1970

The State of Utah v. Verl Farnsworth : Brief of Respondent

Utah Supreme Court

In The Supreme Court of the State of Utah

STATE OF UTAH,
Plaintiff-Respondent,

vs.

VERL FARNSWORTH,
Defendant-Appellant.

Case No. 11[illegible]

BRIEF OF RESPONDE[illegible]

APPEAL FROM THE JUDGMENT OF T[illegible] JUDICIAL DISTRICT COURT OF SALT [illegible] TY, UTAH, BEFORE THE HONORABLE [illegible] CROFT, JUDGE.

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In The Supreme Court of the State of Utah

STATE OF UTAH,
Plaintiff-Respondent,
vs.
VERL FARNSWORTH,
Defendant-Appellant.

Case No. 11126

BRIEF OF RESPONDENT

STATEMENT OF THE CASE

The defendant, Verl Farnsworth, was convicted by a jury of second degree murder before the Honorable Bryant H. Croft, Judge.

DISPOSITION OF CASE IN LOWER COURT

The defendant was tried, convicted and sentenced as provided by law for the crime of murder in the second degree.

RELIEF SOUGHT ON APPEAL

The State asks this Court to affirm the judgment of the lower court on the basis that no reversible errors were committed.

STATEMENT OF FACTS

The Brief of Appellant sets out the facts quite fairly. Any disagreement that the State has will be pointed out in the arguments that follow.

ARGUMENT

POINT I

THE PROSECUTION CORRECTLY IMPEACHED THE DEFENDANT WITH HIS OWN PRIOR VOLUNTEERED STATEMENTS.

In the case at bar Ralph Whittaker ,a police officer with twelve years experience, was assigned to a radio patrol car on the day of the murder (TR. 89). He was flagged down by a lady waving her arms. This lady reported a man with a gun had either shot or was planning to shoot his son.

Officer Whittaker proceeded to the scene of the shooting, made a quick examination and investigation, then placed the defendant under arrest. While defendant was in the police car having handcuffs placed on him, he made some statements (TR. 98). The defendant informed the police officer that there was no need for handcuffs because he wasn't going to hurt anybody. The defendant also commented that he had shot his son and wasn't sorry, but hoped the boy wouldn't die (TR. 99).

Officer Whittaker then began transporting the defendant to the Salt Lake City Police Station. As

they started towards the Police Station the defendant seemed very willing to talk (TR. 194). Because of this apparent willingness to talk, Officer Whittaker stopped the car and asked Officer Frisbey to witness the *Miranda* warning. At this time Officer Whittaker told the defendant that he had a right to remain silent and asked the defendant if he understood this right. The defendant said he did. Then the defendant was told that anything he said could and would be used against him in court. The police officer again asked the defendant if he understood and again the defendant answered that he did understand. The defendant was then told of his right to have a lawyer with him while he was questioned and again the defendant stated he understood. Officer Whittaker then informed the defendant that if he could not afford an attorney one would be appointed before any questioning, and again the defendant indicated his understanding of what was told him.

Even after this careful warning given by an experienced policeman, the defendant again started to talk about the circumstances of the incident. The police officer then asked the defendant if by talking he was waiving his rights to an attorney and the defendant stated: "I guess I ought to talk to a lawyer before I make a formal statement, ***but I'll tell you what happened.***" (Emphasis added.) (TR. 193). After the defendant made this statement the policeman did not interrogate nor ask questions about this matter. The officer's testimony was as follows: "Well, he was

disposed to talk and I just listened to what he had to say." (TR. 194).

After Officer Whittaker and the defendant arrived at the police station, custody of the defendant was given to Leonard Elton, a detective in the Detective Bureau. Detective Elton took the defendant into the Interrogation Room in the Salt Lake County Jail and read the *Miranda* card to him. Defendant was then asked what happened and he started to tell them. A tape recording was taken (TR. 200). The defendant did not ask for an attorney to be with him (TR. 200), nor did he tell the police that he wished to remain silent until an attorney was present (TR. 202).

The statements on this tape were later used to impeach the defendant's testimony (TR. 222).

A

STATEMENTS FREELY GIVEN DO NOT VIOLATE *MIRANDA V. ARIZONA*.

