



IN THE SUPREME COURT OF THE STATE OF DELAWARE

ANTHONY DAVIS,)
)
Defendant-Below,)
Appellant,)
)
v.)
)
STATE OF DELAWARE,)
)
Plaintiff-Below,)
Appellee.)

No. 175, 2023

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

STATE’S ANSWERING BRIEF

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TABLE OF CONTENTS

	PAGE
Table of Authorities	ii
Nature and Stage of the Proceedings	1
Summary of the Argument.....	3
Statement of Facts	4
Argument	
I. THE SUPERIOR COURT DID NOT COMMIT PLAIN ERROR FOR EXCLUDING DET. SILVERS’S TESTIMONY <i>SUA SPONTE</i>.....	8
Conclusion	19

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
69 A.L.R.5th 425 (Originally published in 1999).....	15
<i>Hopkins v. State</i> , 293 A.3d 145 (Del. 2023)	18
<i>Hudson v. State</i> , 956 A.2d 1233 (Del. 2008).....	17, 18
<i>Johnson v. State</i> , 813 A.2d 161 (Del. 2001).....	8, 16
<i>Mason v. State</i> , 590 A.2d 502 (Del. 1991).	17
<i>Morales v. State</i> , 133 A.3d 527 (Del. 2016).....	8
<i>Morales v. State</i> , 696 A.2d 390 (Del. 1997).....	19
<i>Quarles v. State</i> , 696 A.2d 1334 (Del. 1997)	15, 16
<i>Reid v. Georgia</i> , 448 U.S. 438 (1980)	15
<i>United States v. Carter</i> , 901 F.2d 683 (8th Cir. 1990)	17
<i>United States v. Fernandez</i> , 795 F. App'x 153 (3d Cir. 2020)	17
<i>United States v. Lui</i> , 941 F.2d 844 (9th Cir. 1991).....	15, 16
<i>United States v. Sanchez-Hernandez</i> , 507 F.3d 826 (5th Cir. 2007).....	15
<i>Williams v. State</i> , 98 A.3d 917 (Del. 2014).....	9
<i>Wright v. State</i> , 980 A.2d 1020 (Del. 2009)	8

NATURE AND STAGE OF PROCEEDINGS

On March 8, 2021, a New Castle County grand jury indicted Anthony Davis (“Davis”) for drug dealing (heroin), drug dealing (cocaine), drug dealing (methamphetamine), possession (methamphetamine), possession (cocaine), and three counts of failure to use turn signal. (A20-A22). On August 30, 2021, a New Castle County grand jury indicted for drug dealing (cocaine), drug dealing (fentanyl), and resisting arrest. (A281-A282).¹

On March 7, 2023, a Superior Court jury found Davis (“Davis”) guilty of one count of drug dealing (fentanyl) and three counts of failure to use turn signal and acquitted him of two counts of drug dealing (cocaine and methamphetamine) and two counts of possession of drugs (cocaine and methamphetamine). On March 15, 2023, a different Superior Court jury found Davis guilty of two counts of drug dealing (cocaine and fentanyl) and one count of drug possession (cocaine). At both trials, the State called the same expert witness on drug dealing to opine that the physical drug evidence in each case was more consistent with drug dealing than with personal use. Defense counsel did not object to the expert witness at either trial.

Davis filed timely notices of appeal of both his convictions. In his Opening Brief, he argues that the State’s expert witness’s testimony was impermissible drug

¹ The grand jury originally indicted Davis on May 24, 2021, and it reindicted him on August 30, 2021. (DI 4, DI 8). The State entered a *nolle prosequi* on the resisting arrest charge prior to trial.

courier profiler testimony, and the Superior Court committed plain error by not *sua sponte* excluding the State's expert witness in both trials. This is the State's Answering Brief.

SUMMARY OF THE ARGUMENT

I. DENIED. In each case, the State's expert witness did not provide testimony on drug courier profiling. In each case, the State's expert witness provided permissible testimony regarding the physical drug evidence that the jury was permitted to use as substantive evidence to find Davis guilty of drug dealing. The Superior Court did not commit plain error by not *sua sponte* excluding the State's expert witness's testimony in either case.

