[Cite as *State v. Phipps*, 2015-Ohio-3042.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
		No. 14AP-545
v.	:	(C.P.C. No. 12CR-6254)
Sharvess M. Phipps,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on July 30, 2015

Ron O'Brien, Prosecuting Attorney, and *Barbara A. Farnbacher*, for appellee.

Timothy Young, Ohio Public Defender, and *Carrie Wood*, for appellant.

APPEAL from the Franklin County Court of Common Pleas

DORRIAN, J.

{¶ 1} Defendant-appellant, Sharvess M. Phipps ("appellant"), appeals from a judgment of the Franklin County Court of Common Pleas denying his petition for postconviction relief without a hearing. Because we conclude that the trial court abused its discretion by denying a hearing on some of appellant's grounds for postconviction relief, we affirm in part and reverse in part.

{¶ 2} The facts and procedural history leading to appellant's convictions and sentence are more fully detailed in this court's decision on his direct appeal, *State v. Phipps*, 10th Dist. No. 13AP-640, 2014-Ohio-2905. As relevant here, appellant was indicted on December 12, 2012, on 41 felony charges arising from a series of robberies, burglaries, and home invasions that occurred in May and June 2012. Appellant, who was represented by attorney J. Tullis Rogers, ultimately pled guilty to 21 counts of the

indictment. *Phipps* at ¶ 2. As a result of these guilty pleas, and his convictions in three other cases, on January 25, 2013, the trial court sentenced appellant to an aggregate prison term of 172 years and 11 months. *Id.* at ¶ 4. Due to errors in the original sentencing, the trial court conducted a resentencing hearing on June 14, 2013, and sentenced appellant to an aggregate prison term of 150 years. At some point following the resentencing hearing, appellant ceased to be represented by attorney Rogers; in his direct appeal and postconviction proceedings, appellant was represented by attorneys from the office of the Ohio Public Defender.

{¶ 3} On April 7, 2014, while his direct appeal was pending, appellant filed a petition for postconviction relief pursuant to R.C. 2953.21, asserting that Rogers provided ineffective assistance by failing to advise him regarding a 33-year plea agreement offered by the state, by failing to provide accurate information and counsel regarding the consequences of his guilty plea to 21 felony counts, and by failing to investigate or present evidence of mitigation at sentencing. The state asserted that the materials attached to appellant's petition were insufficient to meet his evidentiary burden. The trial court issued a judgment denying the petition without conducting a hearing on it, concluding that appellant did not present credible evidence demonstrating that his trial counsel was ineffective to warrant a hearing or to support relief from the judgment.

{¶ 4} Appellant appeals from the trial court's judgment, assigning four errors for this court's review:

> Assignment of Error I
>
> The trial court erred in dismissing Sharvess Phipps's petition without an evidentiary hearing because Sharvess provided sufficient evidence that he was denied the effective assistance of counsel during the plea phase of his proceedings. Sharvess produced evidence that demonstrated both the lack of competent counsel and prejudice, which overcomes any presumption of counsel's "reasonable professional assistance" and required a hearing.
>
> Assignment of Error II
>
> The trial court abused its discretion in making a merits determination without holding a hearing and without considering Sharvess's status as a juvenile for purposes of sentencing, as Sharvess's postconviction petition provided

> sufficient operative facts to demonstrate that (1) trial counsel was ineffective for failing to investigate mitigation evidence, and (2) that the mitigation evidence demonstrated, among other things, that Sharvess should have been considered a juvenile for purposes of sentencing.
>
> Assignment of Error III
>
> The trial court erred when it concluded that trial counsel was entitled to a strong presumption that his conduct fell within the range of reasonable professional assistance and when it failed to order a hearing when the defendant was unable to produce an affidavit from trial counsel to rebut plea hearing when trial counsel constructively refused to (1) produce the complete client file to postconviction counsel, including any documentation of conversations with the client and/or the investigator, and (2) communicate with postconviction counsel.
>
> Assignment of Error IV
>
> Sharvess Phipps was denied the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United State [sic] Constitution and Section 16, Article I of the Ohio Constitution, and his plea was rendered unknowing, unintelligent, and involuntary under the Fourteenth Amendment to the United States Constitution and Section 10, Article I of the Ohio Constitution, when defense counsel (1) failed to discuss the initial plea offer of 33 years and consequences of acceptance and rejection with Sharvess; (2) provided incorrect legal advice to Sharvess regarding the State's second plea offer of an open plea to 21 of the 41 counts; and (3) failed to investigate, evaluate, or present any evidence of mitigation at Sharvess's sentencing.

