IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE	)	
	)	CRIMINAL ACTION NUMBER
v.	)	
	)	IN-08-04-1593
DENNIS J. STRZALKOWSKI	)	
	)	ID No. 0611018661
Defendant	)	

Submitted: April 19, 2010
Decided: July 28, 2010

MEMORANDUM OPINION

Upon Motion of Defendant to Dismiss
Under Rule 48(b) - ***DENIED***

Appearances:

Matthew B. Frawley, Esquire, Deputy Attorney General, Department of Justice, Wilmington, Delaware, Attorney for the State of Delaware

James A. Natalie, Jr., Esquire, of Woloshin Lynch Natalie & Gagne, Wilmington, Delaware, Attorney for the Defendant.

HERLIHY, Judge

The Defendant, Dennis J. Strzalkowski, has moved to dismiss Count I of the indictment under the Sixth and Fourteenth Amendments to the United States Constitution, Article 1 Section 7 of the Delaware Constitution, and Superior Court Criminal Rule 48(b)[1]. Strzalkowski is charged with driving a vehicle while under the influence ("DUI") of alcohol and/or drugs, a 4th offense felony.[2]

Factual Background

On July 4, 2006, an officer with the Newark Police Department responded to a traffic accident on North Chapel Street and East Main Street in Newark, Delaware.[3] When the officer arrived at the scene of the accident, Strzalkowski was sitting the passenger seat of the car.[4] The officer was advised by the driver of the other vehicle that she attempted to make a left hand turn from a driveway and was struck by Strzalkowski in the left rear of her vehicle.

Initially, there was a question as to whether Strzalkowski was in physical control of the vehicle because he was in the passenger seat when the officer arrived at the scene of the accident. Strzalkowski insisted he was not driving, but admitted to drinking during the Fourth of July festivities. He was ordered by the officer to perform a series of field

[1] "If there is unnecessary delay in presenting the charge to a grand jury…against a defendant who has been held to answer in Superior Court, or if there is unnecessary delay in brining a defendant to trial, the court may dismiss the indictment…" Super. Ct. Crim. R. 48(b).

[2] *See* 21 *Del. C.* §4177(a).

[3] The information about the incident comes from the responding officer's police report.

[4] Witnesses standing on the porch and the driver of the other vehicle also told the officer that Strzalkowski and the other woman in the vehicle with him conspired to switch roles of driver and passenger.

sobriety tests. He failed the horizontal gaze nystagmus but refused to complete the remaining tests. The officer then administered a preliminary breath test resulting in a Blood Alcohol Content ("BAC") of 0.191. Strzalkowski was taken to the Newark Police Department where he was administered the intoxilyzer resulting in a 0.247 BAC.

At the police department, the other person in the car was given her *Miranda* warnings and questioned in reference to who was driving the vehicle. She admitted that Strzalkowski was driving and told her to say that she was driving. She was issued a criminal summons and was subsequently released. Strzalkowski was released without charges on July 4, 2006. Prior to being released, the officer obtained his contact information. The officer informed Strzalkowski that would be contact him about this incident.

The officer prepared a warrant for Strzalkowski's arrest for a felony DUI on November 26, 2006. On December 9, 2006, the officer made one attempt by telephone to contact Strzalkowski concerning the warrant but the phone was disconnected. On August 11, 2007, Strzalkowski was arrested and taken into custody when a Milton, Delaware police officer ran a wanted check on passengers in a car stopped for a moving violation. When he was arraigned in the Justice of the Peace Court 11 on the DUI charge, he was released on his own recognizance. He signed a "Bond/Order to Appear" form stating, "Defendant . . . understand[s] the following: If [he] fails to keep the Court advised of [his] address as required by Delaware statute, [he] waive[s] any notice requirements pertaining to this release . . . to court appearances and/or other matters pertaining to the charge . . . ." This language refers to 11 *Del. C.* §2113(e), which states:

> Any person released pursuant to this chapter shall notify the court before which the case is pending, of any changes of address or residence within 5 days of such change. Failure to make such notification will result in constructive receipt of any subpoena issued to the person by or on behalf of the court to the last address or residence given to the court by that person.