In *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed.2d 694, 86 S.Ct. 1602 (1966), the Supreme Court of the United States excluded all volunteered statements from its holding:

> **"Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today." 384 U.S. at 473, 16 L.Ed.2d at 726.**

Many jurisdictions hold that the question is real-

ly whether or not the statement given was solicited by the police. In *State v. Law*, 203 Kan. 89, 452 P.2d 862 (1969), the Supreme Court of Kansas dealt with a case wherein the police officer advised the defendant of his rights and the defendant stated: "If I knew that you was going to pick me up this quick I would have had a gun." *Id.* 452 P.2d at 864. The court held that this statement was admissible, and stated:

> **"The defendant's voluntary exclamation in connection with his arrest may not be said, in our judgment, to have been elicited by police officers either through solicitation or by means of investigatory questioning." *Id.* at 865**

A somewhat similar situation faced the Appellate Court of Illinois in *People v. Savage*, 242 N.E.2d 446 (1968). In that case the defendant entered a sheriff's office and stated that he had murdered his wife. The deputies then took the defendant to the murder scene and advised him of his rights. He was then taken to the sheriff's office, where:

> **". . . he was fully advised of his rights and was, in fact, given the name of the Public Defender. At this point, he stated that he wished to tell his story and to get it off his chest and made a detailed statement of the occurrence and the events leading up to it. Having been fully advised of his rights prior to making this statement, it was proper to admit it into evidence." *Id.* at 448, 449.**

The Court of Criminal Appeals of Oklahoma also faced this question in *Andrews v. State*, Okl. Cr.,

455 P.2d 741 (1969). In this case the defendant was placed in police custody at the scene of the crime and he, like the defendant in the case at bar, talked all the way to the station without being questioned by the transporing officer. However, in this case no *Miranda* warning was given. The Court of Criminal Appeals then cited the *Miranda* language which stated that volunteered statements were not affected by its holding, and said:

> **"Under the circumstances of this case, we can only view the situation as being one in which the defendant volunteered his statements, as described in that part of the Miranda opinion just recited."** *Id.* **at 744.**

The court then held that the testimony of the police officer was properly admitted.

It would be strange indeed if the court were to find that had the Salt Lake City Police not given the *Miranda* warning, and had not questioned the defendant, but merely listened to him (a person who seemed quite willing to talk), then the volunteered statements would be admissible, but since the Salt Lake City Police were extra careful with this defendant and warned him of his rights, those statements he made voluntarily after mentioning that he ought to have an attorney, must be excluded from evidence.

It was well put by the Trial Judge:

> **"All right. I am not satisfied at all that his rights to counsel was misunderstood or that it was not intelligently waived. Here is a man**

> who apparently is anxious to talk to the Police and tell them what happened even to the point where the Officer taking him to the Police Department stops in a street and gets another Officer to come over and listen to him give the warnings. . . . Now, if the Supreme Court wants to go that far, why let them tell us about it again. I think this cloak of protection that we throw over people that commit crimes will reach a limit and this case impresses me of being a good example. Where the Officers go just about as far as they ought to be required to go, but the man still tells them what he wants to tell them, so, I am not satisfied at all that the confession itself if there were a confession or rather the statement he made to the Officer itself would be admissible if the Prosecution had attempted to put it in to begin with. In any event, they get him to the Police Station, they tell him this same thing and he goes ahead and talks to them. Now, there is no specific demand for a Lawyer, no request that a Lawyer be called or be present. He has been asked certainly by Officer Whittaker at one point if he understands these rights and he said he did and yet he went ahead and chatted with him while he was taking him into the Station." (TR. 204, 205).

There is absolutely no valid claim in this case that the statements of the defendant were not volunteered.

B

MIRANDA SAFEGUARDS CAN STOP INTERROGATION MACHINERY, BUT THE DEFENDANT'S

CONDUCT OR STATEMENTS CAN START IT AGAIN.

Even if this Court were to find that the defendant's statement ("I guess I ought to talk to a lawyer before I make a formal statement, but I'll tell you what happened") were a request for counsel, the statements subsequently made should still be admissible.

