

[Cite as *State v. Golson*, 2010-Ohio-560.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 22927
v.	:	T.C. NO. 1998-CR-4083/2
STEVEN A. GOLSON	:	(Criminal appeal from Common Pleas Court)
Defendant-Appellant	:	

**OPINION**

Rendered on the 19<sup>th</sup> day of February, 2010.

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STEVEN A. GOLSON, #372-493, Lebanon Correctional Institution, P. O. Box 56, Lebanon, Ohio 45036  
Defendant-Appellant

DONOVAN, P.J.

{¶ 1} This matter is before the Court on the pro se Notice of Appeal of Steven Golson, filed September 5, 2008. On June 25, 2008, Golson was brought before the trial court for a re-sentencing hearing, pursuant to R.C. 2929.191, having been convicted and sentenced on two counts of aggravated robbery (deadly weapon), and one count of

kidnaping. There were multiple firearm specifications. Golson was resentenced to nine years on the aggravated robbery charges and five years on the kidnaping charge, all to be served consecutively. The court merged the three year firearm specifications in counts two and three into one three-year firearm specification, and it imposed an additional term of three years actual incarceration on another two three-year firearm specifications, with all specifications to be served consecutively, for a total sentence of 29 years, of which six years are for the firearm specifications.

{¶ 2} Golson asserts four assignments of errors. We will consider them together.

They are as follows:

{¶ 3} “DEFENDANT-APPELLANT WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE RE-SENTENCING HEARING WHER[E] THE RESENTENCING PROCESS IS VIOLATIVE OF THE DUE PROCESS CLAUSE OF THE OHIO AND U.S. CONSTITUTION AND CANTRARY [sic] TO THE SEPARATION OF POWERS DOCTRINE.” And,

{¶ 4} “DEFENDANT-APPELLANT WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE JUNE 26, 2008 RESENTENCING HEARING WHERE COUNSEL FAILED TO OBJECT AND ARGUE THAT APPELLANT’S MAXIMUM SENTENCE OF SIX [6] YEARS HAD EXPIRED IN 2006 AT THE LATEST,” And,

{¶ 5} “DEFENDANT-APPELLANT WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE RESENTENCING HEARING OF JUNE 26, 2008 WHERE HE FAILED TO OBJECT TO THE FACT THAT THE AGGRAVATED

ROBBERY AND [KIDNAPING] COUNTS FAILED TO CHARGE AN OFFENSE IN THE ABSENCE OF THE STATUTES AND INDICTMENT ALLEGING A MEN[S] REA.” And,

{¶ 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 CONSTITUTION EX POST FACTO LEGISLATION AS WELL AS THE DOUBLE JEOPARDY CLAUSE OF THE OHIO AND UNITED STATES CONSTITUTION.”

{¶ 7} Golson asserts in the above errors that defense counsel was ineffective at Golson’s resentencing hearing in failing to object on several grounds. According to Golson, defense counsel was deficient in failing to object: (1) that the Ohio Supreme Court’s decision in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856 is unconstitutional; (2) that Golson’s original sentence, imposed prior to *Foster*, expired after six years (the shortest prison term authorized by statute) and therefore he should not have been resentenced; (3) that his convictions for aggravated robbery and kidnaping resulted from deficient indictments that failed to include the requisite mens rea for the charged offenses; and (4) that Golson’s sentence is unconstitutional because the State did not prove “sentencing enhancers,” and that a sentence in excess of six years was accordingly prohibited. Golson also asserts that his sentence violates the Double Jeopardy Clause. In a supplemental filing, Golson asserts that his convictions should have been merged as they are allied offenses of

similar import.

{¶ 8} “We review the alleged instances of ineffective assistance of trial counsel under the two prong analysis set forth in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, and adopted by the Supreme Court of Ohio in *State v. Bradley* (1989), 42 Ohio St.3d 136, \* \* \* . Pursuant to those cases, trial counsel is entitled to a strong presumption that his or her conduct falls within the wide range of reasonable assistance. *Strickland*, 466 U.S. at 688. To reverse a conviction based on ineffective assistance of counsel, it must be demonstrated that trial counsel’s conduct fell below an objective standard of reasonableness and that his errors were serious enough to create a reasonable probability that, but for the errors, the result of the trial would have been different. *Id.* Hindsight is not permitted to distort the assessment of what was reasonable in light of counsel’s perspective at the time, and a debatable decision concerning trial strategy cannot form the basis of a finding of ineffective assistance of counsel.” (Internal citation omitted). *State v. Mitchell*, Montgomery App. No. 21957, 2008-Ohio-493, ¶ 31.

{¶ 9} We initially note, Golson has failed to provide us with a sentencing transcript. “Therefore, the record does not portray the errors he alleges. Under such circumstances, we must presume the regularity of the proceedings below” and affirm. (Citation omitted). *State v. Jones*, Montgomery App. No. 20862, 2006-Ohio-2640, ¶ 50; *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197; *State v. Jones*, Montgomery App. No. 20862, 2006-Ohio-2640.

{¶ 10} Further, as the State points out, Golson was resentenced, not pursuant to the mandates of *Foster*, but pursuant to R.C. 2929.191, because the court neglected to inform

Golson that he would be subject to a mandatory period of post-release control following his release from prison. R.C. 2967.28 provides that every prison sentence for a felony of the first degree 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.* The remedy is to resentence Golson and notify him at the hearing 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.

{¶ 11} Regarding Golson’s *Foster* arguments, “we have held that *Foster* does not operate as an ex post facto law. (Citation omitted). We have also repeatedly held that we are without jurisdiction to declare that *Foster*’s mandate operates as an unconstitutional ex post facto law. (Citation omitted). Accordingly, [Golson’s] argument that the mandate of the supreme court in *Foster* violates the United States Constitution is not cognizable in this court. In addition, we have consistently held that *Foster* does not apply retroactively to those cases that were neither on direct appeal nor still pending in the trial court when *Foster* was decided. (Citation omitted). Because [Golson’s] case was neither on direct appeal nor pending in the trial court when *Foster* was decided, *Foster*’s holding is inapplicable to his case.” *State v. Kemp*, Clark App. No. 2206 CA 116, 2007-Ohio-5985, ¶ 6. Further, sentencing courts may impose greater than minimum and consecutive sentences without judicial factfinding after *Foster*, contrary to Golson’s arguments. *Foster*, paragraph 7 of the

syllabus.

{¶ 12} Regarding Golson’s supplemental filing, we agree with the State, again, that in the absence of a transcript, the record is inadequate to allow review of Golson’s assigned errors regarding allied offenses of similar import.

{¶ 13} There being no merit to Golson’s assigned errors, they are overruled, and the judgment of the trial court is affirmed.

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GRADY, 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).

Copies mailed to:

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