{¶ 5} Pursuant to R.C. 2953.21(A)(1), an individual who has been convicted of a criminal offense may file a petition requesting that the court vacate or set aside the judgment or sentence based on a claim of denial or infringement of their rights that would render the judgment void or voidable under the Ohio Constitution or the United States Constitution. Postconviction relief is a civil collateral attack on a judgment, not an appeal of that judgment. *State v. Calhoun*, 86 Ohio St.3d 279, 281 (1999). A petition for postconviction relief allows the petitioner to present constitutional issues that would otherwise be unreviewable on direct appeal because the evidence supporting those issues

is not contained in the record of the criminal conviction. *State v. Carter*, 10th Dist. No. 13AP-4, 2013-Ohio-4058, ¶ 15. A postconviction relief petition does not, however, provide a second opportunity to litigate the conviction. *Id*.

{¶ 6} A defendant is not automatically entitled to an evidentiary hearing on a postconviction relief petition. *State v. Ibrahim*, 10th Dist. No. 14AP-355, 2014-Ohio-5307, ¶ 9. R.C. 2953.21(C) provides that, "[b]efore granting a hearing on a petition * * * the court shall determine whether there are substantive grounds for relief." Thus, the petitioner bears the initial burden of providing evidence that demonstrates a cognizable claim of constitutional error. *Ibrahim* at ¶ 9. A postconviction relief petition may be denied without an evidentiary hearing where the petition, the supporting affidavits, the documentary evidence, the files, and the records do not demonstrate that the petitioner set forth sufficient operative facts to establish substantive grounds for relief. *Calhoun* at paragraph two of the syllabus. We review a trial court's denial of a postconviction relief petition without a hearing for abuse of discretion. *State v. McBride*, 10th Dist. No. 14AP-237, 2014-Ohio-5102, ¶ 11. An abuse of discretion occurs when a trial court's decision is "unreasonable, arbitrary, or unconscionable." *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

{¶ 7} In his postconviction relief petition, appellant claimed that he received ineffective assistance from his trial counsel. "A convicted defendant alleging ineffective assistance of counsel must demonstrate (1) defense counsel's performance was so deficient that he or she was not functioning as the counsel guaranteed under the Sixth Amendment to the United States Constitution, and (2) defense counsel's errors prejudiced defendant, depriving him or her of a trial whose result is reliable." *State v. Campbell*, 10th Dist. No. 03AP-147, 2003-Ohio-6305, ¶ 24, citing *Strickland v. Washington*, 466 U.S. 668 (1984), and *State v. Bradley*, 42 Ohio St. 3d 136 (1989), paragraph two of the syllabus. Judicial scrutiny of counsel's performance is highly deferential, and there is a strong presumption that counsel's conduct falls within the wide range of professional assistance. *Id.* Thus, in order to obtain a hearing on his postconviction relief petition, appellant was required to submit evidence demonstrating sufficient operative facts which, if believed, would establish that his trial counsel substantially violated at least one of his essential duties to appellant and that appellant was prejudiced as a result. *Ibrahim* at ¶ 18.

{¶ 8} Appellant's first assignment of error asserts that the trial court erred by denying his petition without a hearing because he provided sufficient evidence that his trial counsel provided ineffective assistance during the plea phase of his proceedings. In his postconviction relief petition, appellant claimed that his trial counsel provided ineffective assistance during the plea phase in two ways. First, he asserted that his counsel failed to discuss a 33-year plea offer with him. Second, appellant asserted that his counsel gave him incorrect advice regarding the consequences of pleading guilty to 21 felony charges.