Under *Miranda* the interrogation machinery must completely stop once the person requests the presence of an attorney. This shut-down of the interrogation process, however, is certainly not final. Actions or statements by the defendant can give the police the right to resume questioning. Once a person has requested counsel but continues to talk, the police are neither forced to remain quiet nor forced to stop listening.

A California Court of Appeals was faced with a situation where a defendant was arrested, given the *Miranda* warning, and requested a lawyer indicating his desire to remain silent. After being placed in jail the defendant asked his jailor if he could talk with Sergeant Neil. While in the interrogation room Sergeant Neil again advised the defendant of his rights, but the defendant proceeded to make a statement which was taped and later used against him. The attorney for the defendant objected to this tape recording claiming that when the defendant asserted his rights he became permanently insulated from subsequent interrogation and this precluded

the use of any elicited statements. The Court of Appeals then commendably made the following observation of the correct rule:

> "We disagree with defendant's contention that an original invocation of rights requires permanent application of the no-interrogation rule regardless of any intervening act by the defendant. The rule explicitly affords insulation, not from an interrogation conducted *after* a defendant has himself changed his mind, but instead from an interrogation conducted *in order* to change his mind.
>
> * * *
>
> We hold, therefore, that after defendant volunteered to make a statement the police were entitled to interrogate him to the same extent as if he had initially so volunteered without having invoked his rights." *People v. Sunday*, 79 Cal. Rptr. 752 at 757 (1969).

The only difference between the *People v. Sunday* case and the case at bar is the fact that the defendant in *Sunday* was left in his cell alone for awhile. The rule set out by the court, however, is a good one. The only question that an appellate court should concern itself with is whether or not the defendant himself has changed his mind.

The Court of Appeals of Kentucky has also recently faced this problem. In that case the defendant was taken into custody and had been given his rights. He requested an attorney before making a statement. At that time the officer giving the defendant his rights read aloud the ballistics report on

a rifle and bullet. At that time the defendant confessed to the crime. Later, on the stand, he stated that he had made no statement that would incriminate him in the murder. The prosecution sought to show that he had orally confessed to the murder. The Court saw the issue as whether or not the defendant's confession was voluntary or coerced in violation of defendant's wishes to remain silent until he had the advice of counsel. The Court then correctly stated:

> "We hold that the evidence justified the trial court in finding that the appellant, after he had been effectively warned of his constitutional rights, had voluntarily waived these rights after being informed that the ballistics report showed the bullet taken from the head of Mrs. Haden had been fired from the rifle that appellant was known to have sold shortly after Mrs. Haden's body was found. Appellant, himself, does not claim the police resorted to unlawful methods to coerce him to implicate himself in the crime. Appellant's own testimony was that he did not make any statement to Sergeant Babbs or to anyone else that would incriminate him in the murder.
>
> Under the facts and circumstances presented by this record we find that the trial court correctly admitted the alleged confession in evidence and therefore conclude that appellant was given a fair trial." *Combs v. Commonwealth*, 438 S.W.2d 82 at 85 (Ky. Ct. App. 1969).

It is readily seen that in this case the defendant was at all times in the presence of policemen as was

the defendant at bar. The questions and answers between the officer and defendant in *Combs* were allowed in evidence and they should also be allowed in the case at bar.

In *Bazzell v. State*, 6 Md. App. 194, 250 A.2d 674 (1969), the Court of Special Appeals of Maryland also faced the situation where one, advised of his rights, requested not to be interrogated and yet still confessed. In *Bazzell* the defendant was placed in jail and when an officer took lunch to the defendant, the defendant admitted breaking into two places. This admission was offered at trial and the trial judge allowed it. On appeal the Court said:

> **"We find, therefore, that the statement here given was not the product of police interrogation but was freely and voluntarily given. Under the circumstances, its admission was not in violation of any of the mandates of *Miranda, supra*." *Id.* 250 A.2d at 677.**

It is clearly evident that *Miranda* safeguards can stop the interrogation process, but when the defendant is disposed to talk and does in fact talk, the police are not required to listen with deaf ears and remain completely silent. Therefore when Officer Whittaker gave the defendant his *Miranda* warning and the defendant continued to talk, his volunteered statements could and should be used against him. He had stated that he understood his rights, therefore his actions and statements should constitute a waiver.

