**Affirmed and Opinion filed November 2, 2000.**

**In The**

# Fourteenth Court of Appeals

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**NO. 14-99-00159-CR**
**NO. 14-99-00161-CR**

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**JOSEPH PRINCE AGHOLOR, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

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**On Appeal from the 182nd District Court**
**Harris County, Texas**
**Trial Court Cause Nos. 793,210 and 793,211**

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## O P I N I O N

Appellant, Joseph Prince Agholor, appeals his convictions on his pleas of guilty for aggregate theft and forgery of a government instrument, and his twenty-year sentence in the Texas Department of Corrections–Institutional Division for each conviction. We affirm.[1]

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[1] We note appellant's counsel incorrectly filed his brief in his appeal of the aggregate theft conviction in this court under appellate cause number 14-99-00159-CR, and his brief in his appeal of the forgery conviction under appellate cause number 14-99-00161-CR. The appellate cause number in the appeal of the (continued...)

## I. BACKGROUND

Appellant entered pleas of guilty to aggregate theft and forgery of a government instrument, without an agreed recommendation from the State as to punishment, and a plea of true to the prior felony offense of passing falsely made and counterfeited obligations of the United States as alleged in the enhancement paragraph. The trial court withheld finding appellant guilty, and ordered the preparation of a Pre-Sentence Investigation report ("PSI report"). Subsequently, the trial court held a hearing and found appellant guilty of aggregate theft and forgery, found the allegation in the enhancement paragraph to be true, and assessed punishment at twenty years confinement in the Texas Department of Criminal Justice–Institutional Division for each offense. Appellant filed a motion for new trial, or in the alternative, a motion to withdraw his guilty plea, in each case, which were overruled by operation of law.

With respect to the charge for aggregate theft, the PSI report states appellant, using an alias, opened five separate bank accounts at different banks. Appellant then obtained convenience checks from different credit card companies in the names and accounts of seven individuals. Appellant made the checks payable to his alias, forged the name of those individuals, and deposited the checks into his various bank accounts. Then, taking advantage of the "float time," he withdrew the funds before the checks were returned to the banks as unauthorized. Appellant deposited checks in the amount of $32,537.95 into his accounts, and withdrew $13,868.24.

With respect to the charge for forgery of a government instrument, the PSI report states appellant presented himself at Neiman Marcus as "Eddie Lewis Allen," opened a credit account, and purchased

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[1] (...continued)
aggregate theft conviction is 14-99-00161-CR, while the appellate cause number in the appeal of the forgery conviction is 14-99-00159-CR. We caution counsel to be more careful in his filings. We further observe that appellant's counsel exceeded the 50-page limit set forth in Rule 38.4 of the Texas Rules of Appellate Procedure with respect to his brief filed in the appeal of the aggregate theft conviction. Rule 38.4 provides an appellant's brief must be no longer than 50 pages, excluding the pages containing the identity of the parties and counsel, the table of contents, the table of authorities, the statement of the case, the issues presented, the signature, the proof of service, and the appendix. *See* TEX. R. APP. P. 38.4. Appellant's counsel skirted the 50-page limit by including the statement of facts and summary of the argument among those items expressly excluded from the 50-page limit by Rule 38.4. We further caution counsel to pay heed to the requirements of the Texas Rules of Appellate Procedure.

approximately $2,000 in merchandise. Store security detained appellant after a sales clerk recognized appellant as having previously opened an account there under another name. When appellant was arrested, a counterfeit driver's license, social security card, Diner's Club card, and credit history in the name of "Eddie Lewis Allen" were found in appellant's possession. The real Eddie Allen told the police there had been several unauthorized credit applications in his name, including the Diners' Club card, and his address had been changed at the Post Office and his credit union without his knowledge.