{¶ 9} Criminal defendants are entitled to effective assistance of counsel during plea negotiations. *Lafler v. Cooper*, __ U.S. __, 132 S.Ct. 1376, 1384 (2012). The United States Supreme Court has held that, "as a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused." *Missouri v. Frye*, __ U.S. __, 132 S.Ct. 1399, 1408 (2012). Defense counsel also must provide effective assistance when advising a defendant on whether to accept a plea offer. *Lafler* at 1384-88; *State v. Fickenworth*, 10th Dist. No. 14AP-542, 2015-Ohio-1556, ¶ 9.

{¶ 10} With respect to his first ground for postconviction relief, appellant argued that his trial attorney provided ineffective assistance by failing to discuss with him a 33-year plea offer conditioned on an agreement to testify against any co-defendants. In his affidavit in support of the postconviction relief petition, appellant asserted that a private investigator who was working with his trial counsel told him about the plea offer but that his attorney never discussed it with him. Appellant does not argue that he was unaware of the 33-year plea offer; instead, he asserts that his trial counsel provided ineffective assistance by failing to discuss the offer with him.

{¶ 11} Assuming, without deciding, for purposes of analysis that appellant's trial counsel performed deficiently by failing to discuss the 33-year plea offer directly with appellant, appellant must also demonstrate that he was prejudiced by such deficient performance. "To show prejudice from ineffective assistance of counsel where a plea offer has lapsed or been rejected because of counsel's deficient performance, defendants must demonstrate a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel." *Frye* at 1409. In his affidavit in

support of the postconviction relief petition, appellant does not assert that he would have accepted the 33-year plea offer if his trial counsel had discussed it with him. Moreover, the record of the plea hearing belies any such claim. In a colloquy with the judge, appellant's trial counsel addressed appellant's reasons for rejecting the 33-year plea offer:

> MR. ROGERS: I would also additionally like to say for the record, Judge Sheward, that during the course of these negotiations, the State did offer a plea, potential plea to my client of 33 years if he would agree to testify completely and fully against any co-defendants that might have been involved in these matters. This was explained in detail to my client.
>
> Since I was not able to assure my client, nor would the State, of safe passage in his years in prison, being labeled as a –
>
> THE COURT: Mr. Rogers, forgive me, the last part of what you said, you kind of dropped off and I didn't hear you. Since you were not able to guarantee your client what?
>
> Mr. ROGERS: If he were to testify against another and be known as a snitch in the institution, [h]e was concerned about his safety.
>
> THE COURT: Safe passage through the institution is what you were saying?
>
> MR. ROGERS: Yes, Your Honor, through the institution. At any rate, for whatever reasons and for reasons known only to him and known by him, he made the decision that he did not wish to offer testimony against another person and decided to accept his responsibility and plead guilty to all of these offenses that we have pled guilty to this morning.
>
> THE COURT: All right. Very well. Thank you. And again, anything further from you, Mr. Phipps, this afternoon?
>
> THE DEFENDANT: No. sir.

(Jan. 17, 2013 Tr. 23-24.) At the plea hearing, appellant heard his trial counsel explain the reason that he rejected the 33-year plea offer and was afforded an opportunity to contradict or supplement this explanation but failed to do so. Appellant cannot demonstrate that he was prejudiced by his trial counsel's alleged deficient performance because there is no evidence, not even appellant's own affidavit, establishing that he

would have accepted the 33-year plea offer if his trial counsel had discussed it with him directly. Therefore, the trial court did not abuse its discretion by denying appellant's postconviction relief petition without a hearing as to the first ground for relief because appellant did not set forth sufficient operative facts to establish substantive grounds for relief on this claim. *See Calhoun* at paragraph two of the syllabus.

