



**COURT OF APPEALS  
SECOND DISTRICT OF TEXAS  
FORT WORTH**

**NO. 02-18-00248-CR  
NO. 02-18-00249-CR  
NO. 02-18-00250-CR  
NO. 02-18-00251-CR**

EX PARTE TAOHEED OLABIYI  
AJAO

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FROM THE 371ST DISTRICT COURT OF TARRANT COUNTY  
TRIAL COURT NOS. C-371-W011222-1385684-AP,  
C-371-W011225-1385687-AP, C-371-W011224-1385686-AP,  
C-371-W011223-1385685-AP

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**MEMORANDUM OPINION<sup>1</sup>**

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In this consolidated appeal, Taoheed Olabiyi Ajao, pro se, appeals from the trial court's denial of his article 11.072 applications for writ of habeas corpus. See Tex. Code Crim. Proc. Ann. art. 11.072 (West 2015). Because Ajao has failed to establish the trial court abused its discretion by denying relief, we affirm.

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<sup>1</sup>See Tex. R. App. P. 47.4.

## I. BACKGROUND

In separate causes, a grand jury indicted Ajao, a noncitizen, with three counts of debit card abuse and one third-degree-felony count of fraudulent use or possession of identifying information. See Tex. Penal Code Ann. §§ 32.31(b)(1)(A) (debit card abuse), 32.51(a)(1)(C), (b)(1), (c)(2) (fraudulent use or possession) (West 2016). Ajao entered into a plea bargain agreement whereby he pleaded guilty to the charged offenses, and in exchange, the trial court (1) placed him on deferred-adjudication community supervision for a period of ten years for the fraudulent-use-or-possession count and (2) placed him on deferred-adjudication community supervision for five years for each respective count of debit card abuse. Ajao did not appeal the trial court's orders.

A little more than three years later, Ajao filed four applications for writ of habeas corpus under article 11.072 of the code of criminal procedure, alleging he had been ordered deported from the United States because of his guilty pleas. See Tex. Code Crim. Proc. Ann. art. 11.072. He therefore sought to have those guilty pleas set aside. As grounds for relief, Ajao asserted that (1) his counsel rendered ineffective assistance; (2) his pleas were not intelligently, knowingly, and voluntarily made; (3) the evidence was legally insufficient to support the indictments; (4) the three debit-card-abuse charges violated the Fifth Amendment's prohibition against double jeopardy; (5) his "sentences" were illegal; (6) the evidence was legally insufficient to support a judgment of

conviction for the charged offenses; (7) the plea-bargain agreement was ambiguous; and (8) the trial court inadequately admonished him.

Ajao attached to his applications his affidavit and the affidavit of his wife. He also requested the trial court to conduct an evidentiary hearing on his application. Ronald Roberts, the attorney whose assistance Ajao alleged was ineffective during the underlying proceedings, filed an affidavit responding to Ajao's applications. The State also filed responses to Ajao's applications.

The trial court denied Ajao's applications in written orders without holding a hearing, and it entered findings of fact and conclusions of law. See Tex. Code Crim. Proc. Ann. art. 11.072, § 7(a). Ajao appeals in eight points. In each appeal, Ajao filed a brief, the State filed a response, and Ajao filed a reply.

## **II. STANDARD OF REVIEW**

An applicant seeking habeas corpus relief under article 11.072 bears the burden of proving his claim by a preponderance of the evidence. See *Ex parte Torres*, 483 S.W.3d 35, 43 (Tex. Crim. App. 2016). Our review of a trial court's ruling on an article 11.072 application for writ of habeas corpus is highly deferential. See *State v. Guerrero*, 400 S.W.3d 576, 583 (Tex. Crim. App. 2013). We generally review such rulings for an abuse of discretion. See *Ex parte Zantos-Cuebas*, 429 S.W.3d 83, 87 (Tex. App.—Houston [1st Dist.] 2014, no pet.). In an article 11.072 proceeding, the trial court is the sole finder of fact, and we thus afford almost total deference to its factual findings when they are supported by the record, especially when those findings are based upon

credibility and demeanor. See *Torres*, 483 S.W.3d at 42. That degree of deference applies even where, as here, all the evidence is submitted by affidavits, and it also applies to any implied findings and conclusions supported by the record. *Ex parte Harrington*, 310 S.W.3d 452, 457 (Tex. Crim. App. 2010); *Ex parte Moreno*, 382 S.W.3d 523, 526 (Tex. App.—Fort Worth 2012, pet. ref'd). But we review de novo mixed questions of law and fact that do not depend upon credibility and demeanor. *Ex parte Duque*, 540 S.W.3d 136, 145 (Tex. App.—Houston [1st. Dist.] 2017, pet. stricken).

### **III. AJAO'S POINTS OF ERROR**

In eight points of error, Ajao argues the trial court abused its discretion by denying his writ applications. We consider each point in turn.

#### **A. INEFFECTIVE ASSISTANCE AND VOLUNTARINESS**

In his first point, Ajao argues the trial court abused its discretion by denying his writ application because he received ineffective assistance from Roberts during the underlying proceedings that resulted in his guilty pleas. In his fourth point, Ajao argues that because of his counsel's ineffective assistance, his pleas were not voluntary.