## II. SUFFICIENCY OF THE EVIDENCE

Appellant challenges the sufficiency of the evidence supporting his conviction for aggregate theft.[2] When a defendant pleads guilty, the State must "introduce evidence into the record showing the guilt of the defendant . . . and in no event shall a person charged be convicted upon his plea without sufficient evidence to support the same." TEX. CODE CRIM. PROC. ANN. art. 1.15 (Vernon Supp. 2000). The evidence is sufficient if it embraces every essential element of the offense charged and establishes the defendant's guilt. *See Stone v. State*, 919 S.W.2d 424, 427 (Tex. Crim. App. 1996).[3] A judicial confession standing alone is sufficient to support a guilty plea under article 1.15. *See Dinnery v. State*, 592 S.W.2d 343, 353 (Tex. Crim. App. 1980) (op. on reh'g).

In his first and third points of error, appellant claims the evidence is insufficient to support his conviction for aggregate theft because the indictment only alleges a complete offense for theft under section 31.03 of the Texas Penal Code, not aggregate theft under section 31.09. A person commits the offense of theft "if he unlawfully appropriates property with intent to deprive the owner of property." TEX. PENAL CODE ANN. § 31.03(a) (Vernon Supp. 2000). A theft is aggregate "[w]hen amounts are obtained . . .

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[2] Appellant does not challenge the sufficiency of the evidence supporting his conviction for forgery.

[3] Appellant challenges the sufficiency of the evidence supporting his conviction for aggregate theft under the standards set forth in *Jackson v. Virginia*, 443 U.S. 307 (1979), and *Clewis v. State*, 922 S.W.2d 126 (Tex. Crim. App. 1996). However, the standards for legal and factual sufficiency are not applicable in cases in which the defendant has voluntarily entered a plea of guilty. *See Ex parte Martin*, 747 S.W.2d 789, 791 (Tex. Crim. App. 1988) (citing *Ex parte Williams*, 703 S.W.2d 674 (Tex. Crim. App. 1986)); *Young v. State*, 993 S.W.2d 390, 391 (Tex. App.–Eastland 1999, no pet.); *Wright v. State*, 930 S.W.2d 131, 132-33 (Tex. App.–Dallas 1996, no pet.).

pursuant to one scheme or continuing course of conduct, whether from the same or several sources, . . ." TEX. PENAL CODE ANN. § 31.09 (Vernon 1994). When an indictment alleges the property was taken pursuant to one scheme or continuing course of conduct, the indictment has charged aggregate theft under section 31.09. *See Thomason v. State*, 892 S.W.2d 8, 11 (Tex. Crim. App. 1994); *Whitehead v. State*, 745 S.W.2d 374, 377 (Tex. Crim. App. 1988); *Turner v. State*, 636 S.W.2d 189, 196 (Tex. Crim. App. 1980).

Appellant, however, did not object to any deficiency in the indictment with regard to whether it alleges the elements of aggregate theft. Therefore, appellant may not complain of such alleged deficiency on appeal. *See* TEX. CODE CRIM. PROC. ANN. art. 1.14(b) (Vernon Supp. 2000); *Ex parte Morris*, 800 S.W.2d 225, 227 (Tex. Crim. App. 1990); *Williams v. State*, 848 S.W.2d 777, 780 (Tex. App.–Houston [14th Dist.] 1993, no pet.). Even if appellant had not waived error, the indictment, closely tracking the language of section 31.09, alleges the property was taken "pursuant to one scheme and continuing course of conduct" and, therefore, charges aggregate theft under section 31.09. *See Thomason*, 892 S.W.2d at 11; *Whitehead*, 745 S.W.2d at 377; *Turner*, 636 S.W.2d at 196. Appellant's "Waiver of Constitutional Rights, Agreement to Stipulate, and Judicial Confession" is identical to the language contained in the indictment. Therefore, appellant's confession embraces every essential element of the offense of aggregate theft and establishes appellant's guilt. *See Stone*, 919 S.W.2d at 427. Appellant's first and third points of error with regard to his aggregate theft conviction are overruled.