STATEMENT OF FACTS

On July 16, 2020, Officer Christopher Nikituk of the New Castle County Police Department observed a green Subaru failing to properly use its turn signal when changing lanes. (A47-A50). Officer Nikituk made a lawful stop of the Subaru. (A48). Officer Nikituk was accompanied by two other officers, including Officer Jason Short. (A51). Davis was the driver of the Subaru and Jeffrey Le Barge was in the passenger seat. (A51). Officer Nikituk observed a tear-off baggie of a type that is commonly used to hold drugs on the front passenger floorboard of the Subaru. (A52). The officers searched Le Barge, finding nothing on him, and conducted a pat down of Davis. (A51, A87).

During the pat down of Davis, Officer Nikituk found 55 bags of heroin, in bundles in a clear bag, in Davis's pants. (A66, A68). The bundles were in glassine baggies with blue wax and stamped with "final destination" in black. (A69). Officer Nikituk also found \$457 in total on Davis's person and in the vehicle comprised of 19 \$20 bills, three \$10 bills, six \$5 bills, and 17 \$1 bills, with most of the cash being found in Davis's pants. (A72-A74).

Aside from the pat down search, the officers were unable to conduct a thorough search of Davis's person on the roadside. (A51, A87). When the officers took Davis into custody, they explained to Davis that they would check the rear of the patrol vehicle prior to placing him in the vehicle to ensure that anything

subsequently found in the rear of the patrol car could only have been placed there by Davis. (A74, A93). The next morning, Officer Short cleaned out the rear of his vehicle and found a black bag on the floor. (A96). In the bag, Officer Short found three plastic bags and several packaged bags with blue bags inside that were stamped with “final destination.” (A97). Officer Short believed that there were 45 bags in total. (A102).

Forensic chemist, Nicole Gerlach, from the Division of Forensic Science subsequently examined the seized substances found on Davis’s person and in the patrol vehicle and determined that the substances were 6.953 grams of cocaine, .343 grams of heroin, 1.21 grams of fentanyl, and 6.6738 grams of methamphetamine (A135-A143).

On January 6, 2021, Officer Antonio Delisi of the New Castle County Police Department stopped a red Toyota Camry with New Jersey tags. (A289). Davis was the driver and sole occupant of the Camry, which was a rental car. (A290, A311). Officer Delisi and Officer Joseph Mihalyi searched Davis and the vehicle. (A293, A310). Officer Delisi found \$490 in cash on Davis’s person. (A291, A330). Inside the vehicle, the officers located nine single dollar bills in the center console, a flathead screwdriver in the back seat, and a cellphone between the center console and the driver’s seat. (A292-A293, A304, A330). Officer Delisi then located a quantity of drugs inside the center console underneath the gearshift of the vehicle.

(A293). Inside a clear plastic baggie were 13 stamped bags of suspected fentanyl and 46 bags of crack cocaine. (A317). The officers located an additional 84 bags of suspected fentanyl in a black bag. (A327). The officers did not find any personal-use paraphernalia on Davis's person or in the vehicle. (A331).

Forensic chemist, Dena Lientz, from the Division of Forensic Science subsequently examined the seized substances found on Davis's person and in the Camry. (A365, A378). She determined that the substances were 9.263 grams of cocaine and 3.94 grams of fentanyl. (A382-A383, A387).

At the trial for the July 16, 2020 incident ("Trial 1"), Detective Jeffrey Silvers of the Wilmington Police Department testified for the State as an expert witness on drug dealing. (A162). Det. Silvers reviewed the physical evidence in the case and concluded, based on his training and experience, that the drugs recovered by police were consistent with drugs that were for sale. (A188).

At the trial for the January 6, 2021 incident ("Trial 2"), Det. Silvers again testified for the State as an expert witness on drug dealing. (A419). Det. Silvers reviewed police reports, photographs of the physical evidence, forensic lab reports, and text messages extracted from Davis's phone. (A425-37). He also noted the absence of drug paraphernalia associated with the personal use of drugs. (A437-38). Ultimately, Det. Silvers concluded that based on his training and experience, the drugs possessed by Davis were consistent with drug dealing. (A439). Davis did not

cross-examine Det. Silvers. (A439). Davis did not call any witnesses. The jury found Davis guilty on all counts—two counts of drug dealing (cocaine and fentanyl) and one count of drug possession (cocaine). (A490).

