[Cite as *State v. Staggs*, 2017-Ohio-7368.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
GALLIA COUNTY

STATE OF OHIO,	:	Case No. 16CA19
Plaintiff-Appellee,	:	
v.	:	DECISION AND JUDGMENT ENTRY
CHEYENNE R. STAGGS,	:	
		RELEASED: 08/21/2017
Defendant-Appellant.	:	

APPEARANCES:

Stephen A. Moyer and Gregory A. Wetzel, Moyer Law Offices LPA, Columbus, Ohio, for appellant.

Adam R. Salisbury, Gallipolis City Solicitor, Gallipolis, Ohio, for appellee.

Harsha, J.

{¶1} The Gallipolis Municipal Court convicted Cheyenne Staggs of assault for transmitting the herpes virus to a minor with whom she had consensual sex. The trial court accepted her guilty plea to the offense and sentenced her to jail, house arrest, and community control.

{¶2} Initially Staggs claims that the trial court abused its discretion in sentencing her because: (1) the trial court considered a charge dismissed under the plea agreement; and (2) the trial court only considered one of the required statutory factors at sentencing. We reject Staggs's claim because dismissed charges may be considered in sentencing, her sentence was within the statutory range for the assault offense, and she makes no affirmative showing to rebut the presumption that the trial court correctly considered the appropriate sentencing criteria. We overrule Staggs's first assignment of error.

{¶3} Next Staggs claims that the trial court erred by failing to advise her of the possible consequences for violating the terms and conditions of community control when it imposed community control as part of her sentence. Because the parties agree and we find that the trial court violated R.C. 2929.25(A)(3) by failing to notify Staggs of the possible sanctions for violating community control at her sentencing hearing, we sustain Staggs's second assignment of error, reverse the community control sanction of the trial court, and remand the cause for proper imposition of the community control sanction.

I. FACTS

{¶4} In December 2016, the Gallipolis City Solicitor filed complaints in the municipal court charging Cheyenne Staggs with unlawful sexual conduct with a minor in violation of R.C. 2907.04(A) and assault in violation of R.C. 2903.13, both misdemeanors of the first degree. The complaint charging Staggs with assault alleged that in December 2015, when she was 18 years old, she "did engage in sexual conduct with D.K. who was, at that time, aged 15 years and unable to give consent. Before engaging in unprotected sexual conduct with the said minor child, Cheyenne R. Staggs did know that she was infected with the Herpes virus. D.K. tested positive for Herpes on 2/16/16." Staggs entered pleas of not guilty to the charges.

{¶5} In exchange for the dismissal of the charge of unlawful sexual conduct with a minor, Staggs pleaded guilty to the charge of assault.

{¶6} At the sentencing hearing the city solicitor read a statement of the victim in which he stated that "[a]fter me finding out that she gave me herpes my life has changed and I'm branded for life" and that Staggs should receive a sentence that was

"[t]he max of everything on every charge because eventually she will get away from sentencing while I'm still maintaining my health for the rest of my life." Staggs noted that she had moved three hours away from the victim so she was not going to be around him anymore. Her counsel represented that Staggs had "learned a valuable lesson from this and it will never happen again" and that she was "almost a straight A student * * * so she is taking steps to make sure that she * * * is going to contribute to society the best way possible."

{¶7} The trial court observed that it was a "very emotional case" in which he understood why the victim and his parents "want to throw * * * her in jail and throw away the key," but it determined that the maximum six-month jail term was not appropriate. The trial court additionally noted Staggs's lack of remorse for her assault and admonished her for having sex with a minor:

> And * * * all I can say Ms. Staggs is I, you know, I see no remorse about this whatsoever. I understand you might have been under the influence, I don't know * * *, but you have the responsibility when you turn 18 to make sure that your behavior * * * complies with the law and * * * I understand Mr. Salisbury's reasons for dismissing that case * * *, but you still are held to a certain standard once you turn 18. Now even if you're in school, you still obviously can be in trouble for the decisions that you make. Now I'm glad you're a great student and that's good and I expect you to go ahead and graduate from high school * * *, but you need to know that decisions you make have repercussions and having sex with a 15 year old when you are 18 is not acceptable, at all. The law does not allow you to do that. And so you need to understand that you cannot * * *, you have to make better decisions.