{¶ 12} Appellant's second and third grounds for relief in his postconviction relief petition were based on a claim that he was denied effective assistance of counsel because his trial counsel gave incorrect information about the consequences of pleading guilty to 21 felony counts. Specifically, appellant argued that his trial counsel advised him that he would receive 24 years of mandatory prison time and that, after completing the mandatory portion of his sentence, he could apply for judicial release. Appellant further asserted that his trial counsel gave the impression that judicial release would be a mere formality. Appellant claimed that, if he had known that a sentence of 150 years or more was possible, he would not have entered the guilty pleas. As applied to entering a guilty plea, in order to establish ineffective assistance of counsel, a defendant must show that his counsel's performance was deficient and that there is a reasonable probability that, but for the deficient performance, he would not have entered his plea. *State v. Hall*, 10th Dist. No. 13AP-747, 2014-Ohio-1647, ¶ 16.

{¶ 13} The trial court concluded that appellant's affidavit was undermined by the transcript of the plea hearing. The trial court noted that, at the plea hearing, it reviewed each charge to which appellant had pled guilty and expressly advised him that the total sentence could be as much as 254 years. The court further noted that appellant was offered the opportunity to ask questions of the court or of his attorney regarding the court's explanation. After briefly conferring with counsel, appellant indicated he had no further questions. The court concluded that appellant's affidavit in support of the postconviction relief petition was not credible because the plea hearing transcript indicated that appellant acknowledged that he understood the potential sentence and asked questions of his counsel as the plea hearing proceeded. The state asserts that the trial court was correct in dismissing the petition without a hearing because appellant's own self-serving affidavit was insufficient as a matter of law to sustain his claims.

{¶ 14} At the plea hearing, the trial court reviewed the charges to which appellant was pleading guilty and explained the *maximum* possible jail term. Although the trial court indicated that some portion of the prison term would be mandatory, it did not expressly state the mandatory term that appellant would receive. Thus, appellant's assertion that he relied on his trial counsel's advice that he could seek judicial release after serving a mandatory term of 24 years is not necessarily inconsistent with the trial court's explanation that he faced a maximum possible sentence of 254 years. *See, e.g., State v. Yahya*, 10th Dist. No. 10AP-1190, 2011-Ohio-6090, ¶ 17 (concluding that trial court's delivery of statutorily required warning that a guilty plea might have immigration consequences would not necessarily cure a specific error committed by the defendant's attorney by advising her that she would not face adverse immigration consequences due to pleading guilty).

{¶ 15} The potential prejudice to appellant is highlighted by the fact that neither appellant nor the state has expressly identified the mandatory portion of appellant's sentence in the context of this appeal. In his brief, appellant alleges that, if the trial court had imposed the minimum possible sentence, he would have faced a mandatory term of 27 years and a total sentence of 54 years. At oral argument, however, appellant's counsel suggested that he would not be able to request judicial release until after he served 75 years in prison. In countering appellant's arguments, the state does not clearly set forth the mandatory portion of appellant's sentence. Moreover, as noted above, the trial court did not expressly state the total mandatory portion of the sentence at the sentencing hearing or the resentencing hearing. At the original sentencing hearing, the trial court appeared to indicate that the mandatory portion of the sentence was composed of fourteen 3-year firearm specifications, along with two 1-year firearm specifications, for a total mandatory term of 44 years. The judgment issued after the resentencing hearing suggests that the mandatory portion of the sentence was composed of eight 3-year firearm specifications and two 1-year firearm specifications, for a total mandatory term of 26 years. Finally, at the resentencing hearing, appellant's trial counsel and the prosecutor engaged in the following colloquy:

> Mr. ROGERS: Now, on these specifications, I think it adds up to about 24 years of mandatory time. Mr. Stead advises me that upon review of all of the facts and circumstances of the

> sentence, that his mandatory may be cut down by three years. Is that about right?
>
> MR. STEAD [the prosecutor]: I don't remember the total, but I expect it to be three years less than the last.

(June 14, 2013 Tr. 5.) This comment by appellant's trial counsel and the general lack of clarity regarding the mandatory portion of appellant's sentence lends credence to the claim that appellant relied on his trial counsel's guarantee that only 24 years of the sentence would be mandatory.

