

Opinion issued February 8, 2022



In The
Court of Appeals
For The
First District of Texas

NO. 01-21-00423-CR

ALBERT PAUL DURAND, JR., Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 185th District Court
Harris County, Texas
Trial Court Case No. 1014716

MEMORANDUM OPINION

Albert Paul Durand, Jr., attempts to appeal from the trial court's July 15, 2021 order denying his motion requesting appointment of counsel to assist him in filing a motion for post-conviction DNA testing under Chapter 64 of the Texas Code of Criminal Procedure. *See* TEX. CODE. CRIM PROC. art. 64.01. Because the order

denying Durand’s request for appointment of counsel is not an immediately appealable order, we dismiss the appeal.

“[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. 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. *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. *Gutierrez*, 307 S.W.3d at 323. If a reviewing court determines that the trial court erred by failing to appoint counsel at that point, 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.*

Although Durand’s notice of appeal asserts that the trial court’s July 15, 2021 order “denied postconviction DNA testing,” the order only denies Durand’s request for appointment of counsel to assist in filing a motion for post-conviction DNA testing. The record does not contain either a motion for post-conviction DNA testing or an order denying such relief. Because Durand attempts to appeal an order denying

his motion for appointment of counsel, rather than a final order denying a motion for DNA testing under article 64.01, we have no jurisdiction to consider the appeal. *See id.*; *see also Campbell v. State*, No. 01-18-00087-CR, 2018 WL 2305526, at *1 (Tex. App.—Houston [1st Dist.] May 22, 2018, no pet.) (mem. op., not designated for publication) (per curiam) (dismissing, for want of jurisdiction, appeal from denial of request for appointed counsel to represent appellant in seeking post-conviction DNA testing because appeal was not from final order denying motion for DNA testing).

Accordingly, we dismiss this appeal for lack of jurisdiction. *See Gutierrez*, 307 S.W.3d at 323; *Campbell*, 2018 WL 2305526, at *1; *see also* TEX. R. APP. P. 43.2(f). We dismiss any pending motions as moot.

PER CURIAM

Panel consists of Justices Goodman, Rivas-Molloy, and Farris.

Do not publish.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