ARGUMENT

I. THE SUPERIOR COURT DID NOT COMMIT PLAIN ERROR FOR NOT EXCLUDING DET. SILVERS'S TESTIMONY *SUA SPONTE*.

Question Presented

Whether the Superior Court committed plain error for not excluding Det. Silvers' testimony *sua sponte* as impermissible drug courier profiler testimony.

Standard and Scope of Review

“A party who fails to raise timely objections to evidence in the trial court [risks] losing the right to raise evidentiary issues on appeal, in the absence of plain error affecting substantial rights.”² “[T]he doctrine of plain error is limited to material defects which are apparent on the face of the record[;] which are basic, serious, and fundamental in their character[;] and which clearly deprive an accused of a substantial right, or which clearly show manifest injustice.”³ Where neither the United States Supreme Court or this Court has “definitively ruled” on the admissibility of a type of evidence, and other courts are divided, the trial court’s failure to exclude the evidence “*sua sponte*, in the absence of any contemporaneous defense objection, [does] not constitute plain error.”⁴ Additionally, a “conscious

² *Wright v. State*, 980 A.2d 1020, 1023 (Del. 2009).

³ *Morales v. State*, 133 A.3d 527, 529 (Del. 2016).

⁴ *Johnson v. State*, 813 A.2d 161, 166 (Del. 2001).

decision to refrain from objecting at trial as a tactical matter' will preclude any plain error appellate review.”⁵

Merits of the Argument

At Trial 1, Det. Silvers testified as an expert witness on drug dealing for the State. (A176-A190). He testified that he was not involved in Davis's case in his capacity as a law enforcement officer but reviewed the facts of the case. (A180). Defense counsel did not object to Det. Silvers' testimony during Trial 1.

Det. Silvers testified that he is a detective working for the Wilmington Police Department, he worked there for 25 years, he works in the Drug Organized Crime Device Division, he worked in that division for about 18 years, the majority of his time is spent on drug investigations, he received formal training on drug recognition and interdiction, he participated in thousands of drug investigations and made thousands of drug arrests, and he talks to persons who purchase and sell drugs on almost a daily basis. (A176-A178). He also testified that he tries to stay up with the current trends of the type of drugs being sold, how drugs are being sold, and the prices of different drugs and that he has testified as an expert in the area of drug dealing at least ten times previously. (A178, A180).

⁵ *Williams v. State*, 98 A.3d 917, 921 (Del. 2014).

Det. Silvers testified that the quantity of cocaine in Trial 1 would sell for almost \$700 and that the quantity of fentanyl would sell for around \$1,500 on the street. (A182, A185). He explained that it is common to package heroin and fentanyl in small blue glassine stamped bags for usage. (A183). He testified that the stamps are used like a brand to identify the quality of the drug. (A183). He also explained that the denominations of the money (19 \$20s, three \$10s, six \$5s, and 17 \$1s) found was significant because it is “very common for people that are selling drugs [to] have multiple denominations and high numbers of those denominations.” (A187). After examining the physical evidence of the quantity of the drugs, the packaging of the drugs, the labels on the packaging, and the quantity and denominations of the money found, Det. Silvers testified that, in his opinion, the physical evidence found are “more consistent with drug sales” than with personal use. (A188).

During Trial 1, Defense counsel cross examined Det. Silvers. (A190-A206). Defense counsel first questioned Det. Silvers about the training that he listed on his CV. (A190-A198). Det. Silvers admitted that some of his listed trainings were decades old and some did not concern drug dealing. (A191-A198). Next, defense counsel questioned Det. Silvers about stamps on the packaging of drugs. (A198-A201). Then defense counsel discussed the indicia of drug dealing and obtained confirmation from Det. Silvers that certain factors indicative of drug dealing—such

as stolen items, firearms, ledgers, measuring instruments, extra bags, or plastic vials—were not found in this case. (A201-A203).

On re-direct, Det. Silvers testified that, in addition to the formal training listed on his CV, he receives on-the-job training concerning drug dealing. (A206-207). He explained that his knowledge and experience come from conducting thousands of drug arrests and thousands of drug investigations, which includes interviewing drug buyers and sellers. (A207).