{¶ 16} We conclude that the trial court abused its discretion by denying appellant's postconviction relief petition without a hearing as to the second and third grounds, asserting that his trial counsel provided ineffective assistance with respect to the consequences of appellant's guilty pleas. As applied to entering a guilty plea, in order to establish ineffective assistance of counsel, a defendant must show that his counsel's performance was deficient and that there is a reasonable probability that, but for the deficient performance, he would not have entered his plea. *State v. Hall*, 10th Dist. No. 13AP-747, 2014-Ohio-1647, ¶ 16. In this case, appellant ultimately received a 150-year sentence as a result of his guilty pleas. He asserts that his trial counsel advised him that he would be required to serve a mandatory term of 24 years and then would be likely to receive judicial release. In his affidavit, appellant asserts that he would not have pled guilty if his trial counsel had advised him that a sentence of 150 years or more was a possibility. Under these circumstances, we find that appellant met his initial burden of demonstrating sufficient operative facts which, if believed, would establish ineffective assistance of counsel. Therefore, appellant was entitled to a hearing on the second and third grounds for relief in his postconviction relief petition.

{¶ 17} Accordingly, we overrule in part and sustain in part appellant's first assignment of error.

{¶ 18} In his second assignment of error, appellant asserts that the trial court erred by denying his petition without a hearing because he provided sufficient evidence that his trial counsel provided ineffective assistance by failing to investigate mitigation evidence or present that mitigation evidence at sentencing. The fourth ground for relief asserted in appellant's postconviction relief petition was that his trial counsel failed to investigate,

evaluate, or present any evidence of mitigation at sentencing. In support of this claim, appellant presented affidavits from his mother, grandmother, grandfather, uncle, half-brother, and one of his former teachers attesting that neither appellant's trial counsel nor any other member of the defense team contacted them prior to sentencing.

{¶ 19} Appellant's mother attested to potential abuse by appellant's father, as well as appellant's troublesome relationship with her boyfriend. Appellant's mother also attested to appellant's history as a good student and the fact that he had a child. She stated that she attempted to discuss these issues with appellant's trial counsel prior to the resentencing hearing. Appellant's trial counsel told the court at the resentencing hearing that he had just learned about new information that would require further follow-up, but appellant's mother attested that trial counsel never conducted any further investigation. Appellant's grandmother, grandfather, uncle, and half-brother similarly attested that appellant had a poor relationship with his father, who was not a positive role model. Appellant's former high school teacher attested that appellant was a good, quiet student who did not cause problems in class. Appellant argues that his trial counsel provided ineffective assistance by failing to investigate or present any of this information as mitigation at the sentencing hearing or the resentencing hearing. Appellant also argues that his trial counsel failed to present information regarding scientific studies of brain development in young adults, which would have supported an argument that it was possible for appellant to reform and rehabilitate as he aged.

{¶ 20} The trial court rejected this ground for postconviction relief, concluding that it did not bear on whether appellant's trial counsel properly advised him prior to entering the plea. The court also concluded that the evidence related to appellant's home life and upbringing would not override the sentencing guidelines the court followed.

{¶ 21} Generally, trial counsel's decision as to what mitigating evidence to present is a matter of trial strategy. *See State v. Campbell*, 10th Dist. No. 03AP-147, 2003-Ohio-6305, ¶ 37. Reviewing the record in this case, the only mitigating evidence offered on appellant's behalf consisted of a letter written by appellant and counsel's argument that appellant saved the state time and money by pleading guilty. In addition to reading appellant's letter into the record at the sentencing hearing, appellant's trial counsel offered the following statement:

When I initially received this case by appointment, it looked like a simple case. It was a weapon under disability and a carrying concealed weapon, and I thought we could work something out. But when I came to court and saw the officers and Mr. Stead here, I realized that there might be more to it than what it appeared to be. This is unusual in a case in my 44 years of practice and years as a prosecutor. I know one of the victims, Mr. Young, which is unfortunate. His colloquy was very eloquent and to the point and I think he was speaking for the whole neighborhood.