##### **1. Ajao's Allegations And The Trial Court's Ruling**

In his writ applications, Ajao asserted a multitude of alleged deficiencies in Roberts's representation. He alleged that Roberts (1) affirmatively misrepresented the deportation consequences of his guilty pleas; (2) failed to conduct any meaningful pretrial discovery; (3) was "totally unaware" that the

State's charges violated the Fifth Amendment's prohibition against double jeopardy; (4) failed to explain the pending charges to him; (5) failed to investigate the charges in relation to federal immigration law; (6) failed to spend "adequate time" preparing for his case; (7) "failed to negotiate an effective plea bargain by neglecting to research and consider immigration consequences when negotiating" the plea bargain; (8) failed to inform him about any legal or factual defenses to the charges; (9) failed to investigate the sufficiency of the evidence to sustain the indictment; (10) failed to inform him that he could have filed a motion to quash the indictments and that he could appeal a denial of such a motion; (11) failed to file a motion to suppress the indictments; and (12) failed to "challenge the sufficiency of the evidence to support the charged offenses and that intent [was] not readily proven" in his case.

Ajao also asserted that these alleged deficiencies prejudiced him. He alleged prejudice mostly in conclusory fashion with statements such as "[b]ut for [Roberts's] ineffectiveness, Applicant would not have accepted the plea deal and [pleaded] guilty to the [charged] offenses, but would have rather asked for a different deal or proceeded to trial"; Roberts's deficient performance "prejudiced the Applicant"; "if the Applicant had known the true nature of the immigration consequences of his potential convictions, he would have requested a different plea deal or gone to trial"; and the like.

The trial court found that Ajao failed to prove both the deficient-performance and prejudice prongs of his ineffective assistance claim and thus denied that ground of relief.

## **2. Ajao Failed to Establish His Claims Based on Ineffective Assistance**

On appeal, Ajao reasserts many of the same alleged deficiencies in Roberts's performance that he asserted in the trial court, and he again argues in mostly conclusory fashion that these alleged deficiencies prejudiced him. As we explain below, we conclude that Ajao failed to meet his burden to establish he was prejudiced by Roberts's allegedly deficient conduct and that the trial court therefore did not abuse its discretion by denying his grounds for relief that were predicated on his counsel's alleged ineffective assistance.

### **a. Applicable Law**

A defendant is entitled to effective assistance of counsel when entering a guilty plea. *Ex parte Uribe*, 516 S.W.3d 658, 665 (Tex. App.—Fort Worth 2017, pet. ref'd). To be entitled to habeas relief based on the claim that his guilty plea resulted from ineffective assistance of counsel, an applicant must satisfy *Strickland v. Washington*'s familiar two-pronged standard: the applicant must demonstrate that (1) counsel's performance was deficient and (2) he was prejudiced as a result of counsel's errors. *See Torres*, 483 S.W.3d at 43 (citing *Strickland v. Washington*, 466 U.S. 668, 687, 693 (1984)). Because we find the prejudice prong dispositive of Ajao's ineffective-assistance and voluntary-plea points, we focus our analysis there. *See Ex parte Ali*, 368 S.W.3d 827, 835 (Tex.

App.—Austin 2012, pet. ref'd) (holding the court need not address *Strickland's* deficiency prong where prejudice prong is dispositive).

To establish prejudice where, as here, an applicant brings a post-conviction attack on the validity of a guilty plea based on ineffective assistance, the applicant must satisfy the standard set forth in *Hill v. Lockhart*, 474 U.S. 52, 58–59 (1985). See *Torres*, 483 S.W.3d at 47; *Duque*, 540 S.W.3d at 146. That standard requires the applicant to “show that there is a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.” *Torres*, 483 S.W.3d at 47 (quoting *Hill*, 474 U.S. at 59). As part of this prejudice standard, an applicant must “convince the court that a decision to reject the plea bargain would have been rational under the circumstances.” See *id.* at 48 (quoting *Padilla v. Kentucky*, 559 U.S. 356, 372 (2010)). Some factors courts consider in the prejudice analysis include “the evidence supporting [the] applicant’s assertions, the likelihood of his success at trial, the risks the applicant would have faced at trial, the benefits received from the plea bargain, and the trial court’s admonishments.” *Id.*

#### **b. Evidence Supporting Ajao’s Assertions**

We consider the first factor identified in *Torres*: the evidence supporting Ajao’s assertions. The only allegations of prejudice Ajao made in his brief were the conclusory assertions that “[i]f not for counsel’s deficiency, Appellant would not have plead[ed] guilty and instead would have insisted on going to trial” and “[h]ad Appellant [known] that deportation [was] certain, he wouldn’t have

plead[ed] guilty and would have taken his chance at trial.” He also briefly touched on prejudice in his reply brief, though also in conclusory fashion, stating that “it appears likely that applicant would not have pleaded guilty [to the offenses] had he been properly advised,” and “because applicant’s entire family consists of United States citizens, it seems highly unlikely that he would have pleaded guilty to the [offenses] that would have placed him at risk of losing protected immigration status or would make him deportable.”

The only record evidence tending to show that Ajao would not have pleaded guilty and would have instead proceeded to trial but for Roberts’s alleged deficiencies is his own self-serving affidavit. In his affidavit, Ajao focused largely on the deportation consequences of his plea. Ajao stated that Roberts told him that a Texas deferred adjudication would not constitute a “conviction” for purposes of federal immigration law and thus he did not need to worry about deportation; that he would “be fine” and would not be deported because he would not be sentenced to any jail or prison time; that the charges would be dropped upon his successful completion of his deferred adjudication; and that he could only be deported if he had a felony conviction. He stated that “not getting deported [was] the main reason [he accepted] the plea deal.” According to Ajao, however, pleading guilty to the charges in exchange for deferred adjudication in actuality constituted a conviction for immigration law purposes. Had he known this, Ajao stated, he would not have accepted the plea deal but instead would have either asked for a different deal or would have gone to trial.



