

[Cite as *State v. Barber*, 2010-Ohio-831.]

IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 22929
vs.	:	T.C. CASE NOS.00CR1272 00CR497
CURTIS L. BARBER	:	(Criminal Appeal from Common Pleas Court)
Defendant-Appellant	:	

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O P I N I O N

Rendered on the 5<sup>th</sup> day of March, 2010.

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GRADY, J.:

{¶ 1} In 2001, Defendant was convicted in Case No. 2000CR497  
 of one count of robbery and was sentenced to five years in prison,  
 to be served concurrently with the sentence in Case No. 2000CR1272.

In Case No. 2000CR1272 Defendant was convicted of aggravated  
 robbery, felonious assault, aggravated burglary, kidnaping,

disrupting public services, and three counts of attempted aggravated murder. Defendant was sentenced to a total of forty-one and one-half years in prison on those charges. No direct appeal was taken from the conviction in Case No. 2000CR497. On direct appeal in Case No. 2000CR1272, we affirmed Defendant's conviction and sentence. *State v. Barber*, Montgomery App. No. 18784, 2002-Ohio-7100.

{¶ 2} On August 7, 2008, the trial court resentenced Defendant pursuant to R.C. 2929.191 in both Case Nos. 2000CR497 and 2000CR1272, because the court had neglected to notify Defendant that he would be subject to a mandatory period of post-release control following his release from prison. On August 8, 2008, the trial court filed a termination entry in both cases, nunc pro tunc to March 5, 2001, imposing the same sentence that had originally been imposed in both cases, but correcting the sentence to include a mandatory period of post-release control.

{¶ 3} Defendant timely appealed to this court from his re-sentencing.

#### FIRST ASSIGNMENT OF ERROR

{¶ 4} "DEFENDANT-APPELLANT WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE RE-SENTENCING HEARING WHERE THE RE-SENTENCING PROCESS IS VIOLATIVE OF THE DUE PROCESS CLAUSE OF THE OHIO AND U.S. CONSTITUTION AND CONTRARY TO THE SEPARATION OF

POWERS DOCTRINE.”

SECOND ASSIGNMENT OF ERROR

{¶ 5} “DEFENDANT-APPELLANT WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF TRIAL COUNSEL AT THE AUGUST 7, 2008 HEARING WHERE COUNSEL FAILED TO ARGUE THAT APPELLANT’S MAXIMUM SENTENCE OF THREE YEARS HAD EXPIRED IN 2003 AT THE LATEST.”

FOURTH ASSIGNMENT OF ERROR

{¶ 6} “DEFENDANT-APPELLANT WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL WHERE THE ATTORNEY FAILED TO OBJECT THAT THE RESENTENCING HEARING AND JUDGMENT VIOLATED APPELLANT’S RIGHT NOT TO BE SUBJECTED TO RETROACTIVE JUDICIAL ENLARGEMENT OF THE SENTENCING STATUTES CONTRARY TO DUE PROCESS OF LAW AS CONSTITUTING EX POST FACTO LEGISLATION AS WELL THE DOUBLE JEOPARDY CLAUSE OF THE OHIO AND UNITED STATES CONSTITUTION.”

{¶ 7} Defendant argues that his counsel at the re-sentencing hearing performed deficiently in several respects, and as a result Defendant was deprived of his Sixth Amendment right to the effective assistance of counsel. Counsel's performance will not be deemed ineffective unless and until counsel's performance is proved to have fallen below an objective standard of reasonable representation and, in addition, prejudice arises from counsel's performance. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. To show that a defendant has been

prejudiced by counsel's deficient performance, the defendant must affirmatively demonstrate to a reasonable probability that were it not for counsel's errors, the result of the trial would have been different. *Id.*; *State v. Bradley* (1989), 42 Ohio St.3d 136.

{¶ 8} Defendant complains that his counsel at re-sentencing was ineffective for failing to object to the court's reliance on *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, in that the court did not make any of the findings required by R.C. 2929.14(B) in order to impose the higher sentences for his first degree felony convictions instead of the minimum three year sentences that could apply. Defendant complains that *Foster's* severance of the finding requirements in R.C. 2929.14(B) violates the separation of power doctrine because only the General Assembly may modify or suspend application of a statute.

