remedy.

4 MR. COVERT: Well, but we believe that the remedy
5 here, the strongest remedy is to deterrent effect of - - -
6 of suppressing that information. Suppressing then what he
7 subsequently receives as fruit of the poisonous tree,
8 pulling over the vehicle.

9 JUDGE ABDUS-SALAAM: What case are you relying on
10 for that proposition, counsel?

11 MR. COVERT: I'm sorry?

12 JUDGE ABDUS-SALAAM: What case are you relying on
13 for that proposition?

14 MR. COVERT: I'm asking that the court find that
15 under Article I, Section 12 of the United States - - - of
16 the New York State Constitution, that this court find that.
17 I'm - - - I'm not relying upon a case that says that
18 there's an exclusionary rule. There are cases in Virginia,
19 Florida, and Oregon where those courts have held that there
20 is the ability to suppress DMV records based upon a
21 violation of the privacy of that individual.

22 JUDGE FAHEY: Did - - - did they - - -

23 JUDGE STEIN: What is your basis for saying that
24 there should be a distinction between the Federal and State
25 Constitutions here?

1 MR. COVERT: Because, as the court is aware, the
2 New York State Constitution of - - - is not only protective
3 of places and seizures at places, but also of the right to
4 privacy. And this court has repeatedly upheld the right to
5 privacy.

6 As a matter fact, in People v. Weaver, this court
7 held that a publicly-followed vehicle with GPS on it, even
8 though it's going to places that are all public, that - - -
9 that the collection of that data is protected, and it
10 violates that individual's right of privacy.

11 JUDGE STEIN: Well, but in Weaver, we talked
12 about a - - - a situation where technology allowed you to
13 get more information that - - - the police to get more
14 information than they could have gotten otherwise. Here,
15 couldn't - - - couldn't the officer simply have, you know,
16 called dispatch and asked them for the information, or gone
17 to DMV and gotten the information? I mean, I - - - I don't
18 see how this is a Weaver-technology issue.

19 MR. COVERT: Well, we argue that they could only
20 do that if they have a lawful law enforcement function to
21 do so. That there has to be an articulable basis for their
22 inquiry at DMV for that information, to get the personal
23 information of any individual. We shouldn't be concerned
24 that when we drive around public highways, that - - - and
25 violate no laws, don't - - - and do anything wrong - - -

1 JUDGE RIVERA: Was he - - - was he driving on the
2 public highway? Could it be - - - have considered a
3 trespass, the area, the road that he came in and then came
4 back out, was that - - -

5 MR. COVERT: There was - - -

6 JUDGE RIVERA: - - - private property; was that
7 the university's property?

8 MR. COVERT: There was no record established here
9 that they were - - - that was private property at all. And
10 that he followed the vehicle for two more right-hand turns,
11 and there was no allegation that there was any erratic
12 driving, violation of any - - - any Vehicle and Traffic
13 Law.

14 And we should be very concerned that police
15 officers not to have the ability to just observe a vehicle
16 on a road and decide for no reason other than just whim,
17 caprice - - -

18 JUDGE RIVERA: Could - - - could the officer have
19 just gone down the street where all the cars are parked,
20 and run all those plates?

21 MR. COVERT: Well, that's not the case here, but
22 it depends on whether they were doing - - - that officer
23 did so in a nonarbitrary, nondiscriminatory objective
24 manner - - -

25 JUDGE ABDUS-SALAAM: So what - - - would that

1 also apply to the officer - - - this - - - in this case,
2 the officer manually put in the license plate, right? So I
3 believe they have some automatic readers that a police
4 officer can sit by the road, and just let cars go by, and
5 their license plates are being read. And if something
6 comes up like in your - - - in your client's case, the
7 registration is suspended; wouldn't they be able to stop
8 someone based on that?

9 MR. COVERT: Well, that's different, and that
10 depends on the technology.

11 JUDGE ABDUS-SALAAM: Why is that different?

12 MR. COVERT: Because that - - - that may have
13 memorandums that the officers are abiding by which indicate
14 that they are nondiscriminatory, nonarbitrary criteria for
15 how the officer uses those - - - that technology.

