

[Cite as *State v. Kline*, 2010-Ohio-3913.]

**IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
CHAMPAIGN COUNTY**

STATE OF OHIO	:	
	:	Appellate Case No. 2009-CA-02
Plaintiff-Appellee	:	
	:	Trial Court Case No. 2008-CR-174
v.	:	
	:	(Criminal Appeal from
STEVEN LEE KLINE	:	Common Pleas Court)
	:	
Defendant-Appellant	:	
	:	

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OPINION

Rendered on the 20th day of August, 2010.

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BROGAN, J.

{¶ 1} Steven Lee Kline appeals from his conviction and sentence following a guilty plea to three counts of raping a child under age ten.

{¶ 2} Kline advances two assignments of error on appeal. First, he contends the prosecutor violated a plea agreement by essentially advocating for a sentence of life without parole. Second, he claims the trial court erred in finding that the

sentences on the three counts were required to be served consecutively.¹

{¶ 3} The record reflects that Kline pled guilty to the three counts set forth above in exchange for the State's dismissal of nine similar counts and its promise not to recommend a sentence of life without parole. At the sentencing hearing, the prosecutor correctly advised the trial court that the only sentencing options were fifteen years to life or life without parole on each count. See, e.g., *State v. Hernandez*, Williams App. No. WM-08-015, 2009-Ohio-3915, ¶41. The prosecutor then proceeded to point out the "egregious nature of the offenses and the effect it's had on the three young victims." The prosecutor opined that Kline had "brutalized and traumatized three very young victims that will have to live with this the rest of their life." The prosecutor also told the trial court that Kline "took advantage of incredible innocence" and that his conduct included forcible anal sex that resulted in significant tearing. The prosecutor mentioned that one of the victims had placed a towel over her head to keep from screaming during the abuse. Finally, the prosecutor told the trial court that "[a]ll three counts must be consecutive and that's by statute." After hearing from defense counsel and Kline, the trial court imposed three consecutive sentences of life without parole.

{¶ 4} In his first assignment of error, Kline contends the prosecutor breached the plea agreement by recommending life without parole. We agree. As noted above, the only sentencing options were fifteen years to life or life without parole. Notwithstanding the State's argument to the contrary, the prosecutor's emphasis on

¹In a September 8, 2009 ruling, we set aside a brief filed pursuant to *Anders v. California* (1967), 386 U.S. 738, appointed new counsel for Kline, and directed counsel

the egregious nature of the crimes and other remarks effectively served as a recommendation of the more severe sanction. The comments had no other apparent purpose.

{¶ 5} The State correctly notes, however, that Kline failed to object when the prosecutor spoke at sentencing. Therefore, we are limited to plain-error review.² To establish plain error, Kline must point to an obvious error that affected the outcome of the proceedings below. *State v. Rohrbaugh*, ___ Ohio St.3d ___, 2010-Ohio-3286, ¶6. Reversal is warranted only if the outcome “clearly would have been different absent the error.” *State v. Hill*, 92 Ohio St.3d 191, 203, 2001-Ohio-141. In the context of the present case, the inquiry is not whether Kline would have entered his plea if he had known the State would breach the agreement. Rather, the outcome at issue is the sentence imposed. The question is whether Kline’s sentence would have been different absent the breach. *Puckett v. United States* (2009), 129 S.Ct. 1423, 1433 n.4.

{¶ 6} The prosecutor’s remarks at sentencing, even though factually accurate, were tantamount to a recommendation of the more severe of the two possible penalties. As explained above, we see no other purpose for the prosecutor to emphasize the horrendous nature of Kline’s crimes. This breach of the plea agreement constituted an obvious error. Kline has failed to establish plain error,

to brief the two issues set forth above and any additional issues counsel desired.

²In *Puckett v. United States* (2009), 129 S.Ct. 1423, the U.S. Supreme Court recently made clear that a prosecutor’s breach of a plea agreement does not constitute “structural error.” When no objection is lodged at trial, a plea-breach claim is subject to plain-error review. *Id.* at 1432-1433.

however, because nothing before us suggests that the trial court would have imposed the more lenient penalty of fifteen years to life in prison but for the prosecutor's remarks. When imposing Kline's sentence, the trial court did not stress, or even mention, the facts of his crimes. Instead, it generally referenced the principles and purposes of sentencing and noted that Kline had violated supervised release in one or more previous cases involving unauthorized contact with juveniles. Lacking any evidence that the prosecutor's remarks persuaded the trial court to impose the sentence it did, Kline has not shown that the outcome would have been different absent the remarks.

