

Opinion issued August 11, 2011.



In The
Court of Appeals
For The
First District of Texas

NO. 01-10-00423-CR

CLYDE URA CAIN, SR., Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the 228th District Court
Harris County, Texas
Trial Court Cause No. 578488**

MEMORANDUM OPINION

Appellant, Clyde Ura Cain, Sr., attempts to appeal from the trial court's order denying his request for appointed counsel to assist in filing for post-conviction DNA testing under Texas Code of Criminal Procedure article 64.01. *See* TEX. CODE CRIM. PROC. ANN. art. 64.01 (West Supp. 2010).

We dismiss.

“[A] motion for appointed counsel is a preliminary matter that precedes the initiation of Chapter 64 proceedings.” *Gutierrez v. State*, 307 S.W.3d 318, 323 (Tex. Crim. App. 2010). “At this stage, a convicted person has only contemplated the filing of a motion for DNA testing.” *Id.* (citing TEX. CODE CRIM. PROC. ANN. art. 64.01(c) (providing that defendant must inform trial court that he “wishes” to submit motion for DNA testing)). Thus, a trial court’s order denying a request for the appointment of counsel under article 64.01(c) is not immediately appealable under Rule of Appellate Procedure 25.2(a)(2). *Id.*; see TEX. R. APP. P. 25.2(a)(2). Any alleged error made by the trial court in refusing to appoint counsel must be raised in an appeal from the final order denying DNA testing. *Id.* If a reviewing court determines that the trial court erred by failing to appoint counsel, the case is then remanded to the trial court for the appellant to file a subsequent motion for DNA testing with the assistance of counsel. *Id.*

Here, because appellant attempts to appeal the trial court’s denial of his motion for the appointment of counsel, rather than a final order denying a motion for DNA testing under article 64.01, we lack jurisdiction to consider the appeal. *See id.* Accordingly, we dismiss the appeal for lack of jurisdiction. *See id.*; TEX. R. APP. P. 43.2(f). All pending motions are dismissed as moot.

PER CURIAM

Panel consists of Chief Justice Radack and Justices Brown and Huddle.

Do not publish.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