



NUMBER 13-07-00158-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

GODFREY GARCIA,

Appellant,

v.

THE STATE OF TEXAS,

Appellee.

On appeal from the 105th District Court of Nueces County, Texas.

MEMORANDUM OPINION

**Before Chief Justice Valdez and Justices Yañez and Benavides
Memorandum Opinion by Chief Justice Valdez**

Appellant, Godfrey Garcia, proceeding pro se, appeals from the trial court's denial of his sixth motion for post-conviction DNA testing. See TEX. CODE CRIM. PROC. ANN. art. 64.03 (Vernon Supp. 2007). We affirm.

In 1996, Garcia was convicted by a jury of the offense of aggravated sexual assault. Garcia appealed to this Court and argued, among other things, that "the sex was

consensual;” therefore, he could not be convicted of sexual assault. See *Garcia v. State*, No. 13-96-128-CR, 1997 Tex. App. LEXIS 3633, at *8 (Tex. App.–Corpus Christi 1997, no pet.) (not designated for publication). This Court affirmed his conviction in 1997. See *id.* at *11.

Garcia subsequently filed five post-conviction motions for DNA testing. See TEX. CODE CRIM. PROC. ANN. art. 64.01 (Vernon Supp. 2007). The trial court denied his fifth motion on October 9, 2003, and Garcia appealed that ruling. This Court, however, held that Garcia’s notice of appeal was untimely filed, and we dismissed his appeal for want of jurisdiction. See *Garcia v. State*, No. 13-04-039-CR, 2004 Tex. App. LEXIS 4056, at *2-4 (Tex. App.–Corpus Christi 2004, no pet.).¹ On February 8, 2007, Garcia filed a sixth motion for DNA testing. The trial court denied Garcia’s sixth motion on February 17, 2007. Garcia filed a notice of appeal on March 5, 2007.

The trial court may order DNA testing only when identity is an issue. See TEX. CODE CRIM. PROC. ANN. art. 64.03(a)(1)(B); *cf. Green v. State*, 100 S.W.3d 344, 345 (Tex. App.–San Antonio 2002, pet. ref’d) (holding that the trial court did not err in denying Green’s motion for DNA testing when he did not raise any issue regarding the sufficiency of the evidence to prove his identity as the assailant and did not assert any facts supporting his assertion that identity is or was an issue); *In re McBride*, 82 S.W.3d 395, 397 (Tex. App.–Austin 2002, no pet.) (holding identity not at issue where appellate challenge to sufficiency of the evidence was directed to an element other than identity). In the present

¹ Garcia also sought a writ of mandamus from this Court, which we denied, stemming from his prior motions for DNA testing. *Garcia v. State*, No. 13-04-458-CR, 2004 Tex. App. LEXIS 8279 (Tex. App.–Corpus Christi 2004, orig. proceeding) (mem. op., not designated for publication)..

case, Garcia argued that “the sex was consensual,” see *Garcia*, 1997 Tex. App. LEXIS 3633, at *8; therefore identity is not an issue.

We affirm the trial court’s order denying Garcia’s sixth motion for post-conviction DNA testing.

ROGELIO VALDEZ
Chief Justice

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

Memorandum Opinion delivered and
filed this the 17th day of July, 2008.