

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

regained consciousness, Mr. Sumpter was masturbating and forced J.B. to touch his penis.

During the attack, Mr. Sumpter took J.B.'s car keys from her as she attempted to fight him off and threw them out the window. Part way through the attack, J.B. was able to force Mr. Sumpter out of the car and lock the doors. Mr. Sumpter then retrieved the keys and displayed them to J.B. in an effort to get her to open the door. J.B. relented, and Mr. Sumpter forced his way back into the car and resumed his assault.

Eventually, another car pulled up and Mr. Sumpter went to speak with the driver. In the meantime, J.B. found her keys and drove away.

The State charged Mr. Sumpter with aggravated kidnapping, attempted rape, and aggravated sexual battery. When Mr. Sumpter was charged, Kansas law defined kidnapping as “the taking or *confining* of any person, accomplished *by force*, threat or deception, with the intent to hold such person . . . *to facilitate* . . . the commission of any crime.” K.S.A. § 21-3420 (repealed 2011) (emphases added). Aggravated kidnapping “is kidnapping . . . when bodily harm is inflicted upon the person kidnapped.” K.S.A. § 21-3421 (repealed 2011).

In *State v. Buggs*, the Kansas Supreme Court construed the “facilitate” element as the “key word” to avoid “convert[ing] every robbery and every rape into the more serious offense of kidnapping.” 547 P.2d 720, 726, 730–31 (Kan. 1976). The *Buggs* framework requires the State to show confinement by force that: (1) “Must not be slight, inconsequential and merely incidental to the other crime”; (2) “Must not be of

the kind inherent in the nature of the other crime”; and (3) “Must have some significance independent of the other crime in that it makes the other crime substantially easier of commission or substantially lessens the risk of detection.” *Id.* at 731.

In March 2012, the Sedgwick County District Court conducted a consolidated jury trial.¹ Mr. Sumpter’s trial counsel did not offer any testimony about Mr. Sumpter’s withholding of the keys as a means of confining J.B. in her vehicle. Nor did counsel cross-examine J.B. about that issue. Trial counsel did move, however, for a judgment of acquittal at the end of the State’s case. Yet counsel did not mention the *Buggs* standard or any specific evidentiary deficiency related to the facilitation element of the aggravated kidnapping charge.

The jury found Mr. Sumpter guilty of all counts. Although trial counsel moved for a judgment of acquittal after the verdict, counsel again did not base the motion on the *Buggs* standard. For the aggravated kidnapping charge, the state district court sentenced Mr. Sumpter to 186 months of imprisonment. In total, the court sentenced Mr. Sumpter to 351 months of imprisonment. On direct appeal, appellate counsel for Mr. Sumpter did not challenge the sufficiency of the evidence as to the aggravated kidnapping conviction. The Kansas Court of Appeals affirmed

¹ Over the course of seven months, Mr. Sumpter sexually assaulted three other women in Sedgwick County, in addition to J.B. Given the similar nature of these attacks, the state district court consolidated the cases relating to these assaults for a single trial.

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