But Roberts's affidavit painted an entirely different picture. He averred that when he represented Ajao, he knew that federal immigration law treated a guilty plea in exchange for deferred adjudication as a conviction for immigration law purposes. He further stated that he discussed the immigration consequences of a plea of guilty or nolo contendere with Ajao; that he "warned [Ajao] numerous times throughout [his] representation of [Ajao] that he could be deported whether or not he pled guilty or nolo contendere and whether or not he was finally convicted and whether or not he did jail time"; and that he advised Ajao that "a plea even with no finding of guilt and a deferred adjudication could and would most probably result in [Ajao's] deportation, loss of immigration status or other consequences under federal law." Roberts stated that because he knew that "a deferred adjudication would have the same effect as a conviction under federal immigration law," he advised Ajao to consult an immigration lawyer and that before he entered his plea, Ajao informed him that he had done so.

Roberts also testified that after he reviewed all of the evidence with Ajao and discussed with him the cost to try a case to the jury, Ajao made the decision to "plead to the charges and to use his limited funds to pay an immigration attorney to represent him, rather than to pay me to try the cases to a jury." Further, Roberts stated that before Ajao went before the trial court for his pleas, he thoroughly reviewed the written plea papers with Ajao. Roberts stated that the plea documents in all four causes contained statements in two separate

places regarding the deportation consequences of a plea of guilty or *nolo contendere* to the charges. Those statements were as follows:

**Citizenship:** If you are not a citizen of the United States of America, a plea of guilty or *nolo contendere* for this offense may result in deportation, the exclusion from admission to this country, or the denial of naturalization under federal law.

....

I am not a United States citizen; and I understand that if I enter a plea of guilty or *nolo contendere* for this offense, I may be deported, excluded from admission to the United States, or denied naturalization under federal law.

Roberts further averred that prior to accepting Ajao's pleas, the trial judge verbally admonished Ajao about the immigration consequences of his pleas and that Ajao acknowledged in open court that he understood all the ramifications of his pleas.

Among its thorough findings, the trial court found that Roberts's affidavit was credible; that "[t]here [was] no credible evidence that [Roberts] failed to accurately advise [Ajao] regarding the plea offers"; that Roberts "properly advised [Ajao] that his plea of guilty in this case would result in his deportation"; that Ajao had presented "no evidence that a reasonable likelihood exists that the outcome of the proceeding would have been different but for the alleged misconduct"; that "[t]here [was] no reasonable probability that [Ajao] would not have pled guilty and would have insisted on going to trial but for [Roberts's] advice"; and that "[i]n light of the overwhelming evidence, not pleading guilty would not have been rational under the circumstances." Thus, the trial court expressly found Roberts's

affidavit was credible and implicitly found Ajao's was not. We defer to those credibility determinations. See *Ex parte Aguilera*, 540 S.W.3d 239, 249–50 (Tex. App.—Houston [1st Dist.] 2018, no pet.).

In light of the trial court's implied finding that Ajao's affidavit was not credible, the trial court was free to disregard it and, along with it, Ajao's self-serving, post hoc testimony that Roberts told him his guilty pleas would not result in a conviction for immigration law purposes and that he would not have pleaded guilty but for Roberts's advice that his guilty pleas would not constitute a conviction under federal immigration law. See *id.* (deferring to trial court's finding that applicant's assertion that "he would have insisted on going to trial had he known about the immigration consequences" of his plea was not credible); see also *Lee v. United States*, 137 S. Ct. 1958, 1967 (2017) (noting that "[c]ourts should not upset a plea solely because of post hoc assertions from a defendant about how he would have pleaded but for his attorney's deficiencies," but should instead "look to contemporaneous evidence to substantiate a defendant's expressed preferences"). Given the trial court's credibility determination, the record supports the findings we noted above, including the finding that Ajao presented "no evidence that a reasonable likelihood exists that the outcome of the proceeding would have been different but for [Roberts's] alleged misconduct." And the lack of such evidence weighs against a finding of prejudice.

### **c. The Likelihood of Ajao's Success at Trial**

As for the second factor, the record reflects Ajao's likelihood of success at trial was low. Roberts detailed in his affidavit the evidence against Ajao. Roberts stated that he met with Ajao at his office after Ajao bonded out of jail and asked Ajao about the circumstances leading to his arrest. Ajao told Roberts that when he was arrested, he had in his possession a fraudulent Pennsylvania driver's license that had his picture and the name "Michael Smith" on it. Ajao further said that via the Internet, he had sent a passport-type photo of himself to an individual who had contacted him; that he had never met and did not know this individual; and that this individual sent him the fraudulent driver's license along with nine debit cards also bearing the name "Michael Smith."

Ajao stated that he was to receive twenty percent of the amounts he was able to obtain through the use of the nine debit cards. Ajao admitted to Roberts that he had used one of the debit cards to obtain three money orders totaling \$2,900 at a Kroger grocery store in Hurst; that later the same day he returned to the same Kroger and had used Western Union to wire \$1,850 to his cousin in Nigeria using a different debit card; and that he obtained another \$2,900 in money orders at the same Kroger. Ajao also told Roberts that a detective had interviewed him while he was in custody.<sup>2</sup>

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<sup>2</sup>We recognize that what Ajao told Roberts is of little value in our discussion of the evidence against him given that Ajao would have had the option not to testify at his trial. However, our discussion of what Ajao told Roberts helps

Roberts averred that he then obtained and reviewed the evidence against Ajao. That evidence included police reports, a summary of the statement Ajao gave during his custodial interview, and five compact discs from the Tarrant County District Attorney's office containing Ajao's custodial interview, still photographs, and video surveillance. One of those discs was a video recording of Ajao's custodial interview. Roberts stated that the summaries of Ajao's statement to police indicated he had been mirandized and had signed a waiver of his right to counsel before he gave his statement, and he averred that the summaries reflected the following:

[Ajao] admitted to being contacted by an unknown person online only known to him as "Michael Smith" and that he had agreed to use approximately nine (9) debit cards sent to him by this person to obtain money for 20% of the amount obtained, because the person claimed that he was in England and could not obtain his own funds. [Ajao] further admitted in the interview that he sent this person a passport type picture of himself so that the fraudulent Pennsylvania driver's license could be manufactured, and that the fake license . . . was sent back to him with his picture on it under the alias "Michael Smith", along with nine debit cards, for [Ajao] to use to obtain the funds.

