TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-16-00404-CR
NO. 03-16-00405-CR

Frank Joseph, Appellant

v.

The State of Texas, Appellee

FROM THE DISTRICT COURT OF TRAVIS COUNTY, 299TH JUDICIAL DISTRICT
NOS. D-1-DC-04-904186 & D-1-DC-04-904187,
THE HONORABLE KAREN SAGE, JUDGE PRESIDING

M E M O R A N D U M O P I N I O N

Appellant Frank Joseph is serving two 30-year sentences for aggravated sexual assault of a child and indecency with a child by sexual contact. *See* Tex. Penal Code §§ 21.11(a)(1), 22.021(a)(1)(B). He now appeals the trial court's denial of his motion for post-conviction forensic DNA testing under Chapter 64 of the Texas Code of Criminal Procedure. *See* Tex. Code Crim. Proc. art. 64.01. We affirm the trial court's order denying testing.

BACKGROUND

In 2005, a jury convicted appellant of aggravated sexual assault of a child and indecency with a child by sexual contact for sexually abusing two young girls who attended the day care operated by appellant's wife in their home. *See Joseph v. State*, Nos. 03-05-00433-CR &

03-05-00434-CR, 2007 WL 283030, at *1 (Tex. App.—Austin Jan. 31, 2007, pet. ref'd) (mem. op., not designated for publication). On appeal, this Court affirmed the convictions. *Id.* at *4.

On March 24, 2016, appellant filed a motion requesting post-conviction DNA testing pursuant to Chapter 64 of the Code of Criminal Procedure.[1] *See* Tex. Code Crim. Proc. art. 64.01. On April 4, 2016, the State filed a response opposing appellant's request. On April 18, 2016, appellant filed two additional motions: one requesting appointed counsel, the other seeking to supplement his motion for DNA testing. On May 17, 2016, the trial court signed an order denying appellant's motion for post-conviction DNA testing. In the order, the trial court made the following finding of fact:

> 1. Applicant's motion for post-conviction DNA testing makes no reference to any facts relating to this case. Applicant has failed to establish that biological evidence exists, that the evidence is in a condition to be tested, that the identity of the perpetrator is or was an issue, and that this is the type of case in which exculpatory DNA results would make a difference. As a result, Applicant has failed to establish, by a preponderance of the evidence, that he would not have been convicted if exculpatory results had been obtained through DNA testing.

In addition, the trial court made the following conclusion of law:

> 1. With regard to the applicant's motion for post-conviction DNA testing, the requirements of Article 64.03 of the Texas Code of Criminal Procedure have

[1] This was not appellant's first request for DNA testing. In 2015, appellant filed a motion seeking post-conviction DNA testing in these cases, which the trial court denied. *See Joseph v. State*, Nos. 03-15-00711-CR & 03-15-00712-CR, 2015 WL 9436661, at *1 (Tex. App.—Austin Dec. 17, 2015, no pet.) (mem. op., not designated for publication). This Court dismissed appellant's attempted appeals of the order denying those motions for want of jurisdiction because appellant's notices of appeal were untimely filed. *Id.*

> not been satisfied. *See* TEX. [CODE] CRIM. PROC. art. 64.03(a)(l)(B), (a)(2)(A). As a consequence, this Court does not have the authority to order post-conviction DNA testing. *See* TEX. [CODE] CRIM. PROC. art. 64.03(a).

The court's order reflected consideration of the motion for post-conviction DNA testing that was filed on March 24, 2016; the order did not explicitly address either of the motions appellant filed on April 18, 2016.

DISCUSSION

In his sole point of error, appellant contends that the trial court erred by not granting his request for appointed counsel to assist him in seeking post-conviction forensic DNA testing.

Jurisdiction

Initially, within its brief, the State presents a motion to dismiss these appeals. The State requests dismissal because, according to the State, appellant seeks to appeal an order that is not an appealable order. It is true that the trial court's decision to deny a request for appointed counsel to assist in filing a motion for post-conviction DNA testing under Chapter 64 is not immediately appealable. *See Gutierrez v. State*, 307 S.W.3d 318, 322–23 (Tex. Crim. App. 2010) (recognizing distinction between "issues that may be litigated on appeal and issues that are immediately appealable" and holding that trial court's order denying appointment of counsel under Chapter 64 does not constitute immediately appealable order but permitting eventual review of that matter on direct appeal under Article 64.05 following denial of testing). However, we do not construe appellant's notice of appeal in these cases to be notice of appellant's desire to appeal the denial of