C

STATEMENTS TAKEN IN VIOLATION OF *MIRANDA* MAY STILL BE USED TO IMPEACH A DEFENDANT'S TESTIMONY.

At this point several things should be pointed out to the court. First, the statements used by the prosecuion were not offered by the State except to challenge the credibility of the defendant. Second, the statements used by the prosecution were voluntary, no claim to the contrary having been made.

The language in the Fifth Amendment of the Constitution of the United States is designed to protect a person from being compelled "to be a witness against himself. . . ." This is not a privilege "to lie with impunity once he [the defendant] elects to take the stand to testify." ***State v. Butler,*** 19 Ohio St. 2d 55, 249 N.E.2d 818 (1969).

Note the following language by Justice Frankfurter from ***Walder v. United States,*** 347 U.S. 62, 74 S. Ct. 354, 98 L.Ed. 503 (1954), which deals with inadmissible evidence under the Fourth Amendment exclusionary rule:

> **"It is one thing to say that the Government cannot make an affirmative use of evidence unlawfully obtained. It is quite another to say that the defendant can turn the illegal method by which evidence in the Government's possession was obtained to his own advantage, and provide himself with a shield against con-**

> tradiction of his untruths." *Id.* 347 U.S. at 65, 74 S. Ct. at 356.

In the case at bar the defendant made certain statements to the police who recorded these statements. Later on the stand the defendant affirmatively claimed no such statements were made. A *Miranda* flaw should not give the defendant a shield to hide behind.

Counsel for the defendant cites *Miranda* as authority that statements taken in violation thereof cannot be used to impeach the defendant's testimony. However, notice the carefully prepared opinion of the Supreme Court of Ohio which has recently dealt with this problem. In that case the defendant was tried without a jury and the court held that the prosecution could use statements of an accused made to police without *Miranda* warnings, to impeach accused's credibility. The court then looked at *Miranda* as follows:

> "We do not believe that the case of *Miranda v. Arizona, supra,* 384 U.S. 436, 86 S. Ct. 1602, dictates a conclusion contrary to ours. In *Miranda,* the court indicated that statements of a defendant used to impeach his testimony at trial may not be used unless they were taken with full warnings and effective waiver. (384 U.S., at 477, 86 S. Ct. 1602.) However, we note that in all four of the convictions reversed by that decision statements of the accused, taken without cautionary warnings, were used by the prosecution as direct evidence of guilt in the case in chief.

"We believe that the words of Chief Justice Marshall regarding the difference between holding and dictum are applicable here.

'It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible hearing on all other cases is seldom completely investigated.' *Cohens v. Virginia* (1821), 19 U.S. (6 Wheat.) 264, 399, 5 L.Ed. 257.

"The court in *Miranda,* was not faced with the facts of this case. Thus, we do not consider ourselves bound by the dictum of *Miranda.*" *State v. Butler,* 19 Ohio St. 2d 55, 249 N.E.2d 818 at 821-822 (1969).

POINT II

THE TRIAL COURT WAS CORRECT IN REFUS ING TO GIVE AN INVOLUNTARY MANSLAUGHTE INSTRUCTION.

Authorities generally agree that where partie request jury instructions on lesser offenses, they ar entitled to have instructions given upon their theor of the case if there is any substantial evidence t justify giving such an instruction. *State v. Gillian,* file

January 8, 1970; *State v. Johnson*, 112 Utah 130, 185 P.2d 738 (1947); *State v. Newton*, 105 Utah 561, 144 P.2d 290 (1943).

The State recognizes that under *State v. Hymas*, 64 Utah 285, 230 P. 349 (1924), and *State v. Gillian, supra*, that it is a "delicate matter for a trial court to withhold" jury instructions of a lesser included offense, and the court may only do so in "clear cases." Our argument, however, is that the case at bar is a "clear case."

All of the evidence in this case shows that there was an argument and a killing. This would lead one to believe there is a question of voluntary manslaughter. Instructions were given to the jury not only on voluntary manslaughter, but also on self defense.