{¶ 7} In opposition to the foregoing conclusion, Kline cites *Santobello v. New York* (1971), 404 U.S. 257, and argues that even a non-prejudicial breach of a plea agreement must be remedied. But *Santobello*, which did not involve plain-error review, is distinguishable. The U.S. Supreme Court explained the distinction in *Puckett*, *supra*, as follows:

{¶ 8} "In [*Santobello*], the State had promised in a plea deal that it would make no sentencing recommendation, but the prosecutor (apparently unaware of that commitment) asked the state trial court to impose the maximum penalty of one year. Defense counsel immediately objected. The trial judge proceeded anyway to impose the 1-year sentence, reassuring Santobello that the prosecutor's recommendation did not affect his decision. This Court vacated the conviction and remanded the case because 'the interests of justice' would thus be best served.

{¶ 9} "Puckett maintains that if the 'interests of justice' required a remand in *Santobello* even though the breach there was likely harmless, those same interests

call for a remand *whenever* the Government reneges on a plea bargain, forfeiture [of the error] or not. We do not agree. Whether an error can be found harmless is simply a different question from whether it can be subjected to plain-error review. *Santobello* (given that the error in that case *was* preserved) necessarily addressed only the former.” *Puckett*, 129 S.Ct. at 1431 (citations omitted).

{¶ 10} In *Puckett*, the majority determined that the defendant had to show prejudice as a result of the prosecutor’s breach of a plea agreement. Finding no evidence that the defendant’s sentence had been affected by the breach, the majority found no plain error. Based on the reasoning set forth above, we reach the same conclusion here. Kline’s first assignment of error is overruled.

{¶ 11} In his second assignment of error, Kline contends the trial court erred in finding that Ohio law required consecutive sentences. Once again, we agree. During Kline’s plea hearing, the trial court advised him that his sentences were “required by state law to be consecutive to each other.” The trial court repeated this assertion during the sentencing hearing, stating: “Sentences are consecutive as required by state law.”

{¶ 12} In *State v. Johnson*, 116 Ohio St.3d 541, 2008-Ohio-69, the Ohio Supreme Court held the trial court erred in finding that it was required to impose consecutive life sentences for the defendant’s four rape convictions pursuant to R.C. 2907.02(B). Rather, “it may exercise its discretion to determine whether consecutive sentences are appropriate based upon the particular facts and circumstances of the case.” *Id.* Although the issue may be largely academic, the trial court committed an obvious error in finding that its sentences of life without parole were required to be

served consecutively.³ But Kline did not object to the trial court's misstatement, either during the plea hearing or at sentencing. Therefore, we are limited to plain-error review.

{¶ 13} Although Kline's consecutive sentences were not required by law, they were authorized by law. Nothing before us suggests that the trial court would have imposed concurrent sentences if it had recognized its discretion to do so. The trial court did not indicate that it believed consecutive sentences were unwarranted or that it wished it could sentence concurrently. As a result, Kline has not shown that the outcome would have been different but for the trial court's misunderstanding of the law. Accordingly, he has failed to demonstrate plain error. Additionally, unlike *Johnson* the trial court's imposition upon the defendant of three life sentences without parole was harmless error since each sentence rendered the defendant ineligible for his lifetime for parole consideration. The second assignment of error is overruled.

{¶ 14} The judgment of the Champaign County Common Pleas Court is affirmed.

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FAIN, concurs.

DINKELACKER, J., concurs in judgment only.

³Prior to Kline's plea and sentencing, the trial court filed a September 12, 2008 entry in which it opined that R.C. 2971.03(E) would require consecutive sentences if it elected to impose minimum sentences of fifteen years to life in prison. As set forth above, however, the trial court instead imposed maximum sentences of life without parole under R.C. 2907.02(B). Because Kline was convicted of rape under R.C. 2907.02(A)(1)(b) and sentenced under R.C. 2907.02(B) to life without parole, R.C. 2971.03(E) had no applicability to him.

(Hon. Patrick T. Dinkelacker, First District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio).

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