

IN THE CIRCUIT COURT FOR THE  
NINETEENTH JUDICIAL CIRCUIT IN AND  
FOR INDIAN RIVER COUNTY, FLORIDA.  
**APPELLATE DIVISION**

Circuit Case No. 17-AP-8  
Lower Tribunal No. 17-IN-1085

THOMAS SADAKA

Appellant,  
v.

Not final until time expires for filing motion  
for rehearing, and if filed, disposed of.

STATE OF FLORIDA,

Appellee.

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Decision filed October 23, 2018.

Appeal from the County Court for Indian River County; Joe Wild, Judge.

Jeanette Bellon, Bellon Law, P.A., for appellant.

Bruce Colton, State Attorney, and Samantha Whitley, Assistant State Attorney, Vero Beach, for appellee.

CROOM, J.

The Appellant is an attorney who was hired to represent his defendant client (“Mercado”) in a DUI case before the trial court. Attorney George Chandler (“Chandler”) filed a notice of appearance in the case on February 26, 2017, and the Appellant filed his own separate notice of appearance on February 27, 2017. Both notices of appearance contained the same law firm name and address.

On April 13, 2017, the Florida Supreme Court suspended the Appellant from the practice of law for ninety-one days. The order stated that it was effective thirty days from the order date, allowing the Appellant thirty days to close out his practice and protect his existing clients. On the advice of his counsel in the suspension proceeding, the Appellant filed a motion for extension of time with the Florida Supreme Court, seeking to delay the effective date of his suspension from

May 13, 2017 until July 1, 2017. The Supreme Court denied that motion on May 17, 2017, making that the effective date of his suspension.

On April 26, 2017, the Appellant appeared at docket call without Mercado, requesting and achieving a continuance until May 24, 2017. He did not mention the Florida Supreme Court's suspension order to the trial court. On May 24, 2017, the Appellant had stand-in Attorney Jerry Roden substitute for him at docket call. Attorney Roden advised the trial court, apparently at the Appellant's direction, that Mercado was ill in Puerto Rico. Again, there was no mention of the Appellant's suspension, despite it being in effect at that time. The trial court set the jury trial date for May 30, 2017, ruling that Mercado must be present in court, and denying Attorney Roden's request for a continuance on behalf of the Appellant.

On May 25, 2017, the State called the Appellant regarding the May 30, 2017 trial date. The Appellant replied via email, stating that he intended to file a motion to withdraw by the end of the day. The email did not disclose his suspension. On May 26, 2017 at 12:46 a.m., Chandler per the above-cited letterhead, and apparently from the same firm, sent an email with the motion to withdraw<sup>1</sup> and proposed order to the Appellant and the State; this was Chandler's first and only involvement with the case since he filed his notice of appearance in February. The State replied at 8:30 a.m. that morning, inquiring whether the motion had been sent to the trial court. Chandler responded no, and asked for the trial court's email address, which the State sent to him.

Approximately an hour and a half later the same day, which was the Friday before trial, the Appellant sent an email to the trial court, advising for the first time of his ninety-one day suspension, and providing a copy of the Florida Supreme Court's order. The Appellant stated that Chandler, despite his notice of appearance in February and emails with the State that same day about the motion to withdraw, had taken a new job at a different firm and would be at risk of losing his new job if he appeared at trial the following Tuesday. Appellant further stated, "I would appear as a witness to personally explain this matter to you further on Tuesday however, my brother-in-law passed unexpectedly and his out of town funeral is scheduled for Tuesday." The trial court did not consider the motion to withdraw before the May 30, 2017 trial date.

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<sup>1</sup> The motion to withdraw was filed in the E portal at 12:40am on May 26, 2017, which was the Friday before Memorial Day weekend.