The defendant requested an instruction on involuntary manslaughter. Under Utah law manslaughter is an unlawful killing of a human being without malice. Involuntary manslaughter is defined as follows:

> **"Involuntary, in the commission of an unlawful act not amounting to a felony, or in the commission of a lawful act which might produce death, in an unlawful manner or without due caution and circumspection." Utah Code Ann. § 76-30-5 (1953).**

The defendant places great weight upon the recent decision of this Court in *State v. Gillian*. That

case is clearly distinguishable. In that case the defendant killed a person who was in the same room as her "common law husband." She did not even know the person she killed was in the room. (State of Utah v. Iva Lee Gillian, Brief of Appellant at 5.) Being angry with her "common law husband" she fired several shots into the room intending to scare him. One shot, however, struck and killed the husband's roommate. As to this set of facts the Utah Supreme Court stated:

> **"If the jury accepted her version of the occurrence, that it was in such a state of emotional upset that she got the pistol and fired it into the room several times intending only to scare Miller, her offense could be found to be involuntary manslaughter in that it was a killing which resulted 'in the commission of an unlawful act not amounting to a felony.' . . . "** *State v. Gillian*, **at 3.**

In other words, firing a gun merely to scare someone is an unlawful act not amounting to a felony. In the present case however, the defendant's own testimony was: "I just figured it was either him or me and I fired." (TR. 178). This statement goes to the question of self defense, not the question of "an unlawful act not amounting to a felony."

Another difference between the *Gillian* case and the case at bar is the fact that in *Gillian* the trial court refused to give the jury instructions of the lesser offenses of second degree murder, voluntary and involuntary manslaughter; thereby limiting the

jury's decision only to two alternatives—guilty of first degree murder (with or without leniency) and not guilty.

In the present case the jury was instructed that they could find the defendant guilty of murder in the second degree, guilty of voluntary manslaughter, or not guilty because of self defense. If the jury were disposed of believing that a lesser crime had been committed, they would have found the defendant guilty of voluntary manslaughter instead of second degree murder.

To find for the defendant, this Court must determine that the defendant was committing a lawful act which might produce death, in an unlawful manner or without due caution; or find the defendant's acts constituted an unlawful act not amounting to a felony.

The evidence in this case simply will not support such a theory. The defendant had his gun before he saw his son with one. The defendant shot his gun to scare his son, or to force his son out of the house. Upon seeing his son with a weapon in hand the defendant shot. This was not by mistake.

The case of *State v. Gillian, supra,* is not in point. In that case the facts were such that the court could determine a theory which would justify an instruction on voluntary manslaughter. In the case at bar, however, the problem is not one where there is an accidental killing but under the defendant's own theory a "square-off."

This is a "clear case" and the trial court correctly determined as a matter of law that the evidence did not warrant an instruction of involuntary manslaughter.

POINT III

THE TRIAL COURT DID NOT ERR IN PERMITTING THE PROSECUTION TO EXAMINE THE DEFENDANT'S PRIOR ACTS OF VIOLENCE.

The Utah Supreme Court set out the test as to whether or not testimony is admissible in *State v. Dickson,* 12 Utah 2d 8, 361 P.2d 412 (1961) as follows:

> **". . . Where evidence has special relevancy to prove the crime of which the defendant stands charged, it may be allowed for that purpose; and the fact that it shows another crime will not render the evidence inadmissible." *Id.* at 12, 361 P.2d at 415.**

In the case at bar the defendant took the stand and testified as to fights and other physical contact he had had with his son two years before the killing (TR. 172). He also testified that as a rule his gun was loaded (TR. 180).

This testimnoy was used by the defendant to show that he was frightened by his son, and went to the issue of self defense. The defendant was the only person who actually knew what his own state of mind was, but there is a strong influence of self interest, in statements like this. The following is found in Wigmore on Evidence:

> "Testimony to one's own intention, or other state of mind, has often been attacked on the ground of what is really a *disqualification by Interest; i.e.* the argument is that, since a person's own intention can be known only to himself, his statement of what it is or was cannot be safeguarded by the possibility of exposing its falsity, through the aid either of conflicting circumstances or of opposing eye-witnesses; and that thus the influence of self interest in falsifying is too dangerous, and that such testimony should consequently be forbidden. This argument has been generally repudiated." *Id.* State of Mind § 1965 at 104.