Roberts attached a copy of the fraudulent Pennsylvania license to his affidavit. Roberts further stated that the police reports indicated that one of the debit cards was on Ajao's person when he was arrested and six more were found at the scene. He attached copies of these seven debit cards to his affidavit. Roberts stated that the still photographs depicted Ajao and another individual "entering

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provide context to the evidence Roberts subsequently obtained and which he described in his affidavit.

and leaving the Kroger store or them at the service counter obtaining money orders and making Western Union transfers.” The remaining three discs contained surveillance video from the Kroger depicting Ajao and his brother “entering the Kroger store [and] exiting the Kroger store and at the service counter using the cards to obtain money orders and mak[ing] a Western Union transfer, all at the time and or dates alleged in the indictments.”

In another portion of his affidavit, Roberts averred that he reviewed the evidence against Ajao—including the police reports, documentary evidence, videos, and pictures—with him “on multiple occasions.” Roberts stated that the evidence “clearly showed [Ajao] using the debit cards on three separate occasions” and that there was additional evidence showing “he used the cards to obtain funds from an automatic teller machine in the Kroger store.” Roberts stated that during his custodial interview with the police, Ajao “made statements which were sufficient to prove all the elements of all four charges, except possibly the element of intent.” But Roberts continued, averring that the element of intent could be inferred from Ajao’s conduct and that it was his professional opinion that a jury would have found, based on all the evidence, that Ajao had the requisite intent and that a conviction would have resulted from a jury trial.

Again, the trial court found Roberts’s affidavit credible, and we defer to that determination. Roberts’s affidavit shows that Ajao’s likelihood of success at trial was low, and thus this second factor also weighs against a finding of prejudice.

**d. The Risks Ajao Would Have Faced at Trial And The Benefits Received From The Plea Bargain**

Turning to the third factor, by going to trial, Ajao would have risked a guilty verdict on all four charges. Had he been found guilty of the third-degree-felony count of fraudulent use or possession, he would have faced between two and ten years' imprisonment and a fine of up to \$10,000. Tex. Penal Code Ann. § 12.34 (West 2011). And for each count of debit card abuse, Ajao would have faced between 180 days' and two years' imprisonment and up to a \$10,000 fine if he were found guilty. See *id.* § 12.35 (West Supp. 2017), § 32.31(d). Thus, assuming Ajao is correct about the deportation consequences of his plea,<sup>3</sup> had he proceeded to trial, he would have faced not only those same deportation consequences but also substantial jail time and fines.

Additionally, Roberts's affidavit indicates that Ajao had limited financial resources available to him. Roberts stated that he discussed the immigration consequences of a guilty or nolo contendere plea, stating that such pleas "even with no finding of guilt and a deferred adjudication could and would most probably result in deportation, loss of immigration status or other consequences under federal law." Roberts stated that he also reviewed all of the evidence against Ajao with him. Roberts averred that he told Ajao the evidence against

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<sup>3</sup>We need not and, thus, do not express any opinion on the merits of Ajao's contention that pleading guilty to either debit card abuse or fraudulent use or possession of identifying information in exchange for deferred adjudication renders a noncitizen defendant "automatically deportable" under federal immigration law.

him was substantial and very damaging and that trying the case to a jury would “almost certainly” result in a conviction. Roberts stated, however, that because he did not practice immigration law, he did not know “whether [Ajao] could, with the help of an immigration attorney, avoid being deported.”

Roberts also discussed the financial cost associated with trying Ajao’s case to the jury with him. Roberts stated that after discussing all of these matters with him, Ajao “made the decision to plead to the charges and to use his limited funds to pay an immigration attorney to represent him, rather than to pay [him] to try the cases to a jury.” In light of Roberts’s testimony, therefore, Ajao did not just face potential deportation, jail time, and substantial fines by proceeding to trial. He risked all of that plus the depletion of his “limited funds”—funds he could have used to hire an immigration lawyer to represent him in subsequent deportation proceedings. And these risks were more than a mere theoretical possibility. As we discussed under the third factor, given the evidence against him, Ajao’s likelihood of success at trial was low.

Consideration of what Ajao would have risked by going to trial leads us to the fourth factor: the benefits Ajao received from the plea bargain. Here, those benefits are essentially the converse of the risks he faced by going to trial. That is, by accepting the plea bargain, Ajao avoided jail time altogether. He received a cumulative total of only \$2,500 in fines for all four counts even though he faced a possible fine of \$10,000 for each count had he proceeded to trial. And he avoided the cost of a jury trial that in his counsel’s professional opinion “would



almost certainly [have] result[ed] in a conviction,” allowing him to use his limited funds to hire an immigration attorney to represent him in any future deportation proceedings.

Given the benefits Ajao received from the plea bargain and the risks he faced by proceeding to trial, we conclude the third and fourth factors, like the first and second, weigh against a finding of prejudice.