his request for appointed counsel. *See Harkcom v. State*, 484 S.W.3d 432, 434 (Tex. Crim. App. 2016) ("The Rules of Appellate Procedure should be construed reasonably, yet liberally, so that the right to appeal is not lost by imposing requirements not absolutely necessary to effect the purpose of a rule.") (citing *Few v. State*, 230 S.W.3d 184, 189 (Tex. Crim. App. 2007)). Here, appellant's notice of appeal references the requirements for DNA testing under Article 64.03 and asserts appellant's belief that he is entitled to such testing. *See id.* ("magic words" not necessary; "[a]ll that is required is that the notice . . . show the party's desire to appeal from the . . . appealable order"). The notice does not mention the denial of his request for appointed counsel. Moreover, subsequent to filing the notice of appeal in these cases, appellant filed a separate notice of appeal attempting to appeal "from an order denying appointment of counsel." We dismissed those appeals for want of jurisdiction because, as noted above, an order denying appointed counsel under Chapter 64 is not an appealable order. *See Joseph v. State*, Nos. 03-17-00006-CR & 03-17-00007-CR, 2017 WL 637239, at *1 (Tex. App.—Austin Feb. 3, 2017, no pet.) (mem. op., not designated for publication). The State's motion to dismiss is denied.

Preservation

The State next argues that appellant has failed to preserve his complaint about the denial of his request for appointed counsel for appellate review because the trial court never ruled on appellant's motion requesting appointed counsel. *See* Tex. R. App. P. 33.1(a) (to preserve complaint for appellate review, party must have presented specific and timely request, motion, or objection to trial court and, further, must have obtained adverse ruling). While it is true that no signed order denying appellant's motion requesting appointed counsel appears in the record, we

conclude, on this record, that the trial court's order denying appellant's request for DNA testing, entered after appellant made his request for appointed counsel, impliedly denied appellant's request for appointed counsel. *See* Tex. R. App. P. 33.1(a)(2)(A) (providing that to preserve error, record must show that trial court "ruled on the request, objection, or motion, either expressly or implicitly"). Accordingly, we address the merits of appellant's single point of error.

Right to Appointed Counsel

Chapter 64 of the Code of Criminal Procedure establishes the procedures for a convicted person to obtain post-conviction DNA testing, *see generally* Tex. Code Crim. Proc. arts. 64.01(a)–.05, including a limited right to appointed counsel to pursue DNA testing. *Ex parte Gutierrez*, 337 S.W.3d 883, 899 (Tex. Crim. App. 2011); *Padilla v. State*, Nos. 03-12-00299-CR, 03-12-00300-CR, & 03-12-00301-CR, 2013 WL 3185896, at *3 (Tex. App.—Austin June 20, 2013, pet. ref'd) (mem. op., not designated for publication); *see* Tex. Code Crim. Proc. art. 64.01(c) (establishing prerequisites for appointment of counsel in Chapter 64 proceeding). Appointment of counsel in a post-conviction DNA proceeding is conditioned on three criteria: (1) the convicted person must inform the convicting court that he wishes to submit a motion for DNA testing; (2) the convicting court must find that "reasonable grounds" exist for filing a DNA motion; and (3) the convicting court must find that the convicted person is indigent. Tex. Code Crim. Proc. art. 64.01(c); *see Gutierrez*, 307 S.W.3d at 321. There is no dispute that the first and third requirements are satisfied in this case. The only issue is whether there are "reasonable grounds" for a motion for DNA testing to be filed.

Although a convicted person need not prove his entitlement to DNA testing to obtain an appointed attorney, he must demonstrate "reasonable grounds" for the motion for DNA testing to be filed. *See Gutierrez*, 337 S.W.3d at 891, 889 (right to appointed counted "used to be absolute, but it is now conditioned on the trial judge's finding 'that reasonable grounds exist for the filing of a motion'") (internal citations omitted); *Ates v. State*, No. 03-15-00307-CR, 2016 WL 3361173, at *1 (Tex. App.—Austin June 8, 2016, no pet.) (mem. op., not designated for publication). "Reasonable grounds are present when the facts stated in the request for counsel or otherwise known to the convicting court reasonably suggest that a 'valid' or 'viable' argument for testing can be made." *Gutierrez*, 337 S.W.3d at 891. Determining whether "reasonable grounds" exist for testing "necessarily turns on what is required for testing." *Id.*