In his second and fourth points of error, appellant claims the evidence is insufficient to support his conviction of a second degree felony for aggregate theft because although the checks deposited in his bank accounts totaled $32,537.95, the PSI report establishes that he withdrew only $13,868.24 and, therefore, he could not have appropriated more than $20,000.[4] Contrary to this assertion, the value of the checks

[4] Appellant claims he could only have been convicted of a state jail felony because he only "attempted" to appropriate more than $20,000. Theft of property valued between $20,000 and $100,000 is a third degree felony. *See* TEX. PENAL CODE ANN. § 31.03(e)(5) (Vernon Supp. 2000). Appellant argues that because criminal attempt is one category lower than the offense attempted, "attempted" theft of $20,000 to $100,000 is a state jail felony with a maximum sentence of two years in a state jail facility, with no (continued...)

deposited into appellant's various bank accounts is the face amount of the checks, even if appellant did not, or was not able to, withdraw the full amount deposited. *See Cooper v. State*, 509 S.W.2d 865, 867 (Tex. Crim. App. 1974) (holding that evidence of an unendorsed check in the amount of $51.86, upon endorsement, could have been sold at that value upon presentation and was sufficient to support the defendant's conviction for theft of property valued over $50); *Huff v. State*, 630 S.W.2d 909, 913 (Tex. App.–Amarillo 1982, no pet.) (holding that evidence that the defendant kept an uncashed check in the amount of $225, in the absence of any showing that he had any intention to return it voluntarily, was sufficient to establish an intent to deprive the owner of property valued at $225); *see also Davila v. State*, 956 S.W.2d 587, 589 (Tex. App.–San Antonio 1997, pet. ref'd) (rejecting the defendant's argument that if she did not cash the check, she could not have deprived the complainant of property under the theft statute).

Appellant further contends, without citing any supporting authority, only coins and currency constitute property subject to theft, not checks. To the contrary, checks are property subject to theft. *See Barefield v. State*, 331 S.W.2d 754, 756 (Tex. Crim. App. 1960); *Davila*, 956 S.W.2d at 589; *Huff*, 630 S.W.2d at 913; *see also Parks v. State*, 960 S.W.2d 234, 237 (Tex. App.–Houston [1st Dist.] 1997, pet. ref'd). Appellant's judicial confession is sufficient to support his conviction for aggregate theft of $20,000 to $100,000. Appellant's second and fourth points of error with regard to his aggregate theft conviction are overruled.

In his sixth and seventh points of error, appellant claims the evidence is insufficient to support his conviction because no money was taken from the seven individuals named as complainants in the indictment. The PSI report states appellant "obtained stolen convenience checks from different credit card companies in the name[s] and accounts of seven different complainants." Appellant argues that although the checks may have been written in the names of the complainants, the checks were actually obtained from different credit card companies and, therefore, the money was shown to be appropriated from the credit

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[4] (...continued)
enhancement for a prior felony not found in article 42.12, section 3g(a)(1). *See* TEX. PENAL CODE ANN. §§ 12.35, 15.01(d) (Vernon 1994); TEX. CODE CRIM. PROC. ANN. art. 42.12, §3g(a)(1) (Vernon Supp. 2000).

card companies, not the seven complainants listed in the indictment.

Appellant cites no authority in support of this assertion and, therefore, has waived error on appeal. *See* TEX. R. APP. P. 38.1(h). Furthermore, to the extent that he is complaining that the indictment erroneously named those seven individuals as the complainants rather than the credit card companies, appellant has waived any error by failing to object to the indictment. *See* TEX. CODE CRIM. PROC. ANN. art. 1.14(b); *Ex parte Morris*, 800 S.W.2d at 227; *Williams*, 848 S.W.2d at 780. In any event, appellant's judicial confession is sufficient to support his conviction for aggregate theft against the complainants listed in the indictment. Appellant's sixth and seventh points of error with regard to his aggregate theft conviction are overruled.