#### **e. The Trial Court’s Admonishments**

Finally, we consider the fifth factor: the trial court’s admonishments. The record shows that Ajao received four written plea admonishments—one for each charged offense. Each of the written admonishments contained paragraphs stating as follows:

9. **Citizenship**: If you are not a citizen of the United States of America, a plea of guilty or *nolo contendere* for this offense may result in deportation, the exclusion from admission to this country, or the denial of naturalization under federal law.

. . . .

(T)  I am a United States citizen.  
 I am not a United States citizen; and I understand that if I enter a plea of guilty or *nolo contendere* for this offense, I may be deported, excluded from admission to the United States, or denied naturalization under federal law.

On all four admonishments, the second box associated with paragraph T is checked (the one beginning “I am not a United States citizen”), and Ajao’s signature appears directly underneath. Additionally, Roberts stated in his affidavit that before accepting Ajao’s pleas, the trial court verbally admonished

him regarding the immigration consequences of his pleas and that Ajao acknowledged in open court that he understood all the ramifications of his pleas. And despite the fact that the trial court made it clear to Ajao that his pleas could have deportation consequences through these admonishments, the record does not show that Ajao did anything in response to indicate that deportation was a paramount concern over avoiding incarceration. See *Duque*, 540 S.W.3d at 149 (“Even though the specter of deportation was raised by the admonishments given by the trial court and by counsel, nothing indicates that deportation was a paramount concern to Appellant over avoiding incarceration.”); see also *Ex parte Castaneda*, No. 05-17-01135-CR, 2018 WL 992024, at \*6 (Tex. App.—Dallas Feb. 21, 2018, no pet.) (mem. op., not designated for publication) (noting that judicial admonishments such as those present here “strongly indicate that appellant was aware of the immigration consequence of his plea, and that he was not prejudiced by his counsel’s failure to inform him of the same.”). We thus conclude that this fifth factor also weighs against a finding of prejudice.

In sum, it was Ajao’s burden to prove by a preponderance of the evidence both that Roberts’s performance was deficient and that he was prejudiced as a result. See *Torres*, 483 S.W.3d at 43 (citing *Strickland*, 466 U.S. at 687, 693). In light of the foregoing, we conclude that Ajao failed to meet his burden to satisfy *Strickland*’s prejudice prong. That is, he failed to show that there is a reasonable probability that, but for Roberts’s alleged errors, he would not have pleaded guilty and would have insisted on going to trial. See *id.* at 47 (quoting *Hill*, 474 U.S. at

59). Therefore, we cannot conclude Ajao has shown that the trial court abused its discretion by denying his ineffective assistance and voluntary plea grounds. See *id.* at 43. Accordingly, we overrule Ajao's first and fourth points.

## **B. SOME EVIDENCE SUPPORTS THE UNDERLYING ORDERS**

In his second point, Ajao contends the trial court abused its discretion by denying his writ application because legally insufficient evidence supports the trial court's orders. Although he briefed his point as a legal sufficiency challenge, we note that the State is correct that such challenges are not cognizable on an application for writ of habeas corpus. See *Ex parte Perales*, 215 S.W.3d 418, 419 (Tex. Crim. App. 2007). However, within the argument portion of his briefing for his second point, Ajao also argued that no evidence supported various elements of the charged offenses, and such a claim of no evidence is cognizable on a writ of habeas corpus. See *id.* We therefore address Ajao's no evidence complaint.

### **1. Applicable Law**

For Ajao to prevail on his no evidence complaint, the record must be devoid of evidentiary support for a conviction. See *id.* at 420. A judicial confession constitutes some evidence supporting a guilty plea so long as it covers all of the elements of the charged offense. See *Menefee v. State*, 287 S.W.3d 9, 13 (Tex. Crim. App. 2009). In its briefing, the State relies on Ajao's judicial confessions in arguing some evidence supports Ajao's pleas.

## **2. Ajao's Judicial Confession to The Fraudulent Use of Possession of Identifying Information Offense**

A person commits fraudulent use or possession of identifying information “if the person, with the intent to harm or defraud another, obtains, possesses, transfers, or uses an item of . . . identifying information of another person without the other person’s consent.” Tex. Penal Code Ann. § 32.51(b)(1). “Identifying information” is a statutorily-defined term, and the definition includes a person’s “financial institution account number.” *Id.* § 32.51(a)(1)(C). And the penal code further provides that such an offense is a third-degree felony “if the number of items obtained, possessed, transferred, or used is five or more but less than 10.” *Id.* § 32.51(c)(2).

In his judicial confession, Ajao swore that he had read the indictment and had “committed each and every act alleged therein, except those acts waived by the State.” He further confessed that all the facts alleged in the indictment were true and correct and that he was guilty of the offense alleged. The indictment alleged that Ajao “with intent to harm or defraud another, obtain[ed], possess[ed,] transfer[red], or use[d] identifying information of another person, without the person’s consent,” and it further alleged that the identifying information was the “financial institution number” of six different persons. Ajao’s judicial confession covers all of the elements of the offense as charged in the indictment and thus constitutes some evidence to support the trial court’s judgment. *See Menefee,*

287 S.W.3d at 13. Accordingly, his no evidence challenge with respect to the charge of fraudulent use or possession of identifying information fails.<sup>4</sup>

### **3. Ajao’s Judicial Confession to The Three Debit Card Abuse Offenses**

A person commits debit card abuse if “with intent to obtain a benefit fraudulently, he presents or uses a credit card or debit card with knowledge that . . . the card, whether or not expired, has not been issued to him and is not used with the effective consent of the cardholder.” Tex. Penal Code Ann. § 32.31(b)(1)(A).