Several requirements must be met in order to obtain DNA testing under Chapter 64, and the convicting court may order forensic DNA testing only if the statutory preconditions are met. *See* Tex. Code Crim. Proc. art. 64.03(a); *Bell v. State*, 90 S.W.3d 301, 306 (Tex. Crim. App. 2002); *see also Swearingen v. State*, 303 S.W.3d 728, 731 (Tex. Crim. App. 2010) ("Chapter 64 requires multiple threshold criteria to be met before a convicted person is entitled to DNA testing."). The statutory requirements for post-conviction DNA testing are that:

- the evidence still exists and is in a condition making DNA testing possible, Tex. Code Crim. Proc. art. 64.03(a)(1)(A)(i);
- the evidence has been maintained such that it has not been materially altered, *id.* art. 64.03(a)(1)(A)(ii);
- the evidence is reasonably likely to contain biological material suitable for DNA testing, *id*. art. 64.03(a)(1)(B);

- the identity of the perpetrator was or is an issue, *id.* art. 64.03(a)(1)(C);
- the convicted person would not have been convicted if exculpatory results had been obtained by DNA testing, *id.* art. 64.03(a)(2)(A); and
- the request for DNA testing is not made to unreasonably delay execution of sentence or administration of justice, *see id.* art. 64.03(a)(2)(B).

See also Gutierrez, 337 S.W.3d at 889 (addressing requirements of prior version of statute: "Basic requirements for post-conviction DNA testing are that biological evidence exists, that evidence is in a condition that it can be tested, that the identity of the perpetrator is or was an issue, and that this is the type of case in which exculpatory DNA results would make a difference.").

The relevant portion of appellant's motion requesting DNA testing asked the trial court for testing

> on biological material related to his case based on the grounds of his actual innocent [sic] on the grounds that the prosecutor–State of Texas as Respondent herein after did not act within due diligence under the case of Williams v. Taylor, cite as 120 S.Ct. 1495 (2000) in bring [sic] the case forward for an evidentiary hearing on the evidence and delaying all proceedings in its effort to by [sic] time and that the evidence that are [sic] currently in the possession of the State–Appellant agents.

This motion does not approach the threshold of presenting reasonable grounds for requesting DNA testing. *See Gutierrez*, 337 S.W.3d at 892 ("Before appointing an attorney, the trial judge needs 'reasonable grounds' to believe that (1) a favorable forensic test is a viable, fair and rational possibility, and (2) such a test could plausibly show that the inmate would not have been convicted."). First, the motion does not include an affidavit containing facts in support of the motion. *See* Tex. Code Crim. Proc. art. 64.01(a–1) (motion "must be accompanied by an affidavit,

sworn to by the convicted person, containing statements of fact in support of the motion"); *see also Skinner v. State*, 484 S.W.3d 434, 438 (Tex. Crim. App. 2016) (addressing statute's affidavit requirement and recognizing that failure to comply with verification requirement of statute was pleading deficiency that, though not jurisdictional, may be fatal to filing). Second, the motion does not specify what evidence should be tested,[2] let alone state that the evidence still exists and is in a condition to be tested, assert that the evidence is reasonably likely to contain biological evidence suitable for DNA testing, or indicate that the evidence has been properly maintained such that it has not been materially altered. *See* Tex. Code Crim. Proc. art. 64.03(a)(1)(A), (B). Further, the motion fails to assert that identity was or is an issue in the case or to claim that appellant would not have been convicted had exculpatory DNA results been obtained. *See id.* art. 64.03(a)(1)(C), (2)(A). Finally, the motion does not affirm that appellant's request was "not made to unreasonably delay the execution of sentence or administration of justice." *See id.* art. 64.03(a)(2)(B).