16 JUDGE FAHEY: So - - -

17 MR. COVERT: I think this is all dependent on the
18 - - -

19 JUDGE FAHEY: So - - - so Mr. Covert, are you - -
20 - you're arguing, essentially, that for an officer to run a
21 plate, you - - - you want to basically establish a
22 Debour-type review.

23 MR. COVERT: Correct.

24 JUDGE FAHEY: A level 1 Debour - - -

25 MR. COVERT: The lowest level.

1 JUDGE FAHEY: You want to have - - - to run a
2 plate now, not to stop someone.

3 MR. COVERT: That's correct. To run a plate, we
4 want to have the lowest level, same as Ingle, where the
5 court held that it's a minimal level.

6 JUDGE FAHEY: Well - - -

7 MR. COVERT: And in Ingle, the court said it
8 could be a dilapidated vehicle that's not in violation of
9 the law, but - - - but some articulable basis - - -

10 JUDGE FAHEY: There was a stop though, not - - -
11 not running the plate.

12 MR. COVERT: That's correct.

13 JUDGE FAHEY: I think analytically, it's - - - a
14 basis to stop is a much different thing than - - - he had
15 no basis to stop here until he had the suspended
16 registration.

17 MR. COVERT: And in People v. Weaver, they didn't
18 stop that vehicle either, but they followed - - -

19 JUDGE FAHEY: I - - - I don't know - - -

20 MR. COVERT: - - - and collected that
21 information.

22 JUDGE FAHEY: - - - if Weaver - - - I'm not sure
23 that Weaver really helps you, but I - - - I just want to be
24 clear. So - - - so that's your argument, level 1 Debour;
25 that's what you're looking for.

1 MR. COVERT: That's correct, Your Honor.

2 JUDGE FAHEY: Okay. All right. I got it.

3 MR. COVERT: So we believe that it'd be - - -

4 Thank you.

5 CHIEF JUDGE DIFIORE: Counsel.

6 MR. HERMAN: Good afternoon, Your Honors. I'm

7 Ray Herman for the respondent.

8 I think this does point out that it's really the
9 only question here is, is there a reasonable expectation of
10 privacy in such a database.

11 JUDGE STEIN: Do we know, from the record, what
12 information was available to this police officer when he
13 ran the plate?

14 MR. HERMAN: Not really. All he said is
15 "personal information".

16 JUDGE STEIN: Does it matter?

17 MR. HERMAN: Well, I would say, if there was
18 something - - - it could possibly matter, but - - - but as
19 far as I can tell from the Statute, I cited the Statute
20 when you want to register vehicle, and I think it's fair to
21 look at the Statute, you basically have to give your name,
22 address, and I believe, probably a birthdate. So this
23 whole thing about Social Security Numbers, I - - - I don't
24 see it in the Statute.

25 But I - - - this is created - - - when you

1 register a car, it - - - it's not a right, it's a privilege
2 to be on the road, and it's a very strong interest in the
3 State - - -

4 JUDGE GARCIA: And what is the actual database
5 he's accessing here; what is it?

6 MR. HERMAN: Well, it's - - - it's a - - - it's
7 the DMV computer. That's what he's accessing. And that's
8 my understanding.

9 JUDGE GARCIA: And it will tell you who the car
10 is registered to, whether the registration is current;
11 obviously, it tells you that?

12 MR. HERMAN: Right. And - - - and it would tell
13 you who the registered owner is. But I would say that when
14 you run a plate check, it's not like you're focusing on a
15 person; you're - - - you're focusing on the - - - the plate
16 number. So the - - - there could be someone else driving
17 the car. So I think that the police should have access.
18 Basically, the counsel is asking you to create a State
19 Constitutional right that's never - - -

20 JUDGE RIVERA: When you give this information to
21 DMV, what - - - why - - - why - - - where do you get the
22 concept that you expect that anybody, any cop has access to
23 it when you've done absolutely nothing wrong?