{¶8} The trial court sentenced Staggs to 30 days in jail, to be served intermittently during school breaks and summer break, 90 days of electronically monitored house arrest, and community control.

II. ASSIGNMENTS OF ERROR

{¶9} Staggs assigns the following errors for our review:

1. THE TRIAL COURT ABUSED ITS DISCRETION IN SENTENCING APPELLANT FOR A SIMPLE ASSAULT.

2. THE TRIAL COURT FAILED TO ADVISE APPELLANT OF THE POSSIBLE CONSEQUENCES FOR VIOLATING THE TERMS AND CONDITIONS OF HER COMMUNITY CONTROL WHEN IT SENTENCED HER, REQUIRING THE COURT TO REMAND THE CASE FOR RESENTENCING.

III. STANDARD OF REVIEW

{¶10} " 'We review a misdemeanor sentence for an abuse of discretion.' " *State v. Williams*, 4th Dist. Jackson No 15CA3, 2016-Ohio-733, ¶ 17, quoting *State v. Marcum*, 2013-Ohio-2447, 994 N.E.2d 1, ¶ 22 (4th Dist.); *see also State v. Berecz*, 4th Dist. Washington No. 16CA15, 2017-Ohio-266, ¶ 12. " 'A trial court abuses its discretion when it makes a decision that is unreasonable, unconscionable, or arbitrary.' " *State v. Keenan*, 143 Ohio St.3d 397, 2015-Ohio-2484, 38 N.E.3d 870, ¶ 7, quoting *State v. Darmond*, 135 Ohio St.3d 343, 2013-Ohio-966, 986 N.E.2d 971, ¶ 34. "An abuse of discretion includes a situation in which a trial court did not engage in a 'sound reasoning process'; this review is deferential and does not permit an appellate court to simply substitute its judgment for that of the trial court." *State v. Felts*, 2016-Ohio-2755, 52 N.E.3d 1223, ¶ 29 (4th Dist.), quoting *Darmond* at ¶ 34.

IV. LAW AND ANALYSIS

A. R.C. 2929.22(B)(1) Factors

{¶11} In her first assignment of error Staggs asserts that the trial court abused its discretion because it did not consider the factors listed in R.C. 2929.22(B)(1). In general trial courts are vested with broad discretion when imposing sentences in misdemeanor cases. *State v. Babu*, 4th Dist. Athens No. 07CA36, 2008-Ohio-5298, ¶

36; *Cleveland v. Peoples*, 8th Dist. Cuyahoga No. 100955, 2015-Ohio-674, ¶ 14 ("trial court has broad discretion in ordering an appropriate sentence for a misdemeanor offense").

{¶12} "Nevertheless, the trial court lacks discretion to disregard the statutory factors in R.C. 2929.22, even though it has the discretion in the ultimate sentence imposed after a consideration of the factors." *State v. Williams*, 4th Dist. Jackson No. 15CA3, 2016-Ohio-733, ¶ 19, citing *State v Picklesimer*, 4th Dist. Pickaway No. 11CA9, 2012-Ohio-1282, ¶ 29.

{¶13} R.C. 2929.22(B)(1) provides that "[i]n determining the appropriate sentence for a misdemeanor, the court shall consider all of the following factors:

> (a) The nature and circumstances of the offense or offenses;
>
> (b) Whether the circumstances regarding the offender and the offense or offenses indicate that the offender has a history of persistent criminal activity and that the offender's character and condition reveal a substantial risk that the offender will commit another offense;
>
> (c) Whether the circumstances regarding the offender and the offense or offenses indicate that the offender's history, character, and condition reveal a substantial risk that the offender will be a danger to others and that the offender's conduct has been characterized by a pattern of repetitive, compulsive, or aggressive behavior with heedless indifference to the consequences;
>
> (d) Whether the victim's youth, age, disability, or other factor made the victim particularly vulnerable to the offense or made the impact of the offense more serious;
>
> (e) Whether the offender is likely to commit future crimes in general, in addition to the circumstances described in divisions (B)(1)(b) and (c) of this section;
>
> (f) Whether the offender has an emotional, mental, or physical condition that is traceable to the offender's service in the armed forces of the United States and that was a contributing factor in the offender's commission of the offense or offenses;

(g) The offender's military service record.

