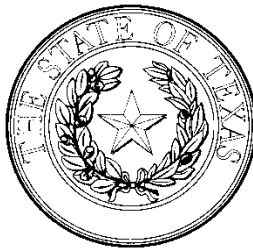


Opinion issued July 28, 2010



In The
Court of Appeals
For The
First District of Texas

NO. 01-09-00497-CR

IN RE RODNEY D. GOWANS, SR., Relator

Original Proceeding on Petition for Writ of Mandamus

MEMORANDUM OPINION

Relator, Rodney D. Gowans, Sr., has filed a motion for leave to file a petition for writ of mandamus and a petition for writ of mandamus. In his petition, relator complains that the trial court committed error by denying his request for appointment of counsel for post-conviction DNA testing in trial court cause number 13300.¹ We deny the petition.

¹ The trial court entered an order in trial court cause number 13300 denying relator's request for representation. The trial court's order states "On this date

We note that relator was convicted in trial court cause number 13300, in the 12th District Court of Grimes County, of the offense of intoxication manslaughter. His appeal was assigned to this Court as appellate case number 01-97-00187-CR. On May 27, 1999, we issued an opinion affirming judgment of the trial court. *Gowans v. State*, 995 S.W.2d 787 (Tex. App.—Houston [1st Dist.] May 27, 1999, pet. ref'd). Our mandate issued on April 26, 2000.

Relator's petition does not meet the requirements of the Texas Rules of Appellate Procedure because he has not served the respondent trial court judge² with a copy of the petition for writ of mandamus. TEX. R. APP. P. 9.5.

In addition, there are three prerequisites for the issuance of a writ of mandamus by an appellate court, namely: (1) the lower court must have a legal duty to perform a nondiscretionary act; (2) the relator must make a demand for

came on to be considered a Motion Requesting Representation for the Filing of Motion for Forensic Testing filed by Movant. The Court finds that Movant's motion informs the court that Movant wishes to submit a motion under Article 64 of the Texas Code of Criminal Procedure and that Movant has filed an Affidavit of Indigency. However, the court finds that Movant fails to allege any facts or information which would allow the Court to find reasonable grounds for a motion to be filed as required Article 64.01(c) Texas Code of Criminal Procedure. The court has also reviewed the appellate opinion in *Gowans v. State*, 995 S.W. 2d 787 (Tex. App.—Houston, 1999) which indicates that identity was not an issue in the case. Therefore, it is ORDERED that Movant's request for representation is denied unless Movant is able to present information upon which the Court can find reasonable grounds for the motion to be filed." Relator's remedy is to file in the trial court a motion that complies with the requirements of Article 64 of the Texas Code of Criminal Procedure. TEX. CODE CRIM. PROC. ANN. art. 64.01 (Vernon Supp. 2009). See *Gutierrez v. State*, 307 S.W.3d 318, (Tex. Crim. App. App. 2010).

² Relator states the Respondent is the "Presiding Judge of Criminal District Court 12 of Grimes County." Relator has not named the respondent trial court judge. TEX. R. APP. P. 52.3.

performance; and (3) the subject court must refuse that request; *Barnes v. State*, 832 S.W.2d 424, 426 (Tex. App.—Houston [1st Dist.] 1992, orig. proceeding). Relator has not provided us with a record that shows that he made any request of respondent to perform a nondiscretionary act that respondent refused. The record provided by relator includes a copy of the trial court’s order denying his motion.

Relator has not provided us with a record that shows that the trial court refused to perform a nondiscretionary act.

Motions for leave to filed petitions in original proceedings are no longer required by the Rules of Appellate Procedure. TEX. R. APP. P. 52.1. We deny the motion for leave to file.

The petition for writ of mandamus is **denied**.

PER CURIAM

Panel consists of Justices Keyes, Hanks, and Higley.

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