## III. INEFFECTIVE ASSISTANCE OF COUNSEL

### A. Standard of Review

Appellant challenges the voluntariness of his guilty pleas for both aggregate theft and forgery on the basis that he received ineffective assistance of counsel. The standard of review for evaluating claims of ineffective assistance of counsel during the guilt/innocence phase of the trial is set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). *See Rosales v. State*, 4 S.W.3d 228, 231 (Tex. Crim. App. 1999). To prove an ineffective assistance of counsel claim, appellant must establish: (1) counsel's performance fell below the standards of reasonable competency, and (2) there is a reasonable probability that the deficient performance prejudiced his defense, depriving him of a fair trial. *See Guidry v. State*, 9 S.W.3d 133, 140 n.4 (Tex. Crim. App. 1999). Appellant must establish both prongs by a preponderance of the evidence. *See Tong v. State*, 25 S.W.3d 707, 712 (Tex. Crim. App. 2000).

To prove deficiency, appellant must show counsel's performance deviated from the "prevailing professional norms." *See Cardenas v. State*, No. 73,107, 2000 WL 489759, at *5 (Tex. Crim. App. April 26, 2000). To satisfy the prejudice prong, appellant must show there is a reasonable probability, but for counsel's errors, the result of the proceeding would have been different. *See Kober v. State*, 988 S.W.2d 230, 232 (Tex. Crim. App. 1999). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *See Thompson v. State*, 9 S.W.3d 808, 812 (Tex. Crim. App.

1999). In the context of a plea of guilty, that standard requires the defendant to show a reasonable probability, but for defense counsel's errors, the defendant would not have pleaded guilty, but, instead, would have insisted on going to trial. *See Ex parte Moody*, 991 S.W.2d 856, 857-58 (Tex. Crim. App. 1999). Showing that defense counsel's errors had some conceivable effect on the outcome of the proceeding is not sufficient. *See Kober*, 988 S.W.2d at 232-33.

The review of defense counsel's representation at trial is highly deferential. *See Tong*, 25 S.W.3d at 712. We indulge a strong presumption that defense counsel's actions fall within the wide range of reasonable representation. *See McFarland v. State*, 928 S.W.2d 482, 500 (Tex. Crim. App. 1996). Appellant bears the burden of overcoming that presumption. *See id.* A claim for ineffective assistance of counsel must be affirmatively supported by the record. *See Thompson*, 9 S.W.3d at 814.

### B. Sufficiency of the Evidence

In his fifth and eleventh points of error with regard to his aggregate theft conviction, appellant claims his trial counsel should have known the evidence does not establish that appellant appropriated more than $20,000. Appellant merely reiterates his argument that although he deposited checks in the amount of $32,537.95 into his various bank accounts, he actually appropriated only $13,868.24 because that is the amount he withdrew from those accounts. As determined above, it is irrelevant that appellant only withdrew $13,868.24, rather than the full $32,537.95; the value of the checks deposited in appellant's bank accounts was the value of the property taken. *See Cooper*, 509 S.W.2d at 867; *Huff*, 630 S.W.2d at 913. Therefore, because the evidence is sufficient to support appellant's conviction for aggregate theft of between $20,000 and $100,000, and establish his guilt, appellant's trial counsel's performance was not deficient in this regard. Appellant's fifth and eleventh points of error with regard to his aggregate theft conviction are overruled.

In his first and third points of error with regard to his forgery conviction, appellant also bases his ineffective assistance of counsel claims on his attorney's alleged failure to know the evidence was not sufficient to support his conviction for aggregate theft because appellant did not appropriate more than $20,000. Appellant contends that because he received ineffective assistance of counsel in the aggregate

theft case, his plea of guilty to the forgery charge was also rendered involuntary. It is highly questionable that counsel's alleged deficient performance in one case could have any bearing on appellant's decision to enter a plea of guilty in another wholly unrelated case. There is no evidence in the record to suggest that appellant entered his plea of guilty to the forgery charge on the basis of his conviction for aggregate theft. Appellant's first and third points of error with regard to his forgery conviction are overruled.