{¶14} Staggs first contends that the trial court abused its discretion by improperly considering the dismissed charge of unlawful sex with a minor in sentencing her. At the sentencing hearing the trial court admonished her, "you need to know that decisions you make have repercussions and having sex with a 15 year old when you are 18 is not acceptable, at all. The law does not allow you to do that."

{¶15} We reject Staggs's contention because " '[c]ourts have consistently held that evidence of other crimes, including crimes that never result in criminal charges being pursued, or criminal charges that are dismissed as a result of a plea bargain, may be considered at sentencing.' " *See State v. Hansen*, 7th Dist. Mahoning No. 11 MA 63, 2012-Ohio-4574, ¶ 22, quoting *State v. Starkey*, 7th Dist. Mahoning No. 06 MA 110, 2007-Ohio-6702, ¶ 17, citing *State v. Cooey*, 46 Ohio St.3d 20, 35, 544 N.E.2d 895 (1989) (uncharged crimes are part of the defendant's social history and may be considered); *State v. France*, 5th Dist. Richland No. 15CA19, 2015-Ohio-4930, ¶ 20 ("Ohio Courts have continually held uncharged crimes and dismissed charges pursuant to plea agreements may be considered by courts as factors during sentencing"); *State v. Finn*, 6th Dist. Lucas Nos. L-09-1162 and L-09-1163, 2010-Ohio-2004, ¶ 8 ("the trial court acts within its statutory purview in considering and referencing facts and circumstances of a dismissed charge when sentencing a defendant on a remaining, non-dismissed charge"); *State v. Reeves*, 8th Dist. Cuyahoga No. 100560, 2015-Ohio-299, ¶ 9 ("Because there was no agreement by the parties that the trial court should not consider the dismissed charges, and because trial courts routinely consider these matters in sentencing, the court's consideration of the underlying facts in this case was

proper"); *see also State v. Scheer*, 158 Ohio App.3d 432, 2004-Ohio-4792, 816 N.E.2d 602, ¶ 17 (4th Dist.) ("the court was free to consider the dismissed charges when determining an appropriate sentence for [the defendant]").[1]

{¶16} Thus, the trial court did not abuse its discretion in considering the facts underlying the dismissed charge of unlawful sex with a minor in sentencing Staggs for assault.

{¶17} Staggs next contends that the trial court abused its discretion in sentencing her because it only indicated that it considered one of the factors listed in R.C. 2929.22(B)(1)—her age—at the sentencing hearing. She claims that the otherwise silent record establishes that the trial court abused its discretion by not considering all of the pertinent factors in R.C. 2929.22(B)(1).

{¶18} We do not agree. "Although it is preferable that the trial court affirmatively state on the record that it has considered the criteria set forth in R.C. 2929.21 and R.C. 2929.22, the statute[s] do not mandate that the record state that the trial court considered the applicable statutory factors." *State v. Kinsworthy*, 12th Dist. Warren No. CA2013-06-060, 2014-Ohio-2238, ¶ 30; *State v. Lundberg*, 2d Dist. Montgomery No. 2278, 2009-Ohio-1641, ¶ 21 ("While it is preferable that the trial court state on the record that it has considered the statutory criteria, the statute does not require the court to do so"); *State v. Remy*, 4th Dist. Ross No. 02CA2664, 2003-Ohio-2600, ¶ 29 ("While

[1] This is distinct from those cases noting that "as a general rule, a defendant cannot pay restitution for damages attributable to an offense for which he was charged, but not convicted." *State v. Savage*, 4th Dist. Meigs No. 15CA2, 2015-Ohio-4205, ¶ 18. Even in those cases, "a well-settled exception to this general rule authorizes restitution for damages related to dismissed charges where restitution is part of a defendant's plea bargain." *Id.* at ¶ 19.

it is preferable, there is no requirement that the court state on the record that it has considered the statutory criteria or discuss them").