On a theory of self-defense, the prosecution has the right to question facts and circumstances surrounding the defendant's state of mind. *State v. Gillian, supra,* is not in point. In that case the court pointed out that there was no indication that there was pre-existing animosity or "bad blood" between defendant and her "husband."

In the case at bar, however, the defendant stated that he carried a loaded gun. Upon cross-examination the defendant was asked if he had threatened others with his loaded gun. This question was asked for the purpose of showing his state of mind (TR. 183). The defendant was then asked whether or not he had threatened dogs or cats and he replied that he had several months prior. This question was *not* objected to by defense counsel. The defendant then admitted threatening to shoot his oldest daughter and also getting out a deer rifle after a fight with his son (TR. 185). Threats

made by defendant against the life of deceased to show state of mind are generally admissible, and remoteness in time goes only to the weight. *State v. Russell*, 106 Utah 116, 145 P.2d 1003 (1944).

As a rebuttal witness, the daughter of the defendant testified that her father had gotten his gun out of the car and was going to shoot the family cat and dog. Again no objection was made by defense counsel. This she testified, took place the afternoon before the shooting. This threw a cloud of credibility on the statements by defendant.

This type of evidence is admissible. The theory of the defendant is that there was self-defense in this situation or that somehow the defendant was committing an illegal act not amounting to a felony. Evidence which shows that there was "bad blood" between defendant and his son would inform the jury as to whether or not there was self-defense. Evidence which shows that the defendant continually weilded a loaded weapon whenever he was angry, certainly informs the jury as to his state of mind in this case. This evidence does have special relevancy to prove the crime charged. It shows that the defendant entertained malice towards his son. The threats to others and to animals shows that the defendant continually made assualts with a loaded weapon which, being a felony under Utah Code Ann. § 76-7-6 (1953), would eliminate involuntary manslaughter.

Furthermore, the reception of this evidence was

not prejudicial to the defendant since he did not object to some of it. In light of the abundance of other evidence which connected him with the killing, it cannot be said that he suffered undue prejudice by the reception of this testimony. The Supreme Court must "give judgment without regard to errors or defects which do not affect the substantial rights of the parties." Even if an error has been committed, there is no presumption of prejudice. Utah Code Ann. § 77-42-1 (1953).

POINT IV

THE EVIDENCE IS MORE THAN AMPLE TO SUPPORT A JURY VERDICT OF SECOND DEGREE MURDER.

In *People v. Davis*, 47 Cal. Rptr. 801, 408 P.2d 129 (1965), there was a conviction of second degree murder. In that case self-defense was the defendant's theory, and he claimed that there was insufficient evidence to support such a conviction. The Supreme Court of California held that the elements "may be implied from the circumstances of the homicide." The same is true in the case at bar.

To convict this defendant of second degree murder the jury had to find that there was an unlawful killing with malice aforethought. "Malice," as applied to second degree murder, is the wish to do great bodily harm. The following summary of evidence (most favorable to the State) shows that the jury came to the proper verdict—second degree murder:

1. Defendant kept a loaded gun (TR. 180).
2. Defendant got out a deer rifle after a fight with his son (TR. 185).
3. Defendant and his son had an argument which defendant started (TR. 226).
4. Defendant went for his gun first (TR. 227).
5. Defendant yelled "I'll kill you" (TR. 136).
6. Defendant shot his gun in the ground or in the air (TR. 136).
7. Defendant then saw his son with a gun and he shot his son, at a distance of two or three feet (TR. 223).
8. The defendant stated to the police that he was too close to miss (TR. 222).
9. The defendant stated to the police that "he had shot the boy and wasn't sorry" (TR. 99).

Admittedly the above summary of evidence is viewed in the light most favorable to the State, but it does show that there was ample evidence whereby the jury could find a verdict of second degree murder. In light of some of the impeachment testimony in this case, the jury found the proper verdict.

CONCLUSION

There were no errors committed by the trial court which would warrant a new trial. The *Miranda* warning was given and complied with. The court was correct in refusing the instruction of involun-

tary manslaughter. There was no error in allowing the prosecution to admit evidence which showed the defendant's state of mind. For the above stated reasons this case must be affirmed.

Respectfully submitted,

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