When I met this young man, Your Honor, he was direct, he looked me in the eye, he talked to me directly. We had many conversations about his cooperation and the possible offer. We met with the officers and Mr. Stead, Officers Best, Hurst and Scott. I have to say that in my years as a defense counsel, I have probably not seen any case prepared any better than this one for trial. It was a hopeless case to take to trial because the evidence was overwhelming. And because of the technological advances over the past years with cell phones and with social media, it became even more prosecution slanted. It was impossible to come up with a defense.

So when all of the evidence was presented to my client, I have to say that he immediately stepped right up to the plate, understood that all of the evidence was against him, and made a decision to plead guilty and to not go to trial. Not going to trial does save the county a lot of money, a lot of time, saves these people from being down here for weeks at a time to go through all of these counts, and it brings some end at least to his part.

* * *

Your Honor, both the State and some observers and I think some of the victims, the police and I were all a little bit surprised when Mr. Phipps rejected the offer of 33 years and said that he would plead guilty to what amounted to a gigantic amount of years, probably the most years that I have ever supervised and pled for in my 44 years of practice.

I have found in my experience that someone that has some hope, whether it be with drugs or prison, some hope that someday they may be able to atone for their sins or return to society in some way, shape or form are better behaved, have a better chance at recovering, better chance of contributing to others.

> God may have some purpose in mind for Mr. Phipps, and I hope it is to guide other people who are within the institution not to follow this path. I hope that he hangs with people who are positive thinkers, which there are people in the institution that are doing the next right thing. And then there are those who are forever evil. I have had clients like that.
>
> I do not believe this is an evil person. This is a 20-year-old who I can't explain, never will be able to explain, and even though I have represented literally thousands of them, I am at a loss. But I do know that I have talked to him, talked about this case, I have talked to him about his life. I have come to know him a little bit. He is very engaging, direct. He is healthy.
>
> Without all of this, taking him at 17 or 18 or 16 or whatever age before he started committing these crimes, he could have had a fabulous life in this country. He is good-looking and healthy.
>
> Your Honor, I can't say anything more except that I hope that you will give him some hope for a future outside the institution. I think it does cost about, what $60,000 a year to house somebody or something like that. Thank you, Your Honor.

(Jan. 25, 2013 Tr. 27-31.)

{¶ 22} At the resentencing hearing, appellant's trial counsel referred to receiving new information from appellant's mother and the need for further investigation of that information. However, he did not offer any additional substantive evidence to mitigate appellant's potential sentence:

> Yes, thank you, Your Honor. I said I think I made what I felt was a strong argument last time because of this young man's age and history. The Court saw fit based upon the charges and the facts of the case to impose what I considered was a severe and harsh sentence, but one that was justified by the law and the Court felt justified by the facts.
>
> Mr. Phipps' mother came today and I had some extensive conversation with her about this young man's background and what he went through. There were certain factors that didn't come out in the PSI and I was not aware of until today. I am looking into them, but they have to do with a series of abuses

> that this young man went through at the hand of his father at a young age which may, in part, explain his mental condition at the time of the commission of all of these crimes against the public that were committed in this, I think, about a three-month period, wasn't it, Doug?
>
> MR. STEAD [prosecutor]: Less than six weeks.
>
> MR. ROGERS: A short term, just completely went haywire. He is currently incarcerated at Noble. He has been back up here awaiting resentencing. I would imagine before my conclusion as a lawyer and your conclusion as a judge I may end up filing some motion in this case asking for maybe a reconsideration of the sentence or something. But I was hoping at the time that we would give him some sentence that allowed him to think that there may be some future for him in the world.

(June 14, 2013 Tr. 4-5.)

{¶ 23} The comments from appellant's trial counsel at the resentencing hearing are consistent with the affidavit from appellant's mother that was attached to the postconviction relief petition. Despite his indication that further investigation would be necessary, there is no indication that appellant's trial counsel undertook any additional investigation. Thus, it appears that appellant's trial counsel may not have presented all of the mitigation evidence that was available; at a hearing, the court would be able to determine why appellant's trial counsel failed to do so. *See State v. Montgomery*, 10th Dist. No. 13AP-1091, 2014-Ohio-5756, ¶ 23. Under these circumstances, we conclude that the trial court erred by denying appellant's postconviction relief petition without a hearing as to the fourth ground for relief.

