

TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

**NO. 03-02-00250-CR**

**In re Kenneth Wayne Thomas**

**FROM THE DISTRICT COURT OF RUNNELS COUNTY, 119TH JUDICIAL DISTRICT  
NO. 3852, HONORABLE CURT F. STEIB, JUDGE PRESIDING**

Kenneth Wayne Thomas appeals from an order dismissing his pro se motion for forensic DNA testing of evidence relating to his conviction for aggravated sexual assault. *See* Tex. Code Crim. Proc. Ann. arts. 64.01-.05 (West Supp. 2002).<sup>1</sup> We will affirm the district court's order.

In his motion, Thomas requested DNA testing of hair and blood samples taken from him following his arrest. The motion was not supported by the required affidavit. *Id.* art. 64.01(a). Nevertheless, the court instructed the State to respond to the motion. *Id.* art. 64.02. In its response, the State informed the court that no physical evidence was obtained during the investigation of this case. The court thereafter dismissed Thomas's motion finding that the motion did not comply with the statutory requirements, that there is no evidence subject to DNA testing and, alternatively, that the testing of hair and blood samples taken from Thomas would merely prove that the samples were taken from him and would not be exculpatory. *Id.* art. 64.03.

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<sup>1</sup> Appellant's conviction was affirmed by this Court. *Thomas v. State*, No. 03-91-00058-CR (Tex. App. CAustin Aug. 28, 1991, pet. ref'd, untimely filed) (not designated for publication).

In his brief to this Court, Thomas asserts his innocence and complains of several violations of his rights at trial. The brief does not discuss the merits of his motion for DNA testing or the court's order thereon other than to urge that the district court improperly placed the burden of proof on him. This complaint is without merit. Under the statute, the movant must establish by a preponderance of the evidence that a reasonable probability exists that he would not have been prosecuted or convicted if exculpatory results had been obtained through DNA testing. *Id.* art. 64.03(a)(2)(A).

Having reviewed the record, we find no error in the court's dismissal of the motion. Accordingly, the order is affirmed.

Mack Kidd, Justice

Before Justices Kidd, Patterson and Puryear

Affirmed

Filed: August 30, 2002

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