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

Circuit Case No. 17-AP-9
Lower Tribunal No. 17-IN-1086

GEORGE CHANDLER

Appellant,

v.

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

STATE OF FLORIDA,

Appellee.
_____/
Decision filed October 23, 2018.

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

Barbara Eagan, Eagan Appellate Law, PLLC, Orlando, for appellant.

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

CROOM, J.

The Appellant filed a notice of appearance on February 26, 2017 to represent the defendant client ("Mercado") in a DUI case, despite the fact that the body of the notice stated that it was entered "pursuant to Rule 6.340(c), Fla.R.Traffic Court (sic) and hereby requests an administrative hearing on the matter" in circuit court. The notice of appearance stated that the Appellant was part of the Sadaka Law Group, PLC and also listed the name and bar number of Thomas Sadaka ("Sadaka"). However, the Appellant never spoke to or met with Mercado. On February 27, 2017, Sadaka filed a separate notice of appearance in Mercado's case and also entered a plea of not guilty on his behalf. On March 20, 2017, the Appellant began working for another law firm, but he did not move to withdraw from Mercado's case. On April 26, 2017, Sadaka appeared at docket call without the Appellant or Mercado, where he requested and received a continuance until May 24, 2017. The Florida Supreme Court suspended Sadaka from the practice of law for ninety-one days

on April 13, 2017, effective on May 17, 2017. On May 24, 2017, Attorney Jerry Roden appeared at docket call on behalf of both the Appellant and Sadaka and requested a continuance, which the trial court denied. The trial court set the case for trial on May 30, 2017.

On May 25, 2017, the State called Sadaka regarding the May 30, 2017 trial date. Sadaka 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., the Appellant per the above-cited letterhead, and apparently from the same firm, sent an email with the motion to withdraw[1] and proposed order to Sadaka and the State; this was the Appellant'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. The Appellant 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, Sadaka 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. Sadaka stated that the Appellant, 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. Sadaka 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 Appellant did not respond to the email.[2] The trial court did not consider the motion to withdraw before the May 30, 2017 trial date.

Neither the Appellant nor Sadaka 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 appear for trial when he was attorney of record, (2) filing a conclusory motion to withdraw in response to the trial court's denial of his substitute counsel's motion for continuance while leaving Mercado only four days to secure alternate representation in violation of Florida Bar Rule 4-1.16(b)(3), and (3) attempting to obtain withdrawal on behalf of the Sadaka

[1] 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.

[2] During the contempt hearing, the Appellant told the trial court that he was "not certain" that he received this email from Sadaka because there was no "@" in his email address in the exhibit. The trial court admitted it into evidence over his "uncertain" objection.

Law Group when he had filed an individual notice of appearance while Sadaka was suspended from the practice of law. An arraignment hearing[3]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. It ordered the Appellant to pay a $300.00 fine. Then the Appellant filed a notice of appeal, seeking this court's review of the trial court's finding him in indirect criminal contempt.

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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> ***
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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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> ***

(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

[3] 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.

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).

The Appellant also argues that the record does not show that he possessed the required intent element of the contempt. *See State v. Diaz de la Portilla*, 177 So. 3d 965, 973 (Fla. 2015) (Intent is an essential element of contempt). Because the trial court failed to advise the Appellant of his right to counsel, this court does not need to reach the intent issue.

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.