

FILED
United States Court of Appeals
Tenth Circuit

PUBLISH

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

March 3, 2023

Christopher M. Wolpert
Clerk of Court

TIMOTHY SUMPTER,

Petitioner - Appellee/Cross-
Appellant,

v.

STATE OF KANSAS,

Respondent - Appellant/Cross-
Appellee.

Nos. 20-3186 & 20-3206
(D.C. No. 5:19-CV-03267-JWL)
(D. Kan.)

NATIONAL ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS,

Amicus Curiae.

ORDER

Before **HOLMES**, Chief Judge, and **KELLY**, and **MATHESON**, Circuit Judges.

These matters are before the court on the Petition for Rehearing filed by
Petitioner-Appellee/Cross-Appellant. We also have a response from Respondent-
Appellant/Cross-Appellee.

Pursuant to Fed. R. App. P. 40, panel rehearing is granted in part to the extent of
the modifications in the attached revised opinion. The court’s December 28, 2022 opinion

is withdrawn and replaced by the attached revised opinion effective *nunc pro tunc* to the date the original opinion was filed.

The petition for rehearing and the attached revised opinion were transmitted to all judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, the request for rehearing en banc is denied. *See* Fed. R. App. P. 35(f).

Petitioner-Appellee/Cross-Appellant's January 18, 2023 "Motion for Extension of Time to File Brief" is denied as moot.

Entered for the Court,

A handwritten signature in black ink, appearing to read "C. M. Wolpert", written over a horizontal line.

CHRISTOPHER M. WOLPERT, Clerk

FILED
United States Court of Appeals
Tenth Circuit

PUBLISH

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

December 28, 2022

Christopher M. Wolpert
Clerk of Court

TIMOTHY SUMPTER,

Petitioner - Appellee/Cross-
Appellant,

v.

Nos. 20-3186 & 20-3206

STATE OF KANSAS,

Respondent - Appellant/Cross-
Appellee.

NATIONAL ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS,

Amicus Curiae.

Appeal and Cross-Appeal from the United States District Court
for the District of Kansas
(D.C. No. 5:19-CV-03267-JWL)

Kurtis K. Wiard, Assistant Solicitor General (Derek Schmidt, Attorney General and Kristafer R. Ailslieger, Deputy Solicitor General, with him on the briefs), Office of Attorney General, Topeka, Kansas, for Respondent-Appellant/Cross-Appellee.

Ruth Anne French Hodson of Sharp Law, LLP, Prairie Village, Kansas, for Petitioner-Appellee/Cross-Appellant.

Norman R. Mueller of Haddon, Morgan and Foreman, P.C., Denver, Colorado and Tyler J. Emerson and Kari S. Schmidt of Conlee, Schmidt & Emerson, L.L.P., Wichita, Kansas, filed an amicus curiae brief for National Association of Criminal Defense Lawyers.

Before **HOLMES**, Chief Judge, **KELLY**, and **MATHESON**, Circuit Judges.

HOLMES, Chief Judge.

Timothy Sumpter was convicted of aggravated kidnapping, attempted rape, and aggravated sexual battery, arising from his 2011 sexual assault of J.B. in Wichita, Kansas. The controlling sentence was for aggravated kidnapping, a conviction which added over 15 years to Mr. Sumpter’s sentence.

After proceeding through the Kansas courts, Mr. Sumpter filed a petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254, claiming that his convictions were obtained in violation of his constitutional rights. The district court granted in part Mr. Sumpter’s petition for relief. Specifically, the district court vacated Mr. Sumpter’s aggravated kidnapping conviction but denied his remaining claims. Furthermore, the district court denied Mr. Sumpter’s request for a certificate of appealability (“COA”) with respect to his unsuccessful claims.

The State of Kansas now appeals from the partial grant of habeas relief; Mr. Sumpter seeks to appeal from the partial denial. We **reverse** the district court’s grant of habeas relief, concluding—under the deference prescribed in the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”)—that the Kansas Court of Appeals (“KCOA”) was reasonable in determining that any ineffective assistance of counsel was not prejudicial because the evidence was sufficient to support the aggravated kidnapping conviction. Furthermore, even assuming, *arguendo*, that the KCOA’s

decision was not entitled to AEDPA deference, we conclude—under de novo review—that the KCOA’s decision should be upheld. As such, we **remand the case** with instructions to enter judgment for the State of Kansas. Additionally, having concluded that Mr. Sumpter is required to obtain a COA for the claims comprising his cross-appeal, we **deny** Mr. Sumpter a COA; accordingly, we **dismiss** his cross-appeal for lack of jurisdiction.

I

We limit our recitation of the facts to those found by the KCOA. *See Sumpter v. State (Sumpter I)*, No. 117,732, 2019 WL 257974, at *3 (Kan. Ct. App. Jan. 18, 2019) (unpublished); *see also Littlejohn v. Trammell*, 704 F.3d 817, 825 (10th Cir. 2013) (“[I]n reviewing a state court decision under § 2254(d)(1), we must ‘limit[]’ our inquiry ‘to the record that was before the state court that adjudicated the claim on the merits.’” (second alteration in original) (quoting *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011))); *Al-Yousif v. Trani*, 779 F.3d 1173, 1181 (10th Cir. 2015) (“[S]tate-court findings of fact are entitled to great deference ‘The presumption of correctness also applies to factual findings made by a state court of review based on the trial record.’” (quoting *Morgan v. Hardy*, 662 F.3d 790, 797–98 (7th Cir. 2011))).

Around 1:00 a.m. on January 11, 2011, Mr. Sumpter accosted J.B., a young woman, as she walked to her car in the Old Town entertainment district in Wichita, Kansas. When they arrived at J.B.’s car, Mr. Sumpter forced his way in, grabbed J.B., and attempted to sexually assault her. Mr. Sumpter had his knee across J.B.’s throat as he tried to touch her vagina. She briefly lost consciousness. When she

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.