Following the arrest, the case was filed in the Court of Common Pleas on September 17, 2007. The State concedes that, when this case was originally filed in the Court of Common Pleas, the officer knew this charge was a felony but proceeded to Court of Common Pleas anyway.[5] The officer, instead of informing the State through the felony intake process, allowed the case to proceed as a misdemeanor offense in the Court of Common Pleas.[6] The case moved from arraignment on October 24, 2007, to case review on November 28, 2007. The State submits that more than likely, the first time the jurisdictional error was discovered was at that first case review.[7] A jury trial was scheduled on March 24, 2008, but continued at Strzalkowski's request, to July 17, 2008.

The State indicted Strzalkowski on the pending DUI charge on April 14, 2008. A summons to appear for arraignment was mailed, but returned to this Court as addressee unknown.[8] This Court issued a capias on May 2, 2008, when Strzalkowski failed to appear for the arraignment. He also failed to appear for his jury trial in Court of

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[5] State's supplemental pleading at 2

[6] *Id*.

[7] *Id*.

[8] Defendant's Motion submits that the summons was mailed to an old address. At oral argument, it was established that from July 4, 2006 to February 29, 2008 there is no record that the Defendant went to the Delaware Division of Motor Vehicles regarding a change of address.

Common Pleas on July 17, 2008.[9] The Court of Common Pleas issued a capias for his failure to appear for trial. The Superior Court capias was returned on February 15, 2010 when Strzalkowski voluntarily turned himself in. The State *nolle prossed* the charge in Court of Common Pleas on February 17, 2010.

Consequently, on March 16, 2010, Strzalkowski filed a motion to dismiss the felony indictment on the grounds that his constitutional right to a speedy trial was violated and that there was unnecessary delay. On March 29, 2010 the Court heard oral argument and supplemental briefing on this matter was ordered by the judge. The trial date in Superior Court is pending a decision on this motion to dismiss.

Contentions of the Parties

Strzalkowski alleges that his Constitutional right to a speedy trial is violated because the State failed to indict on the DUI charge for 17 months. He submits that the State has caused him "obvious and unnecessary delay and prejudice."[10] Strzalkowsi also asserts that while the State cannot be responsible for any delay after May 2, 2008 (the Superior Court arraignment date), the State is responsible for the delay from July 4, 2006 until May 2, 2008. Furthermore, he claims that under Superior Court Criminal Rule 48(b), this indictment should be dismissed because of unnecessary delay.

[9] There is no record or indication Strzalkowski notified, as required, the Court of Common Pleas of a change in address. But he, of course, had prior knowledge of the trial date from earlier appearances in that court.

[10] Def.'s Mot. to Dismiss at 3.

The State argues that an eight-month delay from Strzalkowski's August 2007 arrest, to his April 2008 indictment, does not result in a violation of Strzalkowski's constitutional right to a speedy trial, and does not warrant dismissal of the indictment under Rule 48(b). In addition, the State asserts that Strzalkowski fails to identify how the delay has caused him prejudice, especially given the fact that he is not incarcerated.

Discussion

The Fourteenth Amendment does not Require Dismissal

Strzalkoswki cites *State v. Pruitt*[11] arguing that the indictment should be dismissed because he was denied due process of law. In *Pruitt*, the Delaware Supreme Court affirmed the Superior Court's decision to dismiss charges of DUI, driving while license suspended or revoked, and disregarding a red light.[12] The Supreme Court held that a due process violation occurred when charges were reinstated on the officer's *ex parte* application and the dismissal was warranted for delay in filing charges after *nolle prosequi* was entered.[13] There, the Justice of the Peace dismissed traffic charges that were incorrectly filed under another charge.[14] The charges were then re-opened when the clerk's office had misfiled the paperwork.[15] The court did not notify Pruitt that the charges were reinstated and rescheduled for a hearing and thus, he failed to appear.[16]

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[11] 805 A.2d 177 (Del. Super. 2001).

[12] *Id*.

[13] *Pruitt*, 805 A.2d at 183.

[14] *Id*. at 179.