During closing arguments of Trial 1, defense counsel addressed Det. Silvers' testimony. (A235-A238). First, she pointed out that some of Det. Silvers' training on his CV is "older" and "some deal with issues not even in this case" but conceded that Det. Silvers "does have 18 years of experience." (A235-A236). Concerning the large quantity of drugs, defense counsel argued that Davis might have been buying his drugs in bulk like how a Costco shopper buys product—such as cheese puffs—in bulk. (A237). Defense counsel also recalled how Det. Silvers testified that different drug users can have drugs with the same stamping on it. (A238). Lastly, she pointed out Det. Silvers' testimony that certain indicia of drug dealing—such as scales, additional packaging, and ledgers—were not present in this case. (A238).

At Trial 2, Det. Silvers again testified as an expert witness on drug dealing for the State. (A421-A439). And he again testified on his training and experience in the

area of drug dealing. (A421-A423). Defense counsel did not object to Det. Silvers' testimony during Trial 2.

Det. Silvers testified that it is common to package cocaine in small baggies like those present in Trial 2. (A426-A427). He calculated that the amount of cocaine found would be worth about \$900 and the amount of fentanyl would be \$500 to \$600. (A427, A430). He also testified that fentanyl is commonly packaged and sold in the types of bags found in this case. (A428-A429). He then testified that the stamps found on the bags of fentanyl act as a brand label to indicate quality. (A429). Det. Silvers further explained that it is common for people transporting drugs to hide the drugs in a natural void in a car and that the location where the drugs were hidden in this case would have provided easy access for the driver while still being hidden if the car is pulled over. (A431). Concerning the text messages that were found on the cellphone, Det. Silvers testified that the conversations were "consistent with drug talk" and drug selling. (A432). Concerning the money found, he explained that the large amounts of \$20 bills and \$1 bills are common denominations used by a person who deals in drugs, especially in this case where the crack cocaine bags appeared to be the type that sell for \$20 a bag. (A437). Finally, he testified that no drug paraphernalia was found and that "its more often a user" when there is paraphernalia for personal use. (A438-A439).

After examining the physical evidence of the quantity of the drugs, the packaging of the drugs, the labels on the packaging, the text messages from the cellphone, the quantity and denominations of the money found, and the lack of personal-use paraphernalia, Det. Silvers testified that, in his opinion, “[t]his case is very consistent with drug dealing.” (A439). Unlike in Trial 1, defense counsel did not cross examine Det. Silvers and did not address Det. Silvers’ testimony in closing argument. (A439, A461-A469).

On appeal, Davis argues that the Superior Court committed plain error by not prohibiting Det. Silvers from testifying *sua sponte* and allowing his testimony to be used as substantive evidence of Davis’s guilt for drug dealing.⁶ Davis contends that Det. Silvers’ testimony constituted drug courier profile testimony and that there is “clear precedent prohibiting drug courier profile testimony.”⁷ Davis also asserts that the State explicitly relied on Det. Silvers’ “impermissible testimony as proof of [his] substantive guilt.”⁸ Davis argues that the testimony caused “extreme prejudice” and that this Court should reverse all his convictions.⁹

a. Davis Fails to Explain or Support His Assertion that During Closing Argument the State Explicitly Relied on Impermissible Testimony as Proof of Defendant’s Substantive Guilt

⁶ Opening Brief, at 12.

⁷ *Id.* at 12, 20.

⁸ *Id.* at 2.

⁹ *Id.* at 20.

In the Summary Argument section of his Opening Brief, Davis writes that during its closing argument the State “explicitly relied on [Det. Silver’s] impermissible testimony as proof of [Davis’s] substantive guilt.”¹⁰ But Davis does not mention the State’s closing argument again in his Opening Brief. Nor does he cite to the transcript of the closing argument anywhere in his Opening Brief. In any case, as the State will show below, Davis’s argument that Det. Silver’s testimony was impermissible is based on his misunderstanding of case law regarding drug dealer profilers and his unawareness of the large amount of case law (from Delaware and other jurisdictions) permitting trained police officers to testify at trial as experts on drug dealing and permitting that testimony to be used as substantive evidence.