{¶ 24} Accordingly, we sustain appellant's second assignment of error.

{¶ 25} Because we conclude that the trial court erred by dismissing appellant's postconviction relief petition without a hearing as to the second, third, and fourth grounds for relief, appellant's third and fourth assignments of error are rendered moot.

{¶ 26} For the foregoing reasons, appellant's first assignment of error is overruled in part and sustained in part. Appellant's second assignment of error is sustained, and his third and fourth assignments of error are rendered moot. Therefore, we affirm in part and reverse in part the judgment of the Franklin County Court of Common Pleas and remand

this case to that court for further proceedings in accordance with law and consistent with this decision.

Judgment affirmed in part, reversed in part, and cause remanded.

KLATT, J., concurs.
SADLER, J., concurs in part; dissents in part.

SADLER, J., concurring in part, dissenting in part.

{¶ 27} I agree with the majority's disposition of appellant's second assignment of error, as well as the majority's conclusion on appellant's first assignment of error that appellant failed to demonstrate that he suffered prejudice on his claim that his counsel did not properly advise him of the plea offer of 33 years of incarceration. However, I disagree with the majority's conclusion that the trial court erred in denying appellant a hearing on his petition for postconviction relief on the remaining grounds in the first assignment of error. Accordingly, I respectfully concur in part and dissent in part.

{¶ 28} Appellant's remaining allegations regarding the ineffective assistance of counsel are set forth by appellant in his affidavit as follows:

> I spoke with my attorney for the above-referenced case a total of about 4 times, each was right before my court appearances. The longest of these 4 conversations I had with him was 10 minutes long, and that was before the court appearance in which I pleaded guilty. I asked him if I could avoid trial. He said that, if I pleaded guilty, I would get only 24 years of mandatory time and then I could apply to get out. He told me that I had to ask the Judge to let me out, but what I understood my attorney to be saying was that this was just a procedural hurdle and a formality—but that I would get out. He did not discuss any other possibilities with me as far as sentencing goes. If my attorney had told me 254 years, 166 years, or 150 years was a possibility, I would not have signed the plea form.

(Appellant's Affidavit, 2.)

{¶ 29} The record is void of any evidence that appellant would not have entered his pleas of guilty had he been aware that the mandatory time he was facing would have been over 24 years of incarceration. Nor does the record contain evidence that appellant would not have entered his pleas of guilty had he known that judicial relief was more than a

"procedural hurdle and a formality." (Appellant's Affidavit, 2.) Rather, appellant only asserts that he would not have entered his pleas of guilty or signed the plea form "[i]f my attorney had told me 254 years, 166 years, or 150 years was a possibility." (Appellant's Affidavit, 2.)

{¶ 30} A review of the record belies appellant's representation that he was unaware of the lengthy sentence he was facing when entering his pleas of guilty to 21 counts of a 41-count indictment. First, the plea form itself specifically indicated the potential maximum prison term for the offenses was an aggregate potential sentence of 254 years of incarceration. Additionally, the transcript reflects that the trial court specifically advised appellant of such when it addressed him at the plea hearing when the court stated:

> If all of those were run consecutive to one another, the total sentence could be as high as 254 years.

(Jan. 17, 2013 Tr. 11.) Because appellant was fully aware that the potential sentence he faced totaled a maximum of 254 years, he cannot show prejudice in this regard. *See State v. Radel*, 5th Dist. No. 2009-CA-00021, 2009-Ohio-3543.

{¶ 31} Accordingly, in my view, the trial court did not abuse its discretion when it denied appellant's postconviction relief petition without a hearing because appellant failed to meet his initial burden of providing evidence to demonstrate he was prejudiced by his counsel's alleged deficient performance. Accordingly, I would overrule appellant's first assignment of error in its entirety.

{¶ 32} Having overruled appellant's first assignment of error, I would address appellant's third and fourth assignments of error. Because the majority holds differently, I respectfully concur in part and dissent in part.

_____