### C. Motion for New Trial

In his tenth point of error with regard to his aggregate theft conviction and his fourth point of error with regard to his forgery conviction, appellant claims his post-conviction attorney rendered ineffective assistance of counsel for failing to prosecute the motion for new trial in each case. It is well-settled that the reviewing court engages in the presumption that defense counsel's actions are sound trial strategy. *See Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994). In this regard, to defeat the presumption of reasonable professional assistance, the defendant's allegation of ineffective assistance of counsel "must be firmly founded in the record and the record must affirmatively demonstrate the alleged ineffectiveness." *McFarland*, 928 S.W.2d at 500. Here, the record is silent as to why appellant's post-conviction trial counsel did not prosecute the motions for new trial. In the face of a silent record, finding defense counsel ineffective would require this court to engage in inappropriate speculation regarding counsel's actions. *See Stults v. State*, 23 S.W.3d 198, 208 (Tex. App.–Houston [14th Dist.] 2000, no pet. h.).

The Texas Court of Criminal Appeals has repeatedly observed that "[a] substantial risk of failure accompanies an appellant's claim of ineffective assistance of counsel on direct appeal. . . . In the majority of instances, the record on direct appeal is simply undeveloped and cannot adequately reflect the failings of trial counsel." *Thompson*, 9 S.W.3d at 813-14. For an undetermined reason, appellant's attorney did not prosecute the motions for new trial. "[O]nly further inquiry will provide the information necessary to make the proper determination whether he provided the effective assistance envisioned under the Sixth Amendment." *Id*. at 814. Accordingly, appellant has not rebutted the presumption that his attorney's

decision not to prosecute the motions for new trial was within the range of competent representation.[5] Appellant's tenth point of error with regard to his aggregate theft conviction and fourth point of error with regard to his forgery conviction are overruled.

### D. State's Punishment Memorandum

In his thirteenth point of error with regard to his aggregate theft conviction and his eighth point of error with regard to his forgery conviction, appellant claims he was denied effective assistance of counsel at punishment because his attorney did not object to the trial court's making the State's punishment memorandum part of the PSI report. The two-pronged *Strickland* test also applies to the determination of ineffective assistance of counsel claims at the punishment stage of trial. *See Milburn v. State*, 3 S.W.3d 918, 919 (Tex. Crim. App. 1999). The State filed a punishment memorandum, which the trial court made part of the PSI report. Appellant argues that under article 42.12, section 9 of the Texas Code of Criminal Procedure, only the probation officer, not the prosecution, may prepare the PSI report. *See* TEX. CODE CRIM. PROC. ANN. art. 42.12, § 9(a) (Vernon Supp. 2000) (providing, in relevant part, "the judge shall direct a *supervision officer* to report to the judge in writing on the circumstances of the offenses with which the defendant is charged, . . .") (emphasis added).

The State's punishment memorandum merely reiterates the information contained in the PSI report. Moreover, there is nothing in the record concerning appellant's attorney's reasons for not objecting to the punishment memorandum. Therefore, appellant has failed to rebut the presumption that his attorney's

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[5] Furthermore, appellant has failed to show that but for counsel's failure to prosecute his motions for new trial, the result of the proceeding would have been different. Appellant raised only two grounds in support of his request for a new trial. First, appellant claimed he did not understand the consequences of his guilty plea. A record showing that the trial court properly admonished the defendant is prima facie showing that the defendant entered into a knowing and voluntary plea. *See Kirk v. State*, 949 S.W.2d 769, 771 (Tex. App.–Dallas 1997, pet. ref'd). The burden then shifts to the defendant to establish that he did not understand the consequences of his plea. *See Ex parte Gibauitch*, 688 S.W.2d 868, 871 (Tex. Crim. App. 1985). Appellant failed to address in what way he did not understand the consequences of his plea. Second, appellant alleged that his previous attorney had advised him that he would receive deferred adjudication. A plea of guilty is not rendered involuntary merely because the sentence exceeds what the defendant expects, even if that expectation was raised by defense counsel. *See West v. State*, 702 S.W.2d 629, 633 (Tex. Crim. App. 1986); *Reissig v. State*, 929 S.W.2d 109, 112 (Tex. App.–Houston [14th Dist.] 1996, pet. ref'd); *Perrett v. State*, 871 S.W.2d 838, 839 (Tex. App.–Houston [14th Dist.] 1994, no pet.).