{¶19} Nor, in the absence of affirmative evidence to the contrary, does the trial court's discussion of some of the factors establish that it did not consider all of them. For example, in *Williams*, 2016-Ohio-733, at ¶ 22-25, we held that the defendant failed to establish that the trial court did not consider all of the appropriate R.C. 2929.22(B) factors merely because it expressly noted only one factor—the defendant's absence of criminal history—during the sentencing hearing. Staggs cites no persuasive authority that holds otherwise.

{¶20} Staggs does not claim that the trial court's sentence, which included a 30-day jail term, was not authorized by statute. *See* R.C. 2929.24(A)(1) (in general, if the sentencing court imposes a jail term for a misdemeanor of the first degree, it shall impose a jail term of "not more than one hundred eighty days"). In the absence of an affirmative showing to the contrary, " 'when a jail sentence falls within the statutory limit, as it does here, reviewing courts presume that the trial court followed the appropriate statutory guidelines.' " *Pickelsimer*, 2012-Ohio-1282, at ¶ 30, quoting *State v. Fitzpatrick*, 4th Dist. Lawrence No. 07CA18, 2007-Ohio-7170, ¶ 10; *State v. Ashe*, 2d Dist. Montgomery No. 26528, 2016-Ohio-136, ¶ 43, quoting *State v. Jackson*, 2d Dist. Montgomery No. 20819, 2005-Ohio-4521, ¶ 43 (court has repeatedly recognized that Ohio courts will presume that the trial court considered the factors set forth in R.C. 2929.22 when the sentence is within the statutory limits in the absence of an affirmative showing to the contrary).

{¶21} There is nothing in the transcript of the sentencing hearing or the sentencing entry that affirmatively shows that the trial court did not consider the appropriate factors in R.C. 2929.22(B)(1) or additional appropriate factors in R.C. 2929.22(B)(2) ("In determining the appropriate sentence for a misdemeanor, in addition to complying with division (B)(1) of this section, the court may consider any other factors that are relevant to achieving the purposes and principles of sentencing set forth in section 2929.21 of the Revised Code").

{¶22} Staggs has thus failed to prove that the trial court abused its discretion in applying R.C. 2929.22 in sentencing her. We overrule her first assignment of error.

B. Notice of Possible Sanctions for

Violating Community Control

{¶23} In her second assignment of error Staggs argues that the trial court erred by failing to advise her of the possible consequences for violating the terms and conditions of her community control when it sentenced her, thus requiring us to remand the case for resentencing.

{¶24} R.C. 2929.25(A) provides that at sentencing, if a trial court directly imposes a community control sanction, it shall notify the offender of the possible penalties for violating any of the conditions:

> (3) At sentencing, if a court directly imposes a community control sanction or combination of community control sanctions pursuant to division (A)(1)(a) or (B) of this section, the court shall state the duration of the community control sanctions imposed and shall notify the offender that if any of the conditions of the community control sanctions are violated the court may do any of the following:
>
> (a) Impose a longer time under the same community control sanction if the total time under all of the offender's community control sanctions

> does not exceed the five-year limit specified in division (A)(2) of this section;
>
> (b) Impose a more restrictive community control sanction under section 2929.26, 2929.27, or 2929.28 of the Revised Code, but the court is not required to impose any particular sanction or sanctions;
>
> (c) Impose a definite jail term from the range of jail terms authorized for the offense under section 2929.24 of the Revised Code.