b. Det. Silvers’ Testimony was Permissible Drug Dealing Expert Witness Testimony, Not Impermissible Drug Courier Profiler Testimony

Davis’s appeal is entirely based on his misunderstanding that a drug courier profiler, who relies on a list of non-drug characteristics—such as travel habits, clothing style, or appearance—to determine whether an individual fits a ‘profile’ of a drug courier for investigative purposes, is the same as an expert witness in the area of drug dealing who explains the significance of physical evidence to a jury at trial. The two are not the same. While this Court has stated that drug courier profiler testimony is not permitted for use as substantive evidence of drug dealing guilt at

¹⁰ *Id.* at 2.

trial, this Court does permit the State to use experts in drug dealing to explain physical evidence to the jury and provide an expert opinion on whether the evidence is more consistent with drug sales than with personal use, which is the type of testimony Det. Silvers provided in both of Davis's cases.

The United States Supreme Court has explained that a drug courier profile is “a somewhat informal compilation of characteristics believed to be typical of persons unlawfully carrying narcotics.”¹¹ These “unofficial list[s] of general behavior pattern[s],” purportedly engaged in by typical drug couriers, “are used by police officers to determine persons more likely to be carrying drugs and thus focus their questioning and investigation.”¹² “These profiles are commonly used by agents as a basis for reasonable suspicion to stop and question a suspect or to form probable cause.”¹³ In *Quarles v. State*, this Court upheld the use of drug courier profile

¹¹ *Reid v. Georgia*, 448 U.S. 438, 440 (1980) (noting that the drug courier profile characteristics in the case were: “(1) the petitioner had arrived from Fort Lauderdale, which the agent testified is a principal place of origin of cocaine sold elsewhere in the country, (2) the petitioner arrived in the early morning, when law enforcement activity is diminished, (3) he and his companion appeared to the agent to be trying to conceal the fact that they were traveling together, and (4) they apparently had no luggage other than their shoulder bags.”).

¹² 69 A.L.R.5th 425 (Originally published in 1999). See *United States v. Sanchez-Hernandez*, 507 F.3d 826, 831 (5th Cir. 2007) (“A ‘drug courier profile’ is ‘nothing more than a compilation of characteristics that aid law enforcement officials in identifying persons who might be trafficking in illegal narcotics.’”).

¹³ *United States v. Lui*, 941 F.2d 844, 847 (9th Cir. 1991).

evidence, when supported by other reasonable articulable suspicion, to justify a search or seizure by law enforcement officials.¹⁴

In *Johnson v. State*, this Court decided that “drug courier profile evidence may not be admitted during a criminal trial as substantive evidence of guilt.”¹⁵ In *Johnson*, a drug courier profiler testified at trial that the defendant “fit the profile of a drug courier because: Mount Vernon, New York, where the car was rented, is only 10-15 miles north of the Bronx; that New York City is a major ‘source city’ for cocaine sold in Dover; and that illegal drug dealers often have couriers transport the contraband in rental cars.”¹⁶ In closing, the State “theorized that the drugs must have belonged to [the defendant], in part, because he is from New York City, the source city for cocaine, and because he had a rental car, a ‘red flag’ indicator for a drug courier.”¹⁷ This Court took the position that drug courier profiler testimony that a defendant fits characteristics on a profiling list cannot be used at trial as substantive evidence of drug dealing guilt.¹⁸

¹⁴ *Quarles v. State*, 696 A.2d 1334, 1338-39 (Del. 1997) (noting that the drug courier profile characteristics were: (1) the defendant came into Wilmington via bus from New York, a known drug source city; (2) he and his companion carried no luggage; (3) he arrived at night, when law enforcement presence is at a minimum; and (4) he traveled with a companion).

¹⁵ *Johnson v. State*, 813 A.2d 161, 166 (Del. 2001).

¹⁶ *Id.* at 164.