24 MR. HERMAN: Because you're on - - -

25 JUDGE RIVERA: You're behind the wheel. Did

1 absolutely nothing wrong, because the cop admits, there
2 wasn't anything unusual, I just ran the plate.

3 MR. HERMAN: He just ran the plate. I would say
4 that - - -

5 JUDGE FAHEY: Is that really true? It - - -
6 there was - - - there was nothing unusual about it, Mr.
7 Herman? Because I remember the facts, it was - - - it's
8 three o'clock in the morning, a car is coming down Elmwood
9 Avenue, he - - - he made a turn into the turnaround, and
10 then clearly had made the wrong turn and came back out.

11 Isn't that the circumstances?

12 MR. HERMAN: No, that is - - - judge, that is - -
13 - that is the facts. I - - - I actually did - - - when I
14 argued in the trial court, I did make that argument. The
15 officer also said, you know, a lot of people make that
16 mistake. So I suppose there was some reason - - -

17 JUDGE FAHEY: Sure.

18 MR. HERMAN: But - - -

19 JUDGE RIVERA: It wasn't out of the ordinary, in
20 other words.

21 MR. HERMAN: That's what he said, it was not out
22 of the ordinary for someone to do so. But I would say for
23 - - - you know, like for instance, I drove from Buffalo
24 today, I - - - I have no reason to believe that someone
25 didn't do plate checks on my car on the Thruway. And

1 really, I - - - I honestly don't think that I have any
2 expectation that that would not happen.

3 JUDGE RIVERA: How - - - how do you avoid the
4 potential for abuse - - -

5 MR. HERMAN: Well - - -

6 JUDGE RIVERA: - - - of an officer who chooses
7 only to run the plate for a certain class of driver?

8 MR. HERMAN: Well, Judge, that - - -

9 JUDGE RIVERA: I only want to run the plates for
10 those female drivers; I'm worried about them on the road.

11 MR. HERMAN: Judge, that always could be a
12 problem, but I don't think enacting a - - - a new
13 Constitutional right really changes anything. You could
14 say I'm only going to stop the females that commit vehicle
15 and traffic law violations. So I don't really think that -
16 - - that prevents that at all.

17 So just - - - just to kind of wrap things up here
18 - - -

19 JUDGE RIVERA: Well, no. His - - - his argument
20 is, you have to have some basis to do it. You can't just
21 do it because you just want to do it.

22 MR. HERMAN: Well - - -

23 JUDGE RIVERA: Doesn't that get to the question
24 of abuse? You're avoiding the abuse because the officer,
25 as - - - as in any interaction with someone, has to have,

1 even at the low threshold, a reason to choose that person.

2 MR. HERMAN: Well - - -

3 JUDGE RIVERA: Why chose that car?

4 MR. HERMAN: Well, the officer is choosing that
5 vehicle just because - - - well, it goes back to whether a
6 person would feel that they're driving on the road, that
7 the officer would - - - could not access their plate,
8 arbitrarily. And my answer to that is, I have no reason to
9 believe that a motorist, having voluntarily - - - the owner
10 of the vehicle surrendered this information to the DMV,
11 would not access - - -

12 JUDGE RIVERA: Is it, in part, beyond that
13 expectation, the difficulty of catching people who have
14 these kinds of violations? If - - -

15 MR. HERMAN: Well - - -

16 JUDGE RIVERA: - - - if you can't do these kinds
17 of runs as - - -

18 MR. HERMAN: Well, of course - - -

19 JUDGE RIVERA: - - - cars go by?

20 MR. HERMAN: - - - and that's - - - judge, that's
21 an excellent point. I mean, you know, we need to stop cars
22 that are not registered, because usually it's because they
23 don't have insurance. There's a lot of reasons that a
24 vehicle would not - - - should not be on the road. And to
25 create some level of justification, which by the way, I

1 can't - - - I couldn't find any case law upholding such a
2 concept. In fact, the case law pretty much says - - -
3 that's out there says that you can do these plates checks.