[15] *Id*.

While courts have some flexibility with regards to a defendant's rights, at a minimum, due process requires some form of notice and a hearing.[17] "A decision by any trial court to reinstate charges that it had previously dismissed may come only after all parties have been given adequate notice and an opportunity to be heard."[18] In *Pruitt*, the defendant was not given any notice that the traffic charges were reinstated.[19] The facts and circumstances of *Pruitt* are distinguishable from this case and dismissal under the 14th amendment is not warranted.

In this case, notice of the Superior Court indictment was sent to Strzalkowski. However, the summons was returned as "addressee unknown" because he changed his address without providing notice to the Court of Common Pleas from which this Court would draw his address. He also violated a condition of his own recognizance by not keeping the Court of Common Pleas informed of his new address. The State cannot be held responsible for Strzalkowski's failure to inform the necessary entities of his change of address. He was given notice and opportunity to be heard and choose to ignore them. His own actions of remaining a fugitive until February 15, 2010, preclude dismissal under a due process argument.

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[16] *Id*.

[17] *Id*.

[18] *Pruitt*, 805 A.2d at 180.

[19] *Id*.

There is no 6th Amendment Speedy Trial Violation

The United States Supreme Court has established four factors to determine whether a defendant's constitutional right to a speedy trial has been violated.[20] The factors to consider are: (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of the right to a speedy trial, and (4) prejudice to the defendant.[21] Courts will balance these factors in addition to other relevant circumstances to the case.[22] The conduct of both the prosecution and defendant are weighed in the balancing test.[23]

The right to a speedy trial attaches as soon as a defendant is arrested or indicted.[24] The length of delay is a threshold requirement to analyzing the other three factors.[25] As a threshold, if the length of delay is determined not to be "presumably prejudicial" there is no need to inquire about the other three factors in the balancing test.[26] Therefore, a court must first overcome the first hurdle of determining that the delay is "presumably prejudicial" to analyze the other three prongs in *Barker*.[27]

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[20] *Barker v. Wingo*, 407 U.S. 514, 530, 92 S.Ct. 2182, 2192, 33 L.Ed.2d 101, 117-18 (1972).

[21] *Middlebrook v. State*, 802 A.2d 268, 273 (Del. 2002) (citing *Barker v. Wingo*, 407 U.S. 514, 530, 92 S.Ct. 2182, 2192, 33 L.Ed.2d 101, 117-18 (1972)).

[22] *Id*. at 272.

[23] *Bailey v. State*, 521 A.2d 1069, 1079 (Del. 1987).

[24] *Id*. at 273.

[25] *Middlebrook*, 802 A.2d at 273.

[26] *Id*.

[27] *Id*.

There is no specific amount of time that automatically violates the right to a speedy trial.[28] Instead, whether the length of delay is presumptively prejudicial "depends on the peculiar circumstances of the case."[29] "To take but one example, the delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge."[30] Generally, courts have found post-accusation delay presumptively prejudicial when the delay approaches at least one year.[31] According to the Superior Court speedy trial guidelines, 90% of criminal trials should be completed or otherwise disposed of, within 120 days from the date of indictment/information, 98% within 180 days, and 100% within one year.[32] The Supreme Court of Delaware determined in *Dabney v. State* that a 234 day delay between arrest and incarceration and the potential trial was presumptively prejudicial.[33] In *Dabney*, the court considered the

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[28] *Dabney v. State*, 953 A.2d 159, 165 (Del. 2008).

[29] *Barker*, 407 U.S. at 530-31.

[30] *Id*. at 531.

[31] *Dogget v. United States*, 505 U.S. 647, 652 n. 1, 112 S.Ct. 2686, 120 L.Ed.2d 520 (1992).

[32] Supreme Court of Delaware Administrative Directive 130 (July 11, 2001). Six exceptions apply to this provision where time periods are not included in the count. Exception (a) which states, "[f]or all cases in which a capias was ordered, the time between the date the capias was issued and the date the capias was executed" applies to Strzalkowski.