In his judicial confession for each count of debit card abuse, Ajao swore that he had read the indictment and had “committed each and every act alleged therein, except those acts waived by the State.” He further confessed that all the facts alleged in the indictment were true and correct and that he was guilty of the offense alleged. All three of the indictments for debit card abuse alleged that

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<sup>4</sup>As part of his argument, Ajao also contends the indictment is “fundamentally defective.” We note that defects in the form or substance of an indictment generally cannot be raised in a habeas corpus proceeding unless the applicant objected to the defect before the trial started, something Ajao concedes he did not do. See Tex. Code Crim. Proc. Ann. art. 1.14(b) (West 2005). But a claim that an indictment is so deficient that it fails to vest the trial court with jurisdiction is cognizable in a habeas corpus proceeding. See *Ex parte Reedy*, 282 S.W.3d 492, 502 (Tex. Crim. App. 2009). Ajao made that claim here. An indictment is sufficient to confer jurisdiction on the trial court if it alleges an offense to the extent that it is clear enough that one can identify the offense alleged. *Teal v. State*, 230 S.W.3d 172, 180 (Tex. Crim. App. 2007). Having examined the language of the indictment, we conclude its allegations were clear and specific enough to identify the offense Ajao had been charged with: fraudulent use or possession of identifying information. See Tex. Penal Code Ann. § 32.51(b)(1). Ajao’s argument that the indictment is “fundamentally defective” is thus unavailing. See *Teal*, 230 S.W.3d at 180.

Ajao “with the intent to fraudulently obtain a benefit, present[ed] or use[d] a debit card . . . to-wit: a Bank of the Ozarks Visa card with the knowledge that said card had not been issued to [him], and with the knowledge that said card was not used with the effective consent of . . . the cardholder.”<sup>5</sup> As was the case with respect to the fraudulent use or possession of identifying information offense, Ajao’s judicial confessions cover all of the elements of the debit card abuse offenses as charged in the indictments and thus constitute some evidence to support the trial court’s judgments as to those offenses. See *Menefee*, 287 S.W.3d at 13. Accordingly, his no evidence challenges with respect to the debit-card-abuse charges fail.

Because some evidence supports each of the trial court’s orders, Ajao has not met his burden to show the trial court abused its discretion by denying his no evidence ground. We thus overrule Ajao’s second point.

**C. AJAO FAILED TO PROVE THE CHARGES VIOLATED THE PROHIBITION  
AGAINST DOUBLE JEOPARDY**

In his third point, Ajao contends the trial court abused its discretion by denying his writ application because the four charges against him violated the Fifth Amendment’s prohibition against double jeopardy. The Double Jeopardy Clause bars, among other things, multiple criminal punishments for the same offense. See U.S. Const. amend. V; *Hudson v. United States*, 522 U.S. 93, 99

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<sup>5</sup>All three indictments alleged that Ajao committed the respective offenses “on or about the 12th day of September 2014,” but each indictment alleged that he presented or used the debit card at different times.

(1997). Ajao argues that the four indictments subjected him to multiple criminal punishments for the same offense.

A multiple-punishments violation can arise either in the context of lesser-included offenses, where the same conduct is punished under a greater and a lesser-included offense, or when the same conduct is punished under two distinct statutes where the legislature only intended for the conduct to be punished once. *Garfias v. State*, 424 S.W.3d 54, 58 (Tex. Crim. App. 2014). In his brief, Ajao alleges the latter has occurred.

Ajao first argues that the four indictments subjected him to multiple punishments for the same offense because penal code section 32.21 (debit card abuse) and penal code section 32.51 (fraudulent use or possession of identifying information) proscribe the same conduct. But even assuming Ajao is correct that, as charged in the indictments, he was subject to multiple punishments for the same conduct under two statutory provisions, the Double Jeopardy Clause does not prohibit this if it is what the legislature intended.<sup>6</sup> See *Mauro v. State*, 221 S.W.3d 896, 903 (Tex. Crim. App. 2007) (noting that “the Double Jeopardy

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<sup>6</sup>And because we conclude the legislature did so intend, we need not and do not decide whether, as alleged in the indictments, those sections did in fact subject Ajao to multiple punishments for the same conduct. See *Missouri v. Hunter*, 459 U.S. 359, 368–69 (1983) (“Where, as here, a legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those two statutes proscribe the ‘same’ conduct under *Blockburger*, a court’s task of statutory construction is at an end and the prosecutor may seek and the trial court or jury may impose cumulative punishment under such statutes in a single trial.”).

Clause does not prohibit a legislature from authorizing cumulative punishments under two statutes that proscribe the same conduct” and analyzing whether “the legislature intended to impose multiple punishments for violating” the two statutes at issue). Penal code section 32.51(e) provides that “[if] conduct that constitutes an offense under this section also constitutes an offense under any other law, the actor may be prosecuted under this section, the other law, or both.” Tex. Penal Code Ann. § 32.51(e). That statutory language plainly authorizes multiple punishments when a defendant’s conduct violates both penal code section 32.51 and “any other law,” which necessarily includes penal code section 32.21. See *Mayhew v. State*, 271 S.W.3d 294, 301 (Tex. App.—Beaumont 2008, no pet.) (holding that similar statutory language in penal code section 22.04(h) made it “clear” that the legislature intended to authorize multiple punishments). Consequently, it did not violate double jeopardy to punish Ajao for both the offense of fraudulent use or possession of identifying information and the offense of debit card abuse, even assuming those offenses were predicated on the same conduct.