Neither the Appellant nor Chandler appeared for jury selection. The trial court rendered an order to show cause directing the Appellant to show why he should not be held in indirect criminal contempt for: (1) failing to disclose his suspension to the trial court, the State, and Mercado, in violation of Florida Bar Rule 3.5-1(h), (2) directing another attorney to appear on his behalf, and (3) either filing or directing Chandler to file a motion to withdraw. An arraignment hearing<sup>2</sup> was held on June 15, 2017, at which time the Appellant did not agree that he was in contempt. The trial court subsequently held an evidentiary hearing, and issued its order finding the Appellant in indirect criminal contempt, and sentencing him to serve ten days in the county jail, in addition to assessing a \$500.00 fine. Three days later, the Appellant filed an emergency motion for stay, seeking a stay of the sentence pending the outcome of the appeal. The trial court granted the motion for stay, conditioned upon the Appellant posting a \$5,000.00 bond, which was posted two days later. This appeal followed.

A trial court's order of indirect contempt is reviewed for an abuse of discretion. *Sandelier v. State*, 238 So. 3d 831, 834 (Fla. 4th DCA 2018).

Fla. R. Crim. P. 3.840 governs indirect criminal contempt, and it states in relevant part:

**A criminal contempt, except as provided in rule 3.830 concerning direct contempts, shall be prosecuted in the following manner:**

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(d) Arraignment; Hearing. The defendant may be arraigned at the time of the hearing, or prior thereto at the defendant's request. A hearing to determine the guilt or innocence of the defendant shall follow a plea of not guilty. The judge may conduct a hearing without assistance of counsel or may be assisted by the prosecuting attorney or by an attorney appointed for that purpose. **The defendant is entitled to be represented by counsel**, have compulsory process for the attendance of witnesses, and testify in his or her own defense. All issues of law and fact shall be heard and determined by the judge.

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<sup>2</sup> Fla. R. App. P. 3.840 allows for an arraignment hearing, and the trial court describes the June 15, 2017 hearing as "basically an arraignment" in the transcript, but the court notes are extremely sparse on what actually happened at the hearing. Based on the fact that the July 19, 2017 hearing was held, the appellate court can infer that the Appellant pled not guilty.

(Emphasis added). Failure to comply with the strict procedural requirements of the rule constitutes fundamental error, and a party's failure to raise the issue of noncompliance before the trial court will not bar consideration by an appellate court. *Sandelier v. State*, 238 So. 3d 831, 834 (Fla. 4th DCA 2005). The Appellant argues that the trial court erred by not advising him at any point that he was entitled to counsel, and the State concedes error. *See Plank v. State*, 190 So. 3d 594, 604 (Fla. 2016) (Fla. R. Crim. P. 3.840 specifically provides entitlement to counsel in indirect criminal contempt proceedings); *Podolsky v. State*, 118 So. 3d 258, 259 (Fla. 2d DCA 2013) (when defendant arrived at indirect contempt hearing without counsel, the trial court did not advise him of his right to counsel or inform him that an attorney could be appointed if he could not afford one, and since he did not knowingly waive his right to counsel, it was error for the trial court to proceed); *Sylvester v. State*, 923 So. 2d 1289 (Fla. 5th DCA 2006) (it was error for the trial court to allow the defendant's counsel to withdraw and then proceed without appointing new counsel).

There is no evidence in this record that the trial court advised the Appellant that he had a right to counsel at any time during the contempt proceedings, which was fundamental error. Therefore, this case must be reversed and remanded for proceedings consistent with Fla. R. Crim. P. 3.840. *See Ensign v. State*, 67 So. 3d 353, 355 (Fla. 2d DCA 2011).

Further, on remand, the trial court is instructed to review Exhibits 3 and 7 to determine if an applicable hearsay exception exists.

*Reversed and remanded for a new indirect contempt proceeding that strictly complies with Fla. R. Crim. P. 3.840.*

SCHWAB, J., and ALONZO, Acting Circuit Judge, concur.

Copies of above decision  
were furnished to the attorneys/parties  
of record on the same date  
the decision was filed.