{¶25} The parties agree that the trial court erred by failing to notify Staggs of the possible sanctions for violating community control at her sentencing hearing. *See State v. Hilderbrand*, 4th Dist. Adams No. 08CA864, 2008-Ohio-6526, ¶ 25 ("the transcript of the sentencing hearing in this case indicates that the court failed to notify appellant of the possible sanctions for community control violations and, therefore, that the trial court failed to comply with the requirements of R.C. 2929.25(A)(3)"). Instead, the trial court only stated, "If you violate any term of probation you can be brought back in for resentencing at which time we can put on the maximums, do you understand that?"

{¶26} Although the parties agree that the trial court erred, there is some confusion about the remedy for that error. In its brief the state suggests that because Staggs has not yet violated her community control, the issue of the trial court's failure to give the required statutory notice may not yet be ripe for appeal, citing our decision in *State v. Slonaker*, 4th Dist. Washington No. 08CA21, 2008-Ohio-7009,[2] in support of that proposition. In her reply brief Staggs "acquiesces to the Court overruling her Second Assignment of Error under [*Slonaker*,] provided the trial court is prohibited from imposing any of the previously-undisclosed sanctions in R.C. 2929.25(A)(3) in the future."

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[2] *Slonaker* involved a trial court's failure to inform the defendant that his failure to pay court costs could result in the court ordering him to perform community service, as provided in R.C. 2947.23.

{¶27} We decline to follow *Slonaker* because we implicitly overruled that case in *State v. Moss*, 186 Ohio App.3d 787, 2010-Ohio-1135, 930 N.E.2d 838, ¶ 18-22 (4th Dist.), by holding that a failure to provide a defendant with statutorily required notice of the potential sanction of community control should the defendant not pay court costs was ripe even though the defendant had not yet suffered any prejudice while still incarcerated. In fact, in *State v. Smith*, 131 Ohio St.3d 297, 2012-Ohio-781, 964 N.E.2d 423, the Supreme Court of Ohio resolved a conflict between courts by holding at the syllabus that "[a] sentencing court's failure to inform an offender, as required by R.C. 2947.23(A)(1), that community service could be imposed if the offender fails to pay the costs of prosecution or court costs presents an issue ripe for review even though the record does not show that the offender has failed to pay such costs or that the trial court has ordered the offender to perform community service as a result of failure to pay." Consequently, *Slonaker* is no longer good law on the issue of ripeness.

{¶28} Instead, as we held in *Hilderbrand*. 2008-Ohio-6526, at ¶ 25, the court's failure to comply with R.C. 2929.25(A)(3) by not notifying a defendant of the potential sanctions for violating community control "constitutes error and requires us to reverse and remand the matter to the trial court for resentencing." We provided the following rationale at fn. 1 of that decision:

> When there is a sentencing error, "the usual practice is for an appellate court to remand to the trial court for resentencing." *State v. Brooks*, 103 Ohio St.3d 134, 814 N.E.2d 837, 2004-Ohio-4746, ¶ 33. While we have previously recognized that a straight remand can cause problems in community control sentencing cases in which a trial court failed to give the statutorily required notification at the original sentencing hearing, *see State v. Maxwell*, Ross App. No. 04CA2811, 2005-Ohio-3575, at ¶ 13, citing *Brooks*, the present case does not involve a sentence imposed after a community control violation has already occurred. As such, the concerns associated with an after-the-fact reimposition of community

> control where the defendant was not properly notified prior to a violation do not apply in this case.

{¶29} Therefore, reversal and remand to correct the trial court's sentencing error is appropriate. Consequently, we sustain Staggs's second assignment of error.

V. CONCLUSION

{¶30} Having sustained Staggs's second assignment of error, we reverse and remand the cause for proper imposition of the community control sanction.

JUDGMENT REVERSED IN PART
AND CAUSE REMANDED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS REVERSED IN PART and that the CAUSE IS REMANDED. Appellee shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Gallipolis Municipal Court to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Abele, J.: Concurs in Judgment and Opinion.
McFarland, J.: Dissents.

For the Court

BY: _____
William H. Harsha, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.