COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-16-00133-CR

WOODY GERARD SOLOMON — APPELLANT

V.

THE STATE OF TEXAS — STATE

FROM CRIMINAL DISTRICT COURT NO. 3 OF TARRANT COUNTY
TRIAL COURT NO. 0466345R

MEMORANDUM OPINION[1]

Appellant Woody Gerard Solomon, a prisoner appearing pro se, appeals the trial court's orders denying his motion for postconviction forensic DNA retesting and for appointment of counsel. *See* Tex. Code Crim. Proc. Ann. art. 64.01(a–1), (c) (West Supp. 2016). We will affirm.

[1]*See* Tex. R. App. P. 47.4.

A jury convicted Solomon of aggravated sexual assault of a child younger than seventeen years of age.[2] *See* Tex. Penal Code Ann. § 22.021(a)(1)(B)(ii), (a)(2)(A) (West Supp. 2016); *Solomon*, 854 S.W.2d at 266. Solomon appealed, and we affirmed his conviction. *Solomon*, 854 S.W.2d at 270.

Solomon thereafter sought DNA testing under chapter 64 of the code of criminal procedure. *See* Tex. Code Crim. Proc. Ann. arts. 64.01–.05 (West 2006 & Supp. 2016). The trial court signed an order finding that the DNA test results were inconclusive and therefore not favorable to Solomon. *See id.* 64.04. The trial court explained, "[U]nder the factual circumstances of this case, the absence of [Solomon's] DNA from the vaginal swab and the [pubic] hair combing do not

---

[2]The jury convicted Solomon on the second count in the indictment, which was set forth in the jury charge as follows:

> If you find from the evidence beyond a reasonable doubt that on or about the 24TH day of September, 1991, in Tarrant County, Texas, the defendant, WOODY SOLOMON, did then and there intentionally or knowingly cause the penetration of the mouth of [C.C.], a child younger than 17 years of age who was not the spouse of said defendant with the sexual organ of said defendant and the defendant by acts or words placed [C.C.] in fear that death or serious bodily injury would be imminently inflicted on [C.C.] and the defendant by acts or words occurring in the presence of [C.C.] threatened to cause the death of or serious bodily injury to [C.C.], then you will find the defendant guilty of the offense of aggravated sexual assault of a child as charged in Count Two of the indictment.
>
> Unless you so find and believe from the evidence beyond a reasonable doubt, or if you have a reasonable doubt thereof, you will acquit the defendant and say by your verdict "not guilty."

Solomon v. State, 854 S.W.2d 265, 269 (Tex. App.—Fort Worth 1993, no pet.).

create a reasonable probability that the defendant would not have been convicted had the test results been available at the time of trial." Solomon appealed the trial court's order, which we affirmed. *Solomon v. State*, No. 02-13-00593-CR, 2015 WL 601877, at *6 (Tex. App.—Fort Worth Feb. 12, 2015, no pet.) (mem. op., not designated for publication).

Nine months after we issued our opinion, Solomon filed "Defendant's Motion For Mitochondrial And Y-Short Tandem Repeat DNA Testing Of Evidence Containing Biological Material," in which he requested "the retesting of the items in the sexual assault kit and other physical evidence" and the appointment of counsel. The trial court denied Solomon's motion for forensic DNA retesting because the evidence had previously been subjected to postconviction forensic DNA testing, which the trial court found was not favorable to him, and because he failed to show "that newer DNA testing would produce a more probative or accurate result" or to meet "the requirements of article 64.01 of the Code of Criminal Procedure for new post-conviction forensic DNA testing of previously-tested evidence." *See* Tex. Code Crim. Proc. Ann. art. 64.01(b)(2). The trial court also denied Solomon's motion for appointment of counsel because reasonable grounds did not exist for the trial court to appoint postconviction DNA counsel under article 64.01 of the Texas Code of Criminal Procedure. *See id.* art. 64.01(c) (requiring appointment of counsel for indigent defendant only if trial court finds reasonable grounds for motion). Solomon filed a notice of appeal from the trial court's order denying his motions. *See id.* art. 64.05.

On June 6, 2016, we notified Solomon that his brief in this appeal was due by July 6, 2016. Solomon thereafter filed a motion for extension of time to file his brief; we granted an extension and ordered Solomon's brief due on September 6, 2016. On September 28, 2016, we notified Solomon that his brief had not been timely filed and that unless he filed a motion reasonably explaining the failure to file a brief and the need for an extension by October 12, 2016, we could consider and decide the appeal without a brief. *See* Tex. R. App. P. 38.2(b)(2). In an order dated November 7, 2016, we stated that Solomon had not filed a brief and ordered that the case be submitted without briefs.[3] *See* Tex. Code Crim. Proc. Ann. art. 44.33(b) (West 2006); Tex. R. App. P. 38.8(b)(4).

