

Opinion issued January 31, 2011



In The  
**Court of Appeals**  
For The  
**First District of Texas**

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NOS. 01-07-00965-CR  
01-07-00966-CR  
01-07-00967-CR

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**RODNEY EARL WILLIAMS, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

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**On Appeal from the 185th District Court  
Harris County, Texas  
Trial Court Case Nos. 713885, 713886, and 713887**

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**MEMORANDUM OPINION**

Appellant, Rodney Earl Williams, appeals the trial court's orders denying his motions for postconviction DNA testing in three related

aggravated-kidnapping, aggravated-robbery, and aggravated-sexual-assault cases.<sup>1</sup> In a single issue in his combined brief, appellant contends that chapter 64 of the Code of Criminal Procedure,<sup>2</sup> governing postconviction forensic DNA testing, is unconstitutional on its face because it violates the right to procedural due process under the Fourteenth Amendment of the United States Constitution. U.S. CONST. amend. XIV, § 1. We affirm the trial court's orders.

### **Factual Background**

Appellant was convicted of three offenses in a 1996 jury trial.<sup>3</sup> In May 2007, appellant moved for postconviction DNA testing in all three cases. The State responded that it had no biological evidence, attaching affidavits to that effect. The trial court denied appellant's requests for DNA testing without holding an evidentiary hearing, and it issued findings that no evidence existed to be tested and that appellant failed to show that he would not have been convicted if

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<sup>1</sup> Trial court case numbers 713885 (appellate case number 01-07-00995-CR), 713886 (appellate case number 01-07-0996-CR), and 713887 (appellate case number 01-07-0997-CR), respectively. *See* TEX. CODE CRIM. PROC. arts. 64.03, .05 (West 2006 & Supp. 2010).

<sup>2</sup> TEX. CODE CRIM. PROC. ANN. arts. 64.01–.05 (West 2006 & Supp. 2010).

<sup>3</sup> The convictions were affirmed on appeal in *Williams v. State*, Nos. 01-96-00984-CR, 01-96-00985-CR, 01-96-00985-CR (Tex. App.—Houston [1st Dist.] Sept. 24, 1998, pets. ref'd).

exculpatory results had been obtained through DNA testing.<sup>4</sup> Appellant did not assert any challenge to the constitutionality of chapter 64 in the trial court.

### **Waiver of Constitutional Complaint**

In his sole issue on appeal, appellant presents a facial challenge to the constitutionality of chapter 64, arguing that it is unconstitutional on its face because the absence of a mechanism to ensure postconviction production or discovery of DNA evidence violates the right to procedural due process. Appellant acknowledges that he did not raise this complaint below and that even a constitutional challenge must first be asserted in the trial court in order to be preserved for appellate review, but appellant nonetheless asserts that a *facial* challenge to the constitutionality of a statute may be raised for the first time on appeal, citing to *Rabb v. State*, 730 S.W.2d 751, 752 (Tex. Crim. App. 1987) and *Briggs v. State*, 789 S.W.2d 918, 924 (Tex. Crim. App. 1990).

The Court of Criminal Appeals recently overturned this line of cases in *Karenev v. State*, in which it held that “a defendant may not raise for the first time on appeal a facial challenge to the constitutionality of a statute.” 281 S.W.3d 428, 434 (Tex. Crim. App. 2009). This holding, which as an intermediate court we are bound to apply, prevents us from considering appellant’s sole issue.

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<sup>4</sup> See TEX. CODE CRIM. PROC. ANN. art. 64.03(a)(1)(A)(i), (2) (West Supp. 2010).

Accordingly, because appellant did not present a challenge to the facial constitutionality of chapter 64 in the trial court, he may not do so now on appeal.

*See* TEX. R. APP. P. 33.1(a)(1)(A); *Karenev*, 281 S.W.3d at 434.

We overrule appellant's sole complaint.

### **Conclusion**

We affirm the trial court's orders.

Jim Sharp  
Justice

Panel consists of Justices Jennings, Alcala, and Sharp.

Do not publish. TEX. R. APP. P. 47.2(b).