

[Cite as *State v. Shackelford*, 2010-Ohio-845.]

IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 22891
vs.	:	T.C. CASE NO. 99CR3477
PHILLIP G. SHACKLEFORD	:	(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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Defendant-Appellant, Pro Se

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GRADY, J.:

{¶ 1} Defendant, Phillip G. Shackelford, was convicted in 2000 of two counts of rape with accompanying firearm specifications, following a jury trial. The trial court sentenced Defendant to consecutive ten year prison terms on the two rape charges and one three year term on the merged firearm specifications, for a total sentence of twenty-three years. We affirmed Defendant's

conviction and sentence on direct appeal. *State v. Shackelford* (May 4, 2001), Montgomery App. No. 18297.

{¶ 2} On August 7, 2008, the trial court resentenced Defendant pursuant to R.C. 2929.191 because the court had neglected to inform Defendant in 2000 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, nunc pro tunc to March 31, 2000, imposing the same twenty-three year sentence as before, but correcting the sentence to include a mandatory five-year 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 CONTRARY TO THE SEPARATION OF POWERS DOCTRINE."

#### SECOND ASSIGNMENT OF ERROR

{¶ 5} "DEFENDANT-APPELLANT WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE AUGUST 7, 2008 RE-SENTENCING HEARING WHERE COUNSEL FAILED TO ARGUE THAT APPELLANT'S MAXIMUM SENTENCE OF SIX (6) YEARS HAD EXPIRED IN 2005 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 RE-SENTENCING HEARING VIOLATED APPELLANT'S RIGHT NOT TO BE SUBJECTED TO JUDICIAL ENLARGEMENT OF THE SENTENCING STATUTES CONTRARY TO DUE PROCESS OF LAW AS CONSTITUTING EX POST FACTO LEGISLATION AS WELL AS THE DOUBLE JEOPARDY CLAUSE OF THE OHIO AND U.S. 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 ten year sentences for his rape 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 must conclude that no error was committed. *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197; *State v. Jones*, Montgomery App. No. 20862, 2006-Ohio-2640. Nevertheless, 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.*

{¶ 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. *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197; *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 twenty-three 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 twenty-three year sentence it imposed on March 31, 2000. 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 RE-SENTENCING HEARING OF AUGUST 7, 2008, WHERE THE ATTORNEY FAILED TO OBJECT THAT THE FIREARM SPECIFICATIONS FAILED TO ALLEGE A MENS REA ELEMENT OF KNOWINGLY POSSESSING A DEADLY WEAPON/FIREARM."

{¶ 20} Defendant argues that his counsel at the re-sentencing hearing performed deficiently because he failed to challenge

Defendant's conviction on the firearm specification. Relying upon *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, Defendant claims that his conviction on the firearm specification is void because that specification does not include any culpable mental state. However, a firearm specification is not a separate criminal offense that requires a culpable mental state of its own. *State v. Cook*, Summit App. No. 24-058, 2008-Ohio-4841. Therefore, counsel was not ineffective for failing to raise the *Colon* challenge about which Defendant complains.

{¶ 21} Defendant's third assignment of error is 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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