4 And this is not a case of new technology here.
5 This has been - - - these plate checks have been going on
6 for a long time.

7 JUDGE STEIN: Is this all - - - is this different
8 from Debour, since Debour involved a seizure, whereas here,
9 there is no seizure when the information is accessed,
10 right?

11 MR. HERMAN: Well, yes. Yes, Judge, because we
12 don't have an encounter with a person. That's a huge
13 difference here. When you're running a plate, it's - - -
14 it's very different than stopping a vehicle, or even
15 approaching an individual. You're targeting a person.
16 Whereas running a plate is just accessing a - - - a
17 database of information that the - - - that the owner re -
18 - -

19 JUDGE FAHEY: Well, you're not - - - you're not
20 checking their movements with - - - with the - - - with
21 some system, as - - - as was happening in the GPS cases.
22 What you're doing here is - - - is identifying the vehicle
23 where there can't be any expectation of privacy.

24 But I'm - - - I'm just wondering if there has to
25 be any circumstances. Can the police do it under - - - in

1 any situation at all, or are there specific articulable
2 circumstances that would confine their ability to run the
3 plate in this situation?

4 MR. HERMAN: Judge, I - - - I would have to say
5 no to that.

6 JUDGE FAHEY: By no, you mean, Mr. Herman, there
7 is - - - there's - - - they could run a plate at any time?

8 MR. HERMAN: They - - - they could run a plate.
9 Now - - -

10 JUDGE FAHEY: And you have no expectation of
11 privacy in it at all?

12 MR. HERMAN: Yes. That's my simple answer. And
13 of course, we, as - - - as it's been pointed out, there are
14 these plate readers. Now, apparently, my opponent does not
15 feel that that's an issue. I think if - - - if you're
16 going to say that there's a - - - we're going to create a
17 State Constitutional right here, then it has to apply to
18 those plate readers, and - - - because they're access - - -

19 JUDGE RIVERA: Well, I thought his point is that
20 it's not - - - it's not choosing this particular car, the
21 discretion is taken from the officers, just everybody
22 that's going by, it's on the car, you don't have to worry
23 about the potential for abuse.

24 MR. HERMAN: True, Judge, but you're still
25 accessing - - - if they feel that this is private

1 information that shouldn't be arbitrarily accessed, that -
2 - - that instrument, device is access - - -

3 JUDGE ABDUS-SALAAM: In any of those cases - - -
4 in any of those cases, counsel, where you've indicated that
5 the courts have decided that the license plate - - -
6 there's no expectation of privacy in a license plate, what
7 have they said about the databases that the license plate
8 is linked to?

9 MR. HERMAN: Well, there's really not much out
10 there on - - - on that question. The database, under that
11 Federal Statute, which I pointed out in my brief, has been
12 restricted. The access you have is restricted, but there's
13 an exception for law enforcement.

14 And I - - - I think the reason that they passed
15 that Federal Statute is because there was no Constitutional
16 claim here. They decided to create a privacy interest by -
17 - - via a statute. Now, here - - - so there's - - -

18 JUDGE FAHEY: Do you think it - - - does it - - -
19 as I - - - I remember in City Court, I thought the basis
20 for the judge's decision there was basically that this was
21 an - - - she used an Ingle analogy; is that correct?

22 MR. HERMAN: She did cite Ingle, which this has
23 nothing to do with Ingle because it's not a - - -

24 JUDGE FAHEY: Okay.

25 MR. HERMAN: - - - we don't - - -

1 JUDGE FAHEY: Are we restricted, in any way, by
2 that decision?

3 MR. HERMAN: Well - - -

4 JUDGE FAHEY: In other words, are we restricted
5 to the question of whether or not Ingle applies to this?

6 MR. HERMAN: Well, I - - - I certainly would - -
7 - would argue that that's - - - that's - - - you could look
8 at that, Judge, because she didn't - - - the record here is
9 very, very skimpy.

