

NO. 12-20-00121-CR

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

***JOE MARLIN GILMER,
APPELLANT***

§ *APPEAL FROM THE*

V.

§ *COUNTY COURT AT LAW*

***THE STATE OF TEXAS,
APPELLEE***

§ *VAN ZANDT COUNTY, TEXAS*

***MEMORANDUM OPINION
PER CURIAM***

Joe Marlin Gilmer, acting pro se, filed a notice of appeal from an order denying his motion for appointment of counsel – forensic DNA testing. Appellant has not filed a motion for DNA testing, only a motion for appointment of counsel for purposes of seeking DNA testing under Chapter 64 of the Texas Code of Criminal Procedure.

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.*

A request for appointed counsel in no way legally binds the convicted person to file a motion for DNA testing. A convicted person may always opt to decline to pursue DNA testing, even after consulting with counsel. Or a convicted person may attempt to cure any deficiencies in an initial request for appointed counsel by filing another request. Indeed, there is no limit to the number of requests for appointed counsel that a convicted person may make.

Id. Consequently, “it would be a waste of judicial resources to entertain a challenge to a trial judge’s refusal to appoint counsel when the convicted person has not yet initiated Chapter 64 proceedings.” *Id.* The convicted person should file a motion for DNA testing and, if and when the motion is denied, appeal any alleged error made by the trial court in refusing to appoint

counsel. *Id.* If the reviewing court determines that the trial court erroneously failed to appoint counsel, then the case will be remanded to the trial court so the convicted person can file a subsequent motion for DNA testing with the assistance of counsel. *Id.* Accordingly, an order denying appointed counsel under Chapter 64 is not immediately appealable. *Id.*

On April 28, 2020, the Clerk of this Court notified Appellant that the notice of appeal received failed to show this Court’s jurisdiction, i.e., the order being appealed is not appealable. The notice further stated that the appeal would be dismissed unless the notice of appeal was amended on or before May 28 to show this Court’s jurisdiction. Appellant filed a second amended notice of appeal, but that notice does not indicate that he filed a motion for DNA testing and obtained a ruling thereon.¹ Nor does the record reflect that Appellant filed a motion for DNA testing with the trial court or that the trial court denied any such motion. The Clerk of this Court contacted the Van Zandt County Clerk’s Office and that office has no motion for DNA testing on file in this case. Because the denial of Appellant’s motion for appointment of counsel – forensic DNA testing is not appealable until an actual motion for DNA testing is filed and denied, we lack jurisdiction to consider Appellant’s appeal at this juncture.² See *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); see also *Martin v. State*, No. 02-18-00119-CR, 2018 WL 2248497, at *2 (Tex. App.—Fort Worth May 17, 2018, no pet.) (mem. op., not designated for publication) (dismissing, for want of jurisdiction, appeal from denial of motion for appointed counsel; trial court’s order

¹ Appellant cites Article 64.05 of the code of criminal procedure, which states, “An appeal under this chapter is to a court of appeals in the same manner as an appeal of any other criminal matter, except that if the convicted person was convicted in a capital case and was sentenced to death, the appeal is a direct appeal to the court of criminal appeals.” TEX. CODE CRIM. PROC. ANN. art. 64.05 (West 2018). This provision does not make the order denying a request for counsel immediately appealable absent the denial of a motion for DNA testing.

² Appellant previously attempted to file a petition for writ of mandamus to challenge the trial court’s jurisdiction to rule on his motion for appointment of counsel. See *In re Gilmer*, No. 12-20-00120-CR, 2020 WL2177227, at *2 (Tex. App.—Tyler May 6, 2020, orig. proceeding) (mem. op., not designated for publication). However, because that complaint is appealable along with the denial of a motion for DNA testing, we denied the petition. *Id.* at *1-2.

denied request for counsel and not request for DNA testing, nor was there a motion for DNA testing in record). For this reason, we *dismiss* the appeal for *want of jurisdiction*.³

Opinion delivered June 30, 2020.

Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.

(DO NOT PUBLISH)

³ Nor may we construe the notice of appeal as premature. *See* TEX. R. APP. P. 27.1(b) (in criminal cases, a prematurely filed notice of appeal is effective and deemed filed on the same day, but after, sentence is imposed or suspended in open court, or the appealable order is signed by the trial court). As previously stated, the denial of a motion for appointed counsel to seek DNA testing becomes appealable once a motion for DNA testing is denied. That has not yet occurred in this case. Moreover, the Texas Court of Criminal Appeals has expressed agreement with appellate courts that rejected the concept that a premature notice of appeal could be used as an appellate place holder for any appealable order that might be entered later. *See Smith v. State*, 559 S.W.3d 527, 534 (Tex. Crim. App. 2018).



COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT OF TEXAS

JUDGMENT

JUNE 30, 2020

NO. 12-20-00121-CR

JOE MARLIN GILMER,

Appellant

V.

THE STATE OF TEXAS,

Appellee

Appeal from the County Court at Law
of Van Zandt County, Texas (Tr.Ct.No. CR-15-00226)

THIS CAUSE came on to be heard on the appellate record, and the same being considered, it is the opinion of this Court that it is without jurisdiction of the appeal, and that the appeal should be dismissed.

It is therefore ORDERED, ADJUDGED and DECREED by this Court that this appeal be, and the same is, hereby **dismissed for want of jurisdiction**; and that this decision be certified to the court below for observance.

By *per curiam* opinion.

Panel consisted of Worthen, C.J., Hoyle, J. and Neeley, J.