[Cite as *State v. Kline*, 2015-Ohio-2429.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	Appellate Case No. 26544
	:	
v.	:	Trial Court Case No. 1996-CR-3095
	:	
TROY L. KLINE	:	(Criminal Appeal from
	:	Common Pleas Court)
Defendant-Appellant	:	
	:	

. . . . . .

O P I N I O N

Rendered on the 19th day of June, 2015.

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MATHIAS H. HECK, JR., by MICHELE D. PHIPPS, Atty. Reg. No. 0069829, Montgomery County Prosecutor's Office, Appellate Division, Montgomery County Courts Building, P.O. Box 972, 301 West Third Street, Dayton, Ohio 45402
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TROY L. KLINE, #345-512, Marion Correctional Institution, Post Office Box 57, Marion, Ohio 43301.
Defendant-Appellant, *pro se*

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HALL, J.

{¶ 1} Troy L. Kline appeals pro se from the trial court's December 19, 2014

decision, order, and entry overruling his motion to correct sentence.

{¶ 2} In his sole assignment of error, Kline contends the trial court incorrectly found no error in its original termination entry.

{¶ 3} The record reflects that Kline pled guilty to fifteen sex offenses in 1997. The offenses included rape (victim under thirteen), felonious sexual penetration (victim under thirteen), gross sexual imposition (victim under thirteen), and illegal use of a minor in nudity-oriented material. Some of the offenses apparently occurred prior to the effective date of S.B. 2, and some occurred after that date. The trial court sentenced Kline accordingly and imposed partially consecutive sentences. His aggregate sentence was thirty to forty-five years in prison.

{¶ 4} In 2006, Kline sought post-conviction relief under R.C. 2953.21. He argued that his consecutive sentences were imposed unconstitutionally based on findings made by the trial court instead of a jury. The trial court denied relief, and this court affirmed. *See State v. Kline*, 2d Dist. Montgomery No. 21660, 2007-Ohio-3703.

{¶ 5} In December 2014, Kline filed his pro se motion to correct sentence. (Doc. #3). The motion raised one issue, namely whether the trial court had erred in ordering the sentence on count one (ten to twenty-five years) to be served consecutive to the sentences on count seven (ten years) and count eight (ten years) *and* in ordering the sentences on count seven and count eight to be served consecutive to each other and consecutive to the sentence on count one. Kline argued that the sentence on count one logically should have been imposed concurrent to the sentences on count seven and count eight, which themselves should have been imposed concurrent to the sentence on count one. Kline reasoned that imposing sentence on count one consecutive to counts

seven and eight and imposing sentence on counts seven and eight consecutive to count one was analogous to ordering a person to stand on top of his shoulders while he stands on top of theirs, which is an impossibility. (*Id*.).

{¶ 6} In overruling Kline's motion, the trial court reasoned:

> * * * Defendant's understanding and assessment of the Termination Entry is incorrect. The court sentenced Defendant to ten to twenty-five years on Count 1, ten years on Count 7, and ten years on Count 8. Counts 7 and 8 were ordered to be served consecutive to Count 1 and consecutive to one another. All remaining Counts were ordered to be served concurrently with Counts 1, 7, and 8. Therefore Defendant's sentence was ordered by the sentencing judge as ten to twenty-five years on Count One, with two separate sentences on Counts Seven and Eight of ten years to be served consecutive to Count One and consecutive to one another. There is no error in the Court's original Termination Entry. Therefore, Defendant's Motion to Correct Sentence is **OVERRULED**.

(Doc. #4 at 1).

{¶ 7} On appeal, Kline deviates from the issue raised in his motion to correct sentence. He argues that some offenses should have merged as allied offenses. He also argues that the trial court erred in imposing partially consecutive sentences under the "old law" and the "new law." In support, he cites *Cunningham v. California,* 549 U.S. 270, 127 S.Ct. 856, 166 L.Ed.2d 856 (2007), which involved an *Apprendi*-based issue about judicial fact-finding.[1] Neither of these two arguments, however, was raised in Kline's

[1] *See Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

motion below, and neither is properly before us. In any event, res judicata precludes Kline from raising an allied-offense argument now, *see State v. Johnson*, 2d Dist. Montgomery No. 26323, 2015-Ohio-347, and this court previously explained to him that *Apprendi*-based arguments are unavailable because his case was not pending on direct review when *Apprendi* was decided. See *Kline*, at ¶ 7-8.

{¶ 8} As for the issue that is before us, we see no error in the trial court's denial of Kline's motion without a hearing. When he was convicted in 1997, the trial court imposed sentences of ten to twenty-five years on count one, ten years on count seven, and ten years on count eight. It then stated: "Counts I, 7, and 8 shall be served CONSECUTIVE to each other; Counts 2, 3, 4, 5, 6, 9, 10, 11, 12, 13, 14, and 15 shall be served CONCURRENT with each other and CONCURRENT with counts 1, 7, and 8." (*See* Termination Entry at 2 attached to Appellant's brief). We see no error or impossibility in requiring Kline to serve consecutive sentences of ten to twenty-five years, ten years, and ten years. The trial court correctly found his motion to be without merit.

{¶ 9} Kline's assignment of error is overruled, and the trial court's judgment is affirmed.

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DONOVAN, J., and WELBAUM, J., concur.

Copies mailed to:

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Hon. Mary K. Huffman