[33] 953 A.2d 159 (Del. 2008). *See also Dogget v. United States*, 505 U.S. at 656 (holding that a delay of eight and one-half years between arrest and indictment was presumptively prejudicial).

elapsed time between arrest and indictment because the Defendant was incarcerated.[34] This Court, however, held in *Baker v. State*, that a delay of seven months between arrest and indictment was not presumptively prejudicial.[35]

In this case, the delay between the arrest on August 11, 2007, and the felony indictment on April 14, 2008, is eight months. The trial date is pending this motion to dismiss. This case is similar to *Baker* because, like *Baker*, this eight month delay is not "presumptively prejudicial" as the standard applies to speedy trial violations. Strzalkowski was not incarcerated during this period of time like the defendant in *Dabney* and there is no evidence suggesting the presumption of prejudice in this case. Since the length of delay is not "presumptively prejudicial" there is no need for the court to analyze whether the remaining three prongs of the speedy trial violation are applicable to Strzalkowski.

While a delay of eight months between arrest and indictment will not invoke a constitutional remedy for the Strzalkowski, because the delay is not "presumptively prejudicial", the court will analyze whether the indictment warrants dismissal under Rule 48(b).

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[34] *Id*.

[35] *Baker v. State*, Del. Super., ID No. 0803038600, Babiarz, J. (Dec. 16, 2009) (Mem. Op.). *See also Clark v. State*, 794 A.2d 1160, 2002 WL 500240 at *2 (Del.)(TABLE) (the Court held that a six-month delay is not sufficiently long enough to be presumptively prejudicial.)

Rule 48(b) Dismissal is Not Appropriate

Rule 48(b) gives the Court discretionary power to dismiss an indictment if there is unnecessary delay in filing the indictment or bringing the defendant to trial.[36] This rule is broader than and not "governed by established concepts of the Speedy Trial Clause of the Sixth Amendment."[37] Therefore, while Strzalkowski's speedy trial claim is not "presumptively prejudicial" he can still potentially prevail on a Rule 48(b) dismissal.

Rule 48(b) does not apply until the defendant is held to answer.[38] Essentially, the State may prosecute anytime within the period specified within the statute of limitations.[39] A fourth offense DUI is characterized as a Class G Felony.[40] The statute of limitations on any felony except murder or any Class A Felony provides the State with five years to initiate proceedings against an alleged offender.[41] Strzalkowski allegedly committed a DUI on July 4, 2006. An arrest warrant was not in place until November 26, 2006. Defense counsel argues that the State is responsible for any delay from July 4, 2006, the time of the incident until after May 2, 2008 (the date a capias was issued for failure to appear for his arraignment in this Court). However, the right to a speedy trial

[36] *State v. Anderson*, 2009 WL 2620502, *2 (Del. Super.).

[37] *State v. Fischer*, 285 A.2d 417, 418 (Del. 1971).

[38] *Middlebrook*, 802 A.2d at 273.

[39] *Id*.

[40] *See* 21 *Del. C.* §4177(d)(4).

[41] 11 *Del. C.* §205.

does not attach until the defendant has been arrested or indicted, whichever occurs first.[42] Since the arrest occurred before the indictment, the Court will only consider the delay after the arrest on August 11, 2007. The time between the incident date and the arrest is not considered under a Rule 48(b) analysis because the State was within 5 year statute of limitations period on this Class G Felony.[43]

A motion to dismiss for unnecessary delay *must* be attributable to the prosecution.[44] Dismissal is proper only when the delay is caused by factors that are within the control of the State.[45] Factors outside the State's control, such as a lack of judicial resources and crowded dockets are not proper grounds for dismissal for unnecessary delay.[46] In determining whether the delay is attributable to the prosecution, "the Court should consider the extent to which the State is at fault in causing the delay and the amount of control the State has over the event causing the delay."[47] "The less control that the State has over the event which causes delay, the more valid the reason for

[42] *Middlebrook*, 802 A.2d at 273.

[43] *See United States v. Basroon*, 38 Fed.Appx. 772, 783 (2002).

[44] *State v. McElroy*, 561 A.2d 154, 156 (Del. 1989).

[45] *State v. Richards*, 1998 WL 732960, at *3 (Del. Super.).