{¶ 9} Defendant also complains that his counsel was ineffective for failing to object that, due to *Foster's* constitutional flaw, the court's failure to make the R.C. 2929.14(B) findings mandated imposition of minimum three year sentences instead of the ten year sentences the court imposed.

{¶ 10} Defendant also complains that his counsel was deficient for failing to object that because he had completed serving the minimum three year sentences that R.C. 2929.14(B) requires in 2006, the court was not authorized to resentence him in 2008.

{¶ 11} Defendant further argues that his counsel was deficient for failing to object that the court's application of the holding in *Foster* violates the double jeopardy and ex post facto clauses of the United States and Ohio Constitutions.

{¶ 12} Defendant's contentions regarding errors the trial court committed and to which his counsel failed to object at re-sentencing are beyond our review because Defendant has failed to file a transcript of the August 7, 2008 re-sentencing hearing at which the alleged errors were committed. In that circumstance, the presumption that the court's proceedings were regular and valid is not rebutted, and we necessarily conclude that no error occurred.

*Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197; *State v. Jones*, Montgomery App. No. 20862, 2006-Ohio-2640. Furthermore, it is clear that none of Defendant's contentions are supportable.

{¶ 13} This court and others have held that *Foster* does not violate the constitutional requirements of due process, the ex post facto or double jeopardy clauses, or the separation of powers doctrine. *State v. Smith*, Montgomery App. No. 22334, 2008-Ohio-6630; *State v. North*, Clark App. No. 07CA0059, 2008-Ohio-6239; *State v. Jordan*, Greene App. No. 2006CA0106, 2007-Ohio-7163; *State v. Benton*, Lucas App. No. L-07-1305, 2008-Ohio-3850. Therefore, we could not find that Defendant's counsel was ineffective for failing to object that those

constitutional requirements were violated by the court's application of *Foster* to Defendant's resentencing.

{¶ 14} R.C. 2967.28 provides that every prison sentence for a felony of the first degree or a felony sex offense shall include a mandatory five-year period of post release control. A trial court is required to notify a defendant at the time of the sentencing hearing of the potential of post release control, and must incorporate that notice into its journal entry. *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085. Where a sentence fails to contain a statutorily mandated term, such as post release control, the sentence is void. *Id.*; *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197.

{¶ 15} When a trial court fails to include the required post-release control notification in a sentence it imposes, the proper remedy is to resentence the defendant at a hearing, notifying him of his post release control requirements. *Id.*; *State v. Davis*, Montgomery App. No. 22403, 2008-Ohio-6722; R.C. 2929.191. Res judicata does not bar re-sentencing. *Simpkins*. Indeed, res judicata could not apply because the prior judgment of sentencing, being void, is not a valid prior judgment which is necessary for application of the res judicata bar. *Grava v. Parkman Twp.* (1995), 73 Ohio St.3d 379. Double jeopardy does not bar re-sentencing because there can be no legitimate expectation of finality in an

unlawful, void sentence. *Id.*

{¶ 16} Defendant had not completed serving his forty-one and one-half year sentence at the time of the 2008 re-sentencing hearing, and therefore it was not improper for the court to resentence him in order to advise him of the post release control requirements. *Simpkins; Davis; R.C. 2929.191.* At the re-sentencing hearing, the trial court imposed the same forty-one and one-half year sentence it imposed on March 5, 2001. The only change was the inclusion of a notification to Defendant that he was subject to a mandatory five-year period of post release control.

{¶ 17} Because Defendant has failed to produce a record that exemplifies his claimed errors, and has further failed to demonstrate any error on the part of the trial court in re-sentencing him in order to advise him about his post release control requirements, Defendant fails to demonstrate any deficient performance by counsel in not objecting to the resentencing, much less any resulting prejudice. Ineffective assistance of counsel has therefore not been demonstrated.

{¶ 18} Defendant's first, second and fourth assignments of error are overruled.

#### THIRD ASSIGNMENT OF ERROR

{¶ 19} "DEFENDANT-APPELLANT WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE AUGUST 7, 2008 RE-SENTENCING HEARING

WHERE HE FAILED TO OBJECT TO THE FACT THAT THE AGGRAVATED ROBBERY, AGGRAVATED BURGLARY AND KIDNAPING COUNTS FAILED TO CHARGE AN OFFENSE IN ABSENCE OF A MENS REA ELEMENT BEING ALLEGED.”