10 JUDGE FAHEY: Well, I understand. I understand.

11 MR. HERMAN: So - - -

12 JUDGE RIVERA: What - - - can I ask you - - - you
13 say if - - - at least there's not any record testimony or
14 information as to what the officer - - - what - - - what
15 was - - - what the information was other than what he
16 testified to, that the officer could see when he ran the
17 plate.

18 Let's assume for one moment that it had personal
19 information. Let's say it had information that the person
20 is an epileptic. People have epileptic seizures, they get
21 licenses, they get confirmed.

22 MR. HERMAN: Right.

23 JUDGE RIVERA: What if there was something like
24 that; is that a different case?

25 MR. HERMAN: I - - - I would still say no, Judge.

1 Because they're - - - they're only collecting information
2 that they need to collect. And the DMV doesn't - - - if
3 that has nothing to do with registering a car, I - - - I
4 don't believe they - - - they would even be - - -

5 JUDGE RIVERA: So if it was the kind of
6 information, for whatever reason DMV may need, but that - -
7 - that one who gives that information doesn't think, well,
8 that's the kind of information anybody can have access to,
9 or a police officer, not anybody, a police officer could
10 have access to, because they don't need it for purposes of
11 figuring out whether or not I violated any detailed
12 requirement or registration requirement; is it a different
13 case?

14 MR. HERMAN: Well, again, I really don't think
15 that that is in the information. I do think I - - -

16 JUDGE RIVERA: No, no, no. But that's not what I
17 asked.

18 MR. HERMAN: Okay.

19 JUDGE RIVERA: It's a hypothetical.

20 MR. HERMAN: Okay.

21 JUDGE RIVERA: Since we don't know really what's
22 there.

23 MR. HERMAN: We don't know what's there. I would
24 just simply say that based upon the facts, I - - - I don't
25 think that that's a case where it's an information that

1 would be in the records.

2 CHIEF JUDGE DIFIORE: Thank you, Mr. Herman.

3 Mr. Covert.

4 MR. COVERT: Yes, Your Honors. Thank you.

5 CHIEF JUDGE DIFIORE: You're welcome.

6 MR. COVERT: I think Mr. Herman just, if I heard
7 him right, did concede that - - - that the database - - -
8 the Federal Law has now restricted the database, the DMV
9 databases nationwide, and - - - and he indicated also it
10 creates a privacy interest. And I believe that those were
11 his words. And I think that that's exactly correct.

12 JUDGE STEIN: But that doesn't apply to law
13 enforcement.

14 MR. COVERT: But it does, because there's only an
15 exception under the Federal Statute for law enforcement
16 when they are performing a law enforcement function.

17 JUDGE STEIN: Well, isn't that performing a law
18 enforcement function to - - - to make sure that a car is
19 properly registered - - -

20 MR. COVERT: Only - - -

21 JUDGE STEIN: - - - car on the highway is
22 properly registered?

23 MR. COVERT: Only if they do so nonarbitrarily
24 without discriminating. And - - - and I believe that when
25 they do so, arbitrarily, in this case, it was on whim,

1 caprice, and - - - and just out of pure curiosity. The
2 officer could give no reason whatsoever for why he ran that
3 license plate. He was given the opportunity; he quite
4 candidly stated that there was nothing unusual about what
5 that vehicle did.

6 And so I believe that there should be a minimal,
7 minimal threshold. And it's de minimis level of
8 expectation of privacy, but a - - - but a minimal, a lower
9 level of expectation of privacy that we should have that
10 requires him to come up with some reason, any articulable
11 basis to pull over - - - I'm sorry, to run that license
12 plate, which led to the vehicle being pulled over, and then
13 these charges.

14 So I very respectfully ask that the court find on
15 behalf of our client. Thank you.

16 CHIEF JUDGE DIFIORE: Thank you, counsel.

17 (Court is adjourned)

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C E R T I F I C A T I O N

I, Meir Sabbah, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Andrew R. Bushey, No. 50 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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