Rule of appellate procedure 38.8(b)(4) provides that an appellate court in a criminal case may consider an appeal without briefs, as justice may require. Tex. R. App. P. 38.8(b)(4). "[A]n appellate court's inherent power to dismiss a case is reserved for those situations in which a party has engaged in serious misconduct such as bad-faith abuse of the judicial process." *Burton v. State*, 267 S.W.3d 101, 103 (Tex. App.—Corpus Christi 2008, no pet.) (relying on Tex. Code Crim. Proc. Ann. art. 44.33(b)). Solomon has not filed a brief, but that failure in itself does not constitute serious misconduct or bad-faith abuse of the judicial process.

[3]We did not abate this appeal pursuant to rule 38.8(b). *See* Tex. R. App. P. 38.8(b). Because Solomon has no constitutional right to counsel in a chapter 64 proceeding, abating the appeal to ensure compliance with a right that Solomon does not possess would be a useless act. *See Homan v. Hughes*, 708 S.W.2d 449, 454 (Tex. Crim. App. 1986) (stating that the law does not compel us to require courts to perform useless tasks).

See Baker v. State, No. 02–14–00157–CR, 2015 WL 392640, at *2 (Tex. App.—Fort Worth Jan. 29, 2015, no pet.) (mem. op. on reh'g, not designated for publication). We therefore submitted this cause without briefs.

When an appellant fails to file a brief and we consider the case without briefs, we review the entire appellate record to determine if fundamental error exists. Tex. R. App. P. 38.8(b)(4); *see Green v. State*, No. 01-14-00960-CR, 2016 WL 3162165, at *2 (Tex. App.—Houston [1st Dist.] June 2, 2016, no pet.) (mem. op., not designated for publication). Fundamental error falls into three classes: (1) errors recognized by the legislature as fundamental; (2) the violation of waivable rights; and (3) the denial of absolute, systemic requirements. *Saldano v. State,* 70 S.W.3d 873, 887–88 (Tex. Crim. App. 2002). Fundamental errors include: (1) denial of the right to counsel, (2) denial of the right to a jury trial, (3) denial of ten days' preparation before trial for appointed counsel, (4) absence of jurisdiction over the defendant, (5) absence of subject-matter jurisdiction, (6) prosecution under a penal statute that does not comply with the Separation of Powers section of the state constitution, (7) jury charge errors resulting in egregious harm, (8) holding trials at a location other than the county seat, (9) prosecution under an ex post facto law, and (10) comments by a trial judge that taint the presumption of innocence. *Id.* When a postconviction-DNA-testing-order appeal is submitted without briefs, our review of the record for fundamental error is limited to the record related to the appellant's request for postconviction DNA testing, as opposed to the record of the underlying

conviction. *See Watkins v. State*, 155 S.W.3d 631, 634–35 & 634 n.5 (Tex. App.—Texarkana 2005, no pet.). Limiting our review to the record related to Solomon's request for postconviction forensic DNA retesting,[4] we do not find fundamental error.[5] *See Green*, 2016 WL 3162165, at *2.

Having found no fundamental error, we affirm the trial court's order denying Solomon's combined motion for postconviction forensic DNA retesting and for appointment of counsel. *See id.*; *Adeleke v. State*, No. 02-15-00368-CR, 2016 WL 3033496, at *1 (Tex. App.—Fort Worth May 26, 2016, no pet.) (mem. op., not designated for publication) (affirming trial court's orders denying appellant's motions for postconviction forensic DNA testing and for appointment

[4]The court reporter notified this court that no reporter's record was made for any proceedings in the trial court related to Solomon's motion for postconviction forensic DNA retesting; therefore, the appellate record contains only the clerk's record.

[5]Regarding the first potential fundamental error—denial of the right to counsel—although there is a statutory right to counsel, there is no federal or state constitutional right to counsel in a chapter 64 proceeding. *See Winters v. Presiding Judge of Crim. Dist. Ct. No. Three of Tarrant Cty.*, 118 S.W.3d 773, 774 (Tex. Crim. App. 2003); *Ard v. State*, 191 S.W.3d 342, 344 (Tex. App.—Waco 2006, pet. ref'd). We therefore fail to see how fundamental error can flow from the denial of Solomon's request for counsel in this context. *See Arizona v. Fulminante*, 499 U.S. 279, 309–10, 111 S. Ct. 1246, 1264–65 (1991) (explaining that fundamental error occurs when certain constitutional rights are violated, such as the right to counsel); *Arguellez v. State*, No. 13–09–00136–CR, 2009 WL 3210934, at *3 (Tex. App.—Corpus Christi Oct. 8, 2009, no pet.) (mem. op., not designated for publication) (reasoning that fundamental errors are violations of rights that are "waivable only" or denials of absolute systemic requirements). And, as previously mentioned, the trial court determined that the statutory requisites for appointment of counsel were not met.

of counsel after examination of record did not reveal any unassigned fundamental error).

PER CURIAM

PANEL: WALKER, J.; LIVINGSTON, C.J.; and SUDDERTH, J.

DO NOT PUBLISH
Tex. R. App. P. 47.2(b)

DELIVERED: December 15, 2016