[46] *Id*. at 157.

[47] *State v. Willis*, 2001 WL 789667, at *1 (Del. Super. 2001) (citing *State v. Ellis*, Del. Super., Cr.A. Nos. IN-86-03-1241-1247, Gebelein, J. (Feb. 10, 1987)).

delay. The more control the State has over the event which causes delay, the less valid the reason for delay."[48]

The State is responsible for only a portion of the delay. Strzalkowski was arrested on August 11, 2007, and the case was incorrectly filed in Court of Common Pleas on September 17, 2007.[49] A fourth offense DUI is a felony,[50] and the Court of Common Pleas does not have jurisdiction over felony cases.[51] The State first realized, or was in a position to know of the jurisdictional error at case review on November 29, 2007, and instead, indicted in Superior Court without first entering a *nolle pros* in the Court of Common Pleas. The State's failure to *nolle pros* the case until February 17, 2010 served as a trap for Strzalkowski because the case was still active in the Court of Common pleas in addition to Superior Court from April 14, 2008, until February 17, 2010, a period of one year and ten months. This "trap," however, does not work to his benefit because he did not show for scheduled appearances in either court in 2008, after March. In that sense, he was an absconder from both courts, and one from this Court from May 2, 2008, until February 15, 2010, when this Court's capias was executed.

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[48] *Ellis*, *supra* note 38, at 3-4.

[49] Defense counsel makes a reference in his Motion to Dismiss that the rescheduled trial date is more than two years after the initial complaint. According to *Middlebrook*, Rule 48(b) does not apply until arrest or indictment, or whichever comes first. Therefore, the court looks at the time from the arrest, *not* the initial incident.

[50] *See* 21 *Del. C.* §4177(d)(4).

[51] *State v. Zickgraf*, 2005 WL 4858688, at *1 (Del. Super.).

Strazalkowski's actions contributed to the delay in this case. The Court of Common Pleas set his trial for July 17, 2008, after he requested a continuance, but he failed to appear. A capias was issued on July 17, 2008, when he did not show for it. It was during that nine-month interval that he moved and neither notified the Court of Common Pleas or the Division of Motor Vehicles of his change of address. On April 14, 2008, Strzalkowski was indicted in the Superior Court. A capias was issued on May 2, 2008, because he failed to appear at his arraignment. Though the Court of Common Pleas lost jurisdiction over him and the pending trial, because of the intervening indictment, he still, not knowing of the indictment for reasons explained above, further contributed to the delay by his failure to provide the notice cited above.

This case is distinguishable from *Baker* therefore, where this Court ruled that the delay was attributable to the prosecution.[52] In *Baker*, the State *nolle prosssed* the charges in the Court of Common Pleas on the day of the trial.[53] There were no intervening factors contributing to the delay. Here, there are contributing factors. First, Strzalkowski failed to appear for trial in the Court of Common Pleas or arraignment in this Court, and remained a fugitive until he voluntarily turned himself in on February 15, 2010. Second, he failed to inform the proper authorities of his address change, and violated a condition of his own recognizance bond. While the State erred in filing a felony charge in the Court of Common Pleas and should have realized this sooner than November 29, 2007,

[52] *Baker v. State*, Del. Super., ID No. 0803038600, Babiarz, J. (Dec. 16, 2009) (Mem. Op.).

[53] *Id*.

the prosecution is still permitted to bring charges against Strzalkowski in a court that has exclusive jurisdiction.[54] Third, the delay is not all caused by circumstances within the State's control as required by *Richards*.[55]

Absent compelling circumstances, the State is prohibited from voluntarily dismissing charges in a lower court and commencing new prosecution in a higher court with concurrent jurisdiction.[56] However, Superior Court and the Court of Common Pleas are not courts with concurrent jurisdiction because the Court of Common Pleas cannot hear felony cases.[57] It was not until the State reviewed Strzalkowski's driving record at the first case review that it realized the Court of Common Pleas did not have jurisdiction over the charge.[58] Even though the delay was not solely attributable to the State, the Court will still consider if Strzalkowski suffered prejudice as a result of the delay.