{¶ 20} Defendant argues that his counsel at the re-sentencing hearing performed deficiently because he failed to challenge Defendant’s conviction on the aggravated robbery, aggravated burglary and kidnaping charges. Relying upon *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, Defendant claims that his convictions on those charges are void because the indictment does not include any culpable mental state for those charges.

{¶ 21} In *State v. Colon* (“*Colon I*”), the Supreme Court held that the particular error alleged is structural, rendering a resulting conviction void. Subsequently, in *State v. Colon*, 119 Ohio St.3d 204, 2008-Ohio-3749 (“*Colon II*”), the Supreme Court reconsidered its prior holding and held that the error is not void but voidable only, as plain error when the defect does not permeate the fairness of the trial proceeding and the defendant failed to object to the defect.

{¶ 22} Defendant argues that he was denied the effective assistance of counsel at resentencing because his counsel failed to object to the defects in the indictment of which Defendant complains. At that point, the alleged error would have been waived for failure to object prior to trial. Crim.R. 12(C)(1). Whether

that failure rises to the level of ineffective assistance cannot be determined on this record, however. Defendant has not provided a transcript of his trial proceeding, which would be necessary in order for us to determine whether Defendant met his burden in that regard required by *Strickland*: to affirmatively show that but for counsel's failure, the outcome of Defendant's trial would have been different.

{¶ 23} Defendant's third assignment of error is overruled.

{¶ 24} In a supplemental brief, Defendant presents two additional assignments of error.

FIRST SUPPLEMENTAL ASSIGNMENT OF ERROR

{¶ 25} "THE TRIAL COURT ERRED IN IMPOSING MULTIPLE PUNISHMENT FOR ALLIED OFFENSE."

SECOND SUPPLEMENTAL ASSIGNMENT OF ERROR

{¶ 26} "TRIAL COURT ERRED FOR IMPOSING A SENTENCE FOR A CRIME THAT APPELLANT WAS NEVER CHARGED WITH."

{¶ 27} In *State v. Winn*, 121 Ohio St.3d 413, 2009-Ohio-1059, the Ohio Supreme Court recently held that kidnapping, R.C. 2905.01(A)(2), and aggravated robbery, R.C. 2911.01(A)(1), are allied offenses of similar import. Defendant argues that in re-sentencing him the trial court erred by imposing multiple punishments for allied offenses of similar import. Defendant also repeats his claim that the indictment in Case No. 2000CR1272 was

not sufficient to charge aggravated robbery, aggravated burglary and attempted aggravated murder because the mens rea element for those offenses is omitted from the indictment.

{¶ 28} As we stated in overruling Defendant's third assignment of error, Defendant's claim that his indictment was defective due to a *Colon* error is outside the scope of this appeal, and is barred by res judicata because that claim could have been raised in Defendant's previous direct appeal from his conviction. *North; Henderson*.

{¶ 29} With respect to the allied offenses issue, we note that the trial court did merge some of the offenses for purposes of sentencing, including the felonious assault and all of the attempted aggravated murder counts. We further note that the record before us does not include either a transcript of the August 7, 2008 re-sentencing hearing or the trial transcript in Case No. 2000CR1272. Absent those materials, this record is inadequate to permit a review of the claimed error because we are unable to review Defendant's conduct to determine whether Defendant's offenses of kidnaping and aggravated robbery were committed separately or with a separate animus as to each. R.C. 2941.25(B); *State v. Winn*, 121 Ohio St.3d 413, 2009-Ohio-1059, at ¶10. Under those circumstances, we must presume the regularity and validity of the trial court's proceedings and affirm its judgment. *Knapp*

*v. Edwards Laboratories, supra; Crosby v. Butcher* (Sept. 28, 1995),  
Cuyahoga App. No. 68808

{¶ 30} Defendant's supplemental assignments of error are  
overruled. The judgment of the trial court will be affirmed.

DONOVAN, P.J. And HARSHA, J., concur.

(Hon. William H. Harsha, Fourth District Court of Appeals, sitting  
by assignment of the Chief Justice of the Supreme Court of Ohio.)

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