actions are not within the wide range of reasonable representation. Appellant's thirteenth point of error with regard to his aggregate theft conviction and his eighth point of error with regard to his forgery conviction are overruled.

### E. Extraneous Victim Impact Statement

In his fourteenth point of error with regard to his aggregate theft conviction and his ninth point of error with regard to his forgery conviction, appellant claims he was denied effective assistance of counsel at punishment because his attorney did not object to the inclusion of an "extraneous" victim impact statement by Eddie Allen on the grounds of relevance and prejudice. Eddie Allen's victim impact statement provides:

> Mr. Allen acknowledged he incurred no out-of-pocket financial loss, but wished to stress the long hours and aggravation expended in trying to sort out and correct the damage done to his credit history. Mr. Allen hopes the defendant receives some jail time for the damage he has caused.

With respect to extraneous victim impact evidence, the Court of Criminal Appeals has stated:

> [t]he danger of unfair prejudice to a defendant inherent in the introduction of "victim impact" evidence with respect to a victim not named in the indictment on which he is being tried is unacceptably high. The admission of such evidence would open the door to admission of victim impact evidence arising from *any* extraneous offense committed by a defendant.

*Cantu v. State*, 939 S.W.2d 627, 637 (Tex. Crim. App. 1997) (emphasis in the original).

Appellant maintains that Eddie Allen was not a victim in either the aggregate theft case or the forgery case because he was not a named complainant in either case. The state contends Eddie Allen, whose identity was stolen by appellant and whose credit was adversely affected by appellant's actions, was a victim in the forgery case, even though he was not a named complainant; therefore, as a victim, Eddie Allen could present victim impact evidence in the PSI report with regard to the forgery charge. *See* TEX. CODE CRIM. PROC. ANN. art. 56.03(e) (Vernon Supp. 2000).

The record here is silent as to appellant's attorney's reasons for not objecting on the grounds the

extraneous victim impact statement was irrelevant and unduly prejudicial. In *Tong*, the Court of Criminal Appeals considered a claim of ineffective assistance of counsel for failing to object to victim impact testimony concerning an unadjudicated extraneous offense. *See Tong*, 25 S.W.3d at 713. Although recognizing such extraneous victim impact testimony was "arguably objectionable," the court found the record was silent as to why defense counsel failed to object and, therefore, insufficient to overcome the presumption that counsel's actions were part of a strategic plan. *See id.* at 713-14 (citing *Thompson*, 9 S.W.3d at 814). Even if Eddie Allen were the victim of an extraneous offense, the record in this case, like the record in *Tong*, is insufficient to overcome the presumption that defense counsel's actions were part of his trial strategy. Appellant's fourteenth point of error with regard to his aggregate theft conviction and ninth point of error with regard to his forgery conviction are overruled.[6]

### F. Victim's Recommendation on Punishment

In his fifteenth point of error with regard to his aggregate theft conviction and his tenth point of error with regard to his forgery conviction, appellant claims he was denied effective assistance of counsel at punishment because his counsel failed to object to the introduction of the victim's recommendation on punishment prior to sentencing. Specifically, appellant complains about the statement contained the PSI report: "Mr. Allen hopes the defendant receives some jail time for the damage caused."[7]

In support of this contention, appellant relies on article 42.03, section 1(b) of the Texas Code of Criminal Procedure, which provides the victim may orally address the court about the effect of the offense on him or her. *See* TEX. CODE CRIM. PROC. ANN. art. 42.03, § 1(b) (Vernon Supp. 2000). The victim's statement to the court must be made after the court has: (1) assessed the accused's punishment and has determined whether or not to grant community supervision, (2) announced the terms and conditions

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[6] Moreover, to the extent that appellant complains Eddie Allen is not a victim in the aggregate theft case, appellant does not raise a complaint regarding the fact that the trial court heard both offenses together or that both offenses were included in the same PSI report.