Prejudice

In addition to the unnecessary delay being solely attributable to the prosecution, the delay must also cause some "definable or measurable prejudice to the defendant."[59] While Rule 48(b) does not make any reference that the defendant must show prejudice

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[54] *See* 11 *Del. C.* § 210: "A prosecution is not a bar . . . [when] (1) the former prosecution was before a court that lacked jurisdiction over the defendant or the offense".

[55] 1998 WL 732960, at *3 (Del. Super.).

[56] *State v. Pruitt*, 805 A.2d 177, 183 (Del. Super. 2002).

[57] *See 21 Del. C.* §4177(d)(8).

[58] The State believes they first realized they did not have jurisdiction on November 29, 2007, at first case review where Strzalkowski's file was initially reviewed.

[59] *McElroy*, 561 A.2d at 157.

resulting from the delay,[60] some showing of prejudice has been required for granting a motion to dismiss for unnecessary delay.[61] The prejudicial effect on the defendant must be beyond that "normally associated with a criminal justice system necessarily strained by a burgeoning case load."[62]

The prejudicial effect of the delay to Strzalkowski should be evaluated to prevent oppressive pretrial incarceration, minimize anxiety and concern of the accused, and to limit the possibility that the defense will be impaired.[63] Other types of prejudice will also be considered under Rule 48(b) including:

> [T]he unexplained commencement of a new prosecution long after a dismissal by the State of the same charge in another court; the anxieties suffered by a defendant and his family as a result of delay and uncertainty in duplicative prosecutions against him; the notoriety suffered by a defendant and his family as a result of repeated commencement of prosecutions for the same offense; the expenses, legal and otherwise, attendant upon a subsequent renewal in another court of a dismissed prosecution.[64]

Essentially, when the delay causes any legal harm or detriment to the defendant, there is potential prejudice.[65]

Strzalkowski was not incarcerated prior to trial. Thus, there is no oppressive pretrial incarceration in this case. Also, he failed to appear to trial on July 17, 2008 in the

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[60] Super. Ct. Crim. R. 48(b).

[61] *McElroy*, 561 A.2d at 156.

[62] *Id*.

[63] *Middlebrook*, 802 A.2d at 276.

[64] *State v. Fischer*, 285 A.2d 417, 419 (Del. Super. 1971).

[65] *State v. Kozak*, 1999 WL 1846459, *2 (Del. Super.).

Court of Common Pleas. Unlike *Baker*, the State did not wait until the day of the trial in the Court of Common Pleas to enter a *nolle prosequi* on the case. It is difficult for defense to make a claim about oppression and anxiety when Strzalkowski waited until February 15, 2009 to turn himself in. Finally, there is nothing offered to show that his defense has been impaired from the delay in this case. In his motion, counsel submits that the State has caused him "obviously and unnecessary delay and prejudice."[66] The defense offers nothing beyond mere speculation suggesting that there is prejudice in this case. Strzalkowski effectively waived any claim of prejudice or speedy trial rights because he failed to give notice of his change of address and did not show up for scheduled court dates, after March, 2008.[67] He also fails to convince this Court, beyond mere speculation, that the delay prejudiced him to merit dismissal under Rule 48(b).

While the Attorney General's Office was at fault for failing to indict in a court with jurisdiction over felony cases and failing to *nolle pros* in the Court of Common Pleas in a timely manner, some of the delay is attributable to Strzalkowski's actions of failing to appear and failure to inform the state of an address change. Also, there is no evidence that Strzalkowski was prejudiced by the 8-month delay between the arrest and indictment. There has been no violation of Strazalkowski's constitutional rights and dismissal under Rule 48(b) is not appropriate.

[66] Def.'s Mot. to Dismiss at 3.

[67] The Court assumes, for purposes of this motion, that Strzalkowski appeared in the Court of Common Pleas on March 24, 2008, for his first trial, even though he requested and received a continuance.

Conclusion

For the reasons stated herein, Dennis J. Strzalkowski's motion to dismiss under Rule 48(b) is **DENIED**.

IT IS SO ORDERED

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J.