Ajao also argues he was subjected to multiple criminal punishments for the same offense because the three debit card abuse indictments each alleged the same offense. To the contrary, each of those indictments alleged a separate debit-card-abuse offense because each indictment alleged that Ajao “present[ed] or use[d]” a debit card with knowledge that it had not been issued to him and that he was not using it with the effective consent of the victim at three different times



“on or about the 12th day of September 2014”—6:50 p.m., 6:59 p.m., and 7:12 p.m.—and did so with the requisite mental state on each occasion. See Tex. Penal Code Ann. § 32.31(b)(1)(A). In other words, the indictments alleged that Ajao committed debit card abuse on three separate occasions. Because the three debit-card-abuse indictments alleged three separate offenses, they did not subject Ajao to multiple punishments for the same debit-card-abuse offense.

Because Ajao failed to establish he was subjected to multiple punishments for the same offense in violation of the Double Jeopardy Clause, he has not met his burden to show the trial court abused its discretion by denying that ground of relief. We thus overrule Ajao’s third point.

#### **D. AJAO FAILED TO PROVE HE RECEIVED AN ILLEGAL SENTENCE**

In his fifth point, Ajao argues that he received illegal sentences in the three debit-card-abuse cases. He first contends that because those offenses were state jail felonies subject to a maximum jail term of two years, the trial court’s assessment of five years’ deferred-adjudication community supervision fell outside the statutory range of punishment for such offenses and that the trial court’s orders of community supervision with respect to those offenses are therefore void.<sup>7</sup>

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<sup>7</sup>For the first time on appeal, Ajao also attempts to argue that his sentences were illegal because they violated the Eighth Amendment’s prohibition against cruel and unusual punishments. Because Ajao did not raise this argument in the trial court, the trial court never had an opportunity to consider it, and he may not raise it for the first time on appeal. See Tex. R. App. P. 33.1(a)(1); *Aldrich v. State*, 104 S.W.3d 890, 895 (Tex. Crim. App. 2003)

Former code of criminal procedure article 42.12 governed the trial court's imposition of deferred-adjudication community supervision regarding Ajao's underlying offenses. See *Ex parte Craven*, No. 02-18-00110-CR, 2018 WL 3060199, at \*1 n.3 (noting repeal and recodification of article 42.12 effective September 1, 2017). As applicable at the time of Ajao's pleas, article 42.12, section 5(a) provided that in a felony case in which the trial court defers adjudication and places the defendant on community supervision, "the period of community supervision may not exceed 10 years." See Act of May 31, 1997, 75th Leg., R.S., ch. 667, § 1, 1997 Tex. Gen. Laws 2250, 2250, *repealed by* Act of May 18, 2017, 85th Leg., R.S., ch. 325, § 23.012(d), 2017 Tex. Sess. Law Serv. 841, 952 (West 2017); Act of May 24, 2017, 85th Leg., R.S., ch. 877, § 11(a), 2017 Tex. Sess. Law Serv. 3652, 3657 (West 2017). Thus, as applicable at the time of Ajao's pleas, article 42.12, section 5(a) permitted the trial court to place Ajao on deferred-adjudication community supervision for up to ten years for each of his state-jail-felony offenses. See *Garrett v. State*, 377 S.W.3d 697, 704 & n.29 (Tex. Crim. App. 2012) (noting article 42.12, section 5(a) afforded trial court the discretion to place a defendant on deferred-adjudication community supervision for a maximum of ten years for a state-jail

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(reasoning that only violations of "rights which are waivable only" and denials of "absolute systemic requirements" may be raised for the first time on appeal); *Nicholas v. State*, 56 S.W.3d 760, 768 (Tex. App.—Houston [14th Dist.] 2001, pet. ref'd) (noting that the complaint that a sentence violates the Eighth Amendment can be forfeited if it is not properly preserved).

felony); see also *Lin v. State*, No. 01-97-01100-CR, 1998 WL 59446, at \*1 (Tex. App.—Houston [1st Dist.] Feb. 11, 1998, no pet.) (not designated for publication) (noting article 42.12, section 5(a) authorized trial court to defer adjudication and place defendant on community supervision for ten years for a state jail felony).<sup>8</sup> Accordingly, the trial court’s orders assessing five years’ deferred-adjudication community supervision for each of those offenses was authorized by statute, and Ajao’s argument to the contrary is unavailing.

Ajao further argues that he received an illegal sentence because the trial court assessed court costs in all four of his causes. He bases his argument exclusively on article 102.073(a) of the code of criminal procedure, which provides, “In a single criminal action in which a defendant is convicted of two or more offenses or of multiple counts of the same offense, the court may assess each court cost or fee only once against the defendant.” Tex. Code Crim. Proc. art. 102.073(a) (West 2018). But that provision did not become effective until September 1, 2015. See Act of May 30, 2015, 84th Leg., R.S., ch. 1160, § 3, 2015 Tex. Sess. Law Serv. 3924, 3924 (West 2015). Since the trial court

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<sup>8</sup>In its briefing, the State argued that article 42.12, section 15(b) provided the statutory basis for the trial court to assess five years’ community supervision for Ajao’s state-jail-felony offenses. We note, however, that the court of criminal appeals has held that “the plain language of [s]ection 15 is limited in its applicability to the form of community supervision that is imposed ‘[o]n conviction of a state-jail felony.’” *Garrett*, 377 S.W.3d at 702. Since the trial court deferred Ajao’s adjudication, he was not convicted of a state-jail felony, and thus section 15 is inapplicable to our analysis here. Rather, article 42.12, section 5(a) is the governing provision.

assessed the costs Ajao challenges on October 29, 2014, article 102.073(a) is inapplicable.

Because Ajao failed to establish he received an illegal sentence, he has not met his burden to show the trial court abused its discretion by denying that ground of relief. We thus overrule Ajao's fifth point.