[7] Appellant still maintains his position that Eddie Allen is not a victim of either the aggregate theft offense or the forgery offense. To the extent that appellant complains that Eddie Allen's statement is extraneous with regard to the aggregate theft offense, appellant, again, does not complain about both offenses having been heard together or having been included in the same PSI report.

of the sentence, and (3) pronounced the sentence. *See id.*

Here, the record is silent as to the reasons for appellant's attorney's reasons for not objecting to the trial court's consideration of Eddie Allen's recommendation on punishment prior to sentencing. Without anything in the record with respect to the reasons for not objecting to Eddie Allen's recommendation on punishment, appellant cannot rebut the presumption that his trial counsel's actions were within the range of competent representation.[8] Appellant's fifteenth point of error with regard to his aggregate theft conviction and his tenth point of error with regard to his forgery conviction are overruled.

### G. Extraneous Offenses

In his sixteenth point of error with regard to his aggregate theft conviction and his second point of error with regard to his forgery conviction, appellant claims he was denied effective assistance of counsel at punishment because his attorney did not object to the admission of certain extraneous offenses for immigration fraud and passport fraud. Appellant contends these extraneous offenses were not proven beyond a reasonable doubt. When the trial court assesses punishment, it may determine an extraneous offense is relevant to punishment and admit such evidence, but it may only consider the extraneous offense in assessing punishment if it finds the offense was proven beyond a reasonable doubt. *See Williams v. State*, 958 S.W.2d 844, 845 (Tex. App.–Houston [14th Dist.] 1997, pet. ref'd); *see also* TEX. CODE CRIM. PROC. ANN. art. 37.07, § 3(a) (Vernon Supp. 2000).

This court rejected a similar claim where there was no indication the trial court had considered the extraneous offenses contained in the PSI report without determining whether they had been proven beyond reasonable doubt. *See Williams*, 958 S.W.2d at 845. Similarly, in this case, we find nothing in the record to suggest the trial court considered the extraneous offenses contained in the PSI report without ascertaining whether they had been proven beyond a reasonable doubt. Therefore, appellant has failed to

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[8] The Fort Worth Court of Appeals rejected a similar argument and held that under article 42.12, section 9(a) of the Texas Code of Criminal Procedure, the trial court could consider the portion of the PSI report that included the victim's sentencing recommendation prior to sentencing. *See Fryer v. State*, 993 S.W.2d 385, 388-89 (Tex. App.–Fort Worth 1999, pet. granted); *see also* TEX. CODE CRIM. PROC. ANN. art. 42.12, § 9(a).

show that counsel's performance in failing to object to the inclusion of the unadjudicated extraneous offenses in the PSI report was not within the range of reasonable representation. Appellant's sixteenth point of error with regard to his aggregate theft conviction and his second point of error with regard to his forgery conviction are overruled.

Finally, appellant requests that we abate this appeal so that the record regarding his ineffective assistance of counsel claims can be developed in the trial court. We deny this request. Ineffective assistance of counsel claims are better raised in a post-conviction application for a writ of habeas corpus. *See Tong*, 25 S.W.3d at 714 n.10.

## IV. MOTION FOR NEW TRIAL

In his eighth and ninth points of error with regard to his aggregate theft conviction and his sixth and seventh points of error with regard to his forgery conviction, appellant claims the trial court should have held a hearing on his motions for new trial because (1) he was denied effective assistance of counsel, and (2) the trial court committed material error likely to injure his rights. The granting or denying of a motion for new trial rests within the sound discretion of the trial court. *See Lewis v. State*, 911 S.W.2d 1, 7 (Tex. Crim. App. 1995). This rule also applies in cases in which the trial court denies a motion for new trial without conducting an evidentiary hearing. *See McIntire v. State*, 698 S.W.2d 652, 660 (Tex. Crim. App. 1985).