[2] *See, e.g.*, *LaRue v. State*, 518 S.W.3d 439, 445 (Tex. Crim. App. 2017) (defendant sought further testing of oral swabs and fingernail scrapings from capital murder victim, T-shirt, bloody fingerprint found on door, and cigarette butt); *Reed v. State*, — S.W.3d —, No. AP-77,054, 2017 WL 1337661, at *3 (Tex. Crim. App. Apr. 12, 2017) (defendant sought further testing of over 40 items collected during investigation, including specified items recovered from capital murder victim's body or her clothing, specified items found in or near her fiancé's truck, and specified items found near victim–recovery scene); *State v. Swearingen*, 478 S.W.3d 716, 719–20 (Tex. Crim. App. 2015), *cert. denied*, 137 S. Ct. 60 (2016) (defendant sought additional testing of fingernail scrapings from capital murder victim's hands, torn pantyhose used as ligature to strangle victim, hair and other samples collected from ligature, four cigarette butts found near victim's body, several specified items of victim's clothing, "rape kit," and hairs collected from body, gloves used to move victim's body, and hairbrush found near scene); *Ex parte Gutierrez*, 337 S.W.3d 883, 888 (Tex. Crim. App. 2011) (defendant sought testing of blood samples, shirt, nail scrapings, and hair).

We note that in response to the State's memorandum opposing appellant's request for DNA testing, which pointed out deficiencies in appellant's motion for DNA testing, appellant filed a *Motion to Supplement Motion for D.N.A. Testing*, in which he averred,

> . . . I am innocent of the charge for which I was convicted and if biological evidence exists that is sufficient for testing it would exonerate me [of] this crime. Identity was not an issue at [trial] but it should have been and is an issue now. I did not commit this crime if in fact it did occur at all. I do believe that technological advancements in technology not available before can be useful in excluding me as one of the perpetrators.

This document—even if construed as a supporting "affidavit" or a supplement to appellant's motion for DNA testing—does not present any facts that could support "reasonable grounds" for DNA testing. Like the motion itself, this document does not specify what evidence should be tested, state that the evidence still exists and is in a condition to be tested, assert that the evidence is reasonably likely to contain biological evidence suitable for DNA testing, or indicate that the evidence has been properly maintained such that it has not been materially altered. *See id.* art. 64.03(a)(1)(A), (B). While appellant asserts in this document that identity "should have been and is an issue now," he offers no factual basis showing how identity was or is an issue. In addition, this document fails to show that appellant would not have been convicted had exculpatory DNA results been obtained; appellant merely summarily asserts that if biological evidence that could be tested exists, "it would exonerate [him]." *See id.* art. 64.03(a)(1)(C),(2)(A). Finally, like the motion, this document does not affirm that appellant's request was "not made to unreasonably delay the execution of sentence or administration of justice." *See id.* art. 64.03(a)(2)(B). Thus, even when construing this document

as an "affidavit" or supplement and considering it in connection with appellant's motion for DNA testing, appellant still fails to present "reasonable grounds" for filing a motion for DNA testing.

Appellant's request for post-conviction DNA testing—void of any facts relating to this case—failed to meet any of the prerequisites to obtaining DNA testing under Chapter 64. Thus, appellant failed to present "reasonable grounds" for a motion to be filed and, consequently, did not establish his entitlement to an appointed attorney under article 64.01(c). Accordingly, the trial court did not err in failing to appoint counsel. *See Olivarez v. State*, No. 13-11-00483-CR, 2012 WL 5187911, at *2 (Tex. App.—Corpus Christi Oct. 18, 2012, no pet.) (mem. op., not designated for publication) ("If a convicted person who bears the burden of satisfying the requirements of Chapter 64 fails to meet the preconditions to obtaining post-conviction DNA testing, he has failed to set forth reasonable grounds to file a motion and, therefore, is not entitled to the appointment of counsel."); *see, e.g.*, *Peyravi v. State*, 440 S.W.3d 248, 250 (Tex. App.—Houston [14th Dist.] 2013, no pet.) (concluding that trial court's denial of request for appointment of counsel was not error because, since appellant admitted to stabbing victim, identity was not at issue and, thus, appellant failed to set forth reasonable grounds for filing motion); *Lewis v. State*, 191 S.W.3d 225, 229 (Tex. App.—San Antonio 2005, pet. ref'd) (concluding that appellant was not entitled to appointed counsel under article 64.01(c) because motion for post-conviction DNA testing failed to meet two preconditions to obtaining DNA testing under Chapter 64 and, thus, also failed to demonstrate reasonable grounds for motion to be filed). We overrule appellant's sole point of error.

CONCLUSION

Having overruled appellant's sole point of error, we affirm the trial court's order denying appellant's motion for DNA testing.[3]

Melissa Goodwin, Justice

Before Chief Justice Rose, Justices Goodwin and Bourland

Affirmed

Filed: August 9, 2017

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[3] Further, we deny all pending motions.