**E. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY FAILING TO HOLD AN EVIDENTIARY HEARING**

In his sixth point, Ajao argues the trial court abused its discretion by failing to hold an evidentiary hearing on his writ application. However, this court has previously held that nothing in article 11.072 requires the trial court to conduct a hearing on an application for writ of habeas corpus before rendering its decision on the relief sought. See *Ex parte Cummins*, 169 S.W.3d 752, 757 (Tex. App.—Fort Worth 2005, no pet.). And recently, we considered the same claim Ajao raises here and declined to depart from our holding in *Cummins*. See *Ex parte Sheridan*, No. 02-16-00254, 2017 WL 1535105, at \*4–5 (Tex. App.—Fort Worth Apr. 27, 2017, no pet.) (mem. op., not designated for publication) (holding trial court did not abuse its discretion by failing to conduct an evidentiary hearing on appellant's article 11.072 application for writ of habeas corpus).<sup>9</sup> Ajao has not

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<sup>9</sup>In *Sheridan*, we noted that some of our sister courts have held that an evidentiary hearing is required under article 11.072 if the habeas applicant makes a claim of actual innocence on the basis of newly-discovered evidence. See 2017 WL 1535105, at \*4 n.5. But like the applicant in *Sheridan*, Ajao has not made a claim of actual innocence based on newly-discovered evidence, and thus this line of authority is inapplicable here. See *id.*

asked us to reconsider our holding nor has he presented any reasons that persuade us to depart from our prior holdings. Adhering to our prior holdings, we conclude the trial court did not abuse its discretion by not holding an evidentiary hearing on Ajao's article 11.072 application for writ of habeas corpus. Accordingly, we overrule Ajao's sixth point.

**F. AJAO FAILED TO ESTABLISH THE PLEA AGREEMENT WAS AMBIGUOUS OR THAT THE TRIAL COURT'S ADMONISHMENTS WERE INADEQUATE**

In his seventh and eighth points, Ajao contends the trial court's admonishments pursuant to article 26.13 of the code of criminal procedure were ambiguous and inadequate with respect to the deportation consequences of his plea. In relevant part, article 26.13 provides,

Prior to accepting a plea of guilty or a plea of nolo contendere, the court shall admonish the defendant of . . . the fact that if the defendant is not a citizen of the United States of America, a plea of guilty or nolo contendere for the offense charged may result in deportation, the exclusion from admission to this country, or the denial of naturalization under federal law.

Tex. Code Crim. Proc. Ann. § 26.13(a)(4) (West Supp. 2017). Article 26.13 further provides that "[i]n admonishing the defendant as herein provided, substantial compliance by the court is sufficient, unless the defendant affirmatively shows that he was not aware of the consequences of his plea and that he was misled or harmed by the admonishment of the court." *Id.* art. 26.13(c).

As we already noted, in all four of the underlying causes, the plea paperwork contained a section entitled, "Written Plea Admonishments," and

under that section, the following paragraph appeared: “**Citizenship:** If you are not a citizen or the United States of America, a plea of guilty or *nolo contendere* for this offense may result in deportation, the exclusion from admission to this country, or the denial of naturalization under federal law.” Ajao contends that “[t]he written admonishments [were] insufficient” and that “[t]here is no question that the trial court’s admonishments” under article 26.13(a)(4) were erroneous. Not so. A comparison between article 26.13(a)(4) and the written admonishments Ajao received reveals that the language of the admonishments track the language of that statute almost verbatim.

Ajao also states that “the [trial court] should have taken its time to explain to [him] the content of the admonishment[s],” suggesting that the trial court did not give the admonishments to him. Again, not so. In addition to the record evidence above showing Ajao received the admonishments, the record shows the following. Underneath the written plea admonishments, a section entitled “Written Waiver of Defendant—Joined by Attorney” appears. Ajao signed this written waiver. The waiver included paragraphs stating, “I fully understand each of the above written plea admonishments given by the Court and I have no questions,” and it further had a checkbox checked beside a paragraph that stated “I am not a United States citizen; and I understand that if I enter a plea of guilty or *nolo contendere* for this offense, I may be deported, excluded from admission to the United States, or denied naturalization under federal law.” Ajao placed his

signature under yet another paragraph that stated, among other things, that the court had given the written plea admonishments to him.

In addition to the above, Roberts testified that before Ajao went before the trial court to enter his plea, Roberts “thoroughly reviewed” the trial court’s written plea admonishments with Ajao, including the above-noted paragraphs regarding the deportation consequences of a guilty plea. Roberts further averred that the trial judge verbally admonished Ajao regarding the deportation consequences of his pleas and that Ajao acknowledged in open court that he understood all of the ramifications of his plea. Again, the trial court found Roberts’s affidavit was credible. And even though, as we noted above, the trial court implicitly found Ajao’s affidavit was not credible, we note that Ajao admitted in his affidavit that “[a]t the [plea] hearing, the court did admonish me on the possible deportation I faced.”

The habeas court made findings that the trial court gave the admonishments required by statute; that the trial court’s admonishments were proper; and that Ajao failed to prove the plea agreement was ambiguous. As demonstrated above, those findings are supported by the record. Accordingly, we conclude Ajao failed to establish that the plea bargains were ambiguous and that the trial court’s admonishments were inadequate, and thus he did not meet his burden to show the trial court abused its discretion by denying those grounds of relief. We thus overrule Ajao’s seventh and eighth points.

#### **IV. CONCLUSION**

Having overruled all of Ajao's points, we affirm the trial court's denial of his article 11.072 application for writ of habeas corpus. See Tex. R. App. P. 43.2(a).

/s/ Lee Gabriel

LEE GABRIEL  
JUSTICE

PANEL: SUDDERTH, C.J., WALKER and GABRIEL, JJ.

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

DELIVERED: August 31, 2018