To be timely, a motion for new trial must be filed within thirty days of the date the trial court imposes the defendant's sentence in open court. *See* TEX. R. APP. P. 21.4. The defendant must further "present" his motion for new trial to the trial court within ten days of filing the motion, unless the trial court, in its discretion, permits the motion to be presented and heard within 75 days from the date with it imposes sentence. *See* TEX. R. APP. P. 21.6. The filing of a motion for new trial is not sufficient, however, to show "presentment." *See Carranza v. State*, 960 S.W.2d 76, 78 (Tex. App. Crim. 1998). Instead, to "present" means the record must show "the movant for a new trial sustained the burden of actually delivering the motion for new trial to the trial court or otherwise bringing the motion to the attention or actual notice of the trial court." *Id*. at 79. Although this list is not exhaustive, presentment may be evidenced by

the trial court's signature or notation on a proposed order or by a hearing set on the docket. *See id.* at 81 (Overstreet, J., concurring).

While the record establishes that appellant timely filed both motions for new trial, the record does not reflect that appellant "presented" his motions to the trial court by bringing the motions to the attention or actual notice of the court. Moreover, a motion for new trial must be supported by an affidavit of either the accused or someone else specifically showing the truth of the grounds asserted for new trial, which are not ascertainable from the record. *See Jordan v. State*, 883 S.W.2d 664, 665 (Tex. Crim. App. 1994) (citing *Reyes v. State*, 849 S.W.2d 812, 816 (Tex. Crim. App. 1993)). No affidavits regarding the truth of appellant's allegations were submitted in support of his motions. Therefore, the trial court did not abuse its discretion in not holding a hearing on appellant's motions for new trial. Appellant's eighth and ninth points of error with regard to his aggregate theft conviction and sixth and seventh points of error with regard to his forgery conviction are overruled.

## V. MANIFESTLY UNJUST SENTENCE

In his twelfth and seventeenth points of error with regard to his aggregate theft conviction and his fifth and eleventh points of error with regard to his forgery conviction, appellant asserts it was "manifestly unjust" for the trial court to assess the maximum term of incarceration, i.e., twenty years for each conviction, in light of the fact that he pleaded guilty. Appellant raises this complaint for the first time on appeal.

Almost every right, constitutional and statutory, may be waived by failing to object. *See Smith v. State*, 721 S.W.2d 844, 855 (Tex. Crim. App. 1986). Specifically, objections to punishment may be waived. *See Solis v. State*, 945 S.W.2d 300, 301-02 (Tex. App.–Houston [1st Dist.] 1997, pet. ref'd) (holding that by not objecting in the trial court, appellant, who entered a plea of guilty without an agreed recommendation of punishment, waived error with regard to complaint of disproportionality of sentences to offenses committed). Therefore, by his failure to object in the trial court to the length of his sentences, appellant has not preserved error for appellate review. *See* TEX. R. APP. P. 33.1. Moreover, appellant has waived error by not citing any authority in support of his contention that the trial court cannot assess

the maximum punishment when the defendant enters a plea of guilty without an agreed recommendation on punishment. *See* TEX. R. APP. P 38.1(h). Appellant's twelfth and seventeenth points of error with regard to his aggregate theft conviction and fifth and eleventh points of error with regard to his forgery conviction are overruled.

Having overruled each of appellant's points of error, the judgments of the trial court, accordingly, are affirmed.

/s/ Don Wittig
Justice

Judgment rendered and Opinion filed November 2, 2000.

Panel consists of Justices Yates, Wittig, and Frost.

Do Not Publish — TEX. R. APP. P. 47.3(b).