¹⁷ *Id.*

¹⁸ *Id.* at 165-66. Other courts have explained the rationale behind excluding drug courier profiling as substantive evidence for guilt. See *United States v. Lui*, 941 F.2d 844, 847 (9th Cir. 1991) (“Drug courier profiles are inherently prejudicial because

But this Court regularly and consistently allows experts on drug dealing to testify on evidence to establish intent to deliver and has recognized that expert testimony is often necessary to prove intent to deliver.¹⁹ In an intent to deliver prosecution, “[t]he State must prove an additional element beyond possession, quantity and/or packaging to establish that the defendant was not possessing the drugs for personal consumption.”²⁰ To satisfy this requirement, this Court has provided that “[t]his element can take the form of *expert testimony*, an admission by the defendant, or some other credible evidence linking the amount and packaging of drugs [the defendant] possessed with any intent to deliver those drugs.”²¹

Over thirty years ago, in *Mason v. State*, this Court held that the “jury was entitled to reasonably infer” from the testimony of an expert witness that the defendant “intended to deliver a Narcotic Schedule II Controlled Substance.”²² In that case, the expert witness explained to the jury that “the amount of cocaine [the

of the potential they have for including innocent citizens as profiled drug couriers.... Every defendant has a right to be tried based on the evidence against him or her, not on the techniques utilized by law enforcement officials in investigating criminal activity.”); *United States v. Carter*, 901 F.2d 683, 684 (8th Cir. 1990) (“Drug courier profiles are investigative tools, not evidence of guilt.”).

¹⁹ *Hudson v. State*, 956 A.2d 1233, 1240 (Del. 2008). *See also United States v. Fernandez*, 795 F. App'x 153, 155 (3d Cir. 2020) (“Experienced narcotics agents’ expert testimony is often helpful in assisting the trier of fact understand the evidence.”).

²⁰ *Hudson*, 956 A.2d at 1240.

²¹ *Id.* (emphasis added).

²² *Mason v. State*, 590 A.2d 502 (Del. 1991).

defendant] possessed, and the way in which it was packaged, were consistent with drug dealing rather than possession for personal use.”²³

In *Hudson v. State*, an expert witness opined that the defendant possessed crack cocaine with intent to deliver based on location, drug quantity (almost 9 grams of crack cocaine), packaging, individual size, denominations of the found on the defendant (\$680 in denominations of \$20 bills and \$50 bills), no drug paraphernalia found, handgun found, and defendant was wearing gloves.²⁴ Again, this Court allowed the expert testimony to be used as substantive evidence of drug dealing guilt.

Similarly, in the recent case, *Hopkins v. State*, this Court held the following:

Officer McCann provided testimony, without objection, as an expert. He testified that the defendant carried \$573 on his person in denominations of \$20 and under and drug dealers often have large sums of money in small denominations; the defendant claimed the money was not his, and drug dealers often try to “separate themselves” from drug profits; 1.3 grams of cocaine was “more than a user amount[;]” the defendant did not possess drug paraphernalia and drug dealers usually do not have drug paraphernalia with them; the defendant possessed more than one kind of drug, as drug dealers often do; and the defendant resisted arrest. This evidence, viewed in the light most favorable to the State, was more than sufficient to justify a rational trier of fact’s finding of guilt beyond a reasonable doubt for drug dealing.²⁵

Here, in Davis’s two trials, Det. Silvers provided the same type of expert testimony that this Court has repeatedly made clear is permitted. Det. Silvers did

²³ *Id.*

²⁴ *Hudson*, 956 A.2d at 1236.

²⁵ *Hopkins v. State*, 293 A.3d 145, 152 (Del. 2023).

not testify that Davis fits the profile of a drug dealer based on characteristics from a drug courier profile list. Instead, he testified on the evidence found, such as the quantity of drugs, the packaging of the drugs, the amount of money, the denominations of the money, and the lack of paraphernalia. He then opined as an expert that each case is consistent with drug sales. The Superior Court did not err in permitting Det. Silvers' testimony to be used as substantive evidence of drug dealing guilt.²⁶

CONCLUSION

For the foregoing reasons, the judgment of the Superior Court should be affirmed.

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²⁶ *Morales v. State*, 696 A.2d 390, 394 (Del. 1997) (affirming conviction of possession with intent to distribute a narcotic where the State offered expert testimony that “the packaging, weight, and quantity” of the heroin found “were consistent with an intent to deal the drugs rather than to use them personally”).

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ANTHONY DAVIS,)
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STATE OF DELAWARE,)
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DATE: November 27, 2023