090012

ASSIGNMENTS OF ERROR

1. The trial court erred by holding Zedd in criminal contempt of court where there was insufficient evidence of any intention to obstruct or interrupt the administration of justice.

2. The trial court erred by holding Zedd in summary contempt for conduct that did not occur exclusively in the presence of the court or so near thereto as to justify invocation of summary contempt.

3. The Court of Appeals erred by affirming Zedd's conviction, holding both that the evidence was sufficient and that Zedd failed to preserve his due process objections to the trial court's finding of summary contempt.

090012

ORDER IN MISDEMEANOR OR TRAFFIC INFRACTION PROCEEDING
NORFOLK CIRCUIT COURT

Case No. CR07003900-00

COMMONWEALTH OF VA
v.
GORDON ANDREW ZEDD
[redacted]
NORFOLK, VA 23504

COMPLETE DATA BELOW IF KNOWN

RACE	SEX	BORN MO.	DAY	YR.	HT. FT.	IN	WGT.	EYES	HAIR
W	M	[redacted]							

SSN: [redacted]

OCTOBER 2, 2007 (OFFENSE DATE) OCTOBER 2, 2007 (TRIAL DATE)

The Defendant was this day [ ] tried in absence [ ] present
Attorney: [ ] Appointed [X] Retained
Original Charge: COMTEMPT OF COURT BENCH WARRANT
Code Section: 18.2-456 [X] State Code [ ] Local Ordinance
Virginia Crime Code: Offense Tracking Number: 710CR0700390000

Plea:
[ ] Not Guilty
[ ] Guilty as Charged
[ ] Guilty to Amended Warrant
[ ] Nolo Contendere
[ ] Consent by Defendant to Waiver of Jury
[ ] Concurrence of Court and Commonwealth's Attorney
[ ] Plea voluntarily and intelligently entered after defendant was apprised of his right against compulsory self-incrimination, right to confront the witnesses against him, and right to a jury trial.

Charge: COMTEMPT OF COURT
Code Cite: 18.2-456 Virginia Crime Code:

Finding:
[ ] Not Guilty [ ] Guilty of
[X] Guilty as Charged [ ] Plea Agreement Accepted [ ] Appeal/Withdraw/Affirm
[ ] Facts sufficient to find guilt but defer adjudication/disposition to (DATE AND TIME)

Charge: COMTEMPT OF COURT
Code Cite: 18.2-456 Virginia Crime Code:

Order:
[ ] Nolle Prosequi [ ] Dismissed [ ] Dismissed with Prejudice
[X] FINE [ ] CIVIL PENALTY of $ 50.00 with $ -0- suspended. [X] Costs imposed.
[ ] JAIL SENTENCE of imposed, [ ] of which days mandatory minimum, with suspended for a period of , conditioned upon being of good behavior, keeping the peace, and obeying this order and for paying fines and costs.
Credit is allowed pursuant to § 53.1-187 for time spent in confinement.
[ ] Serve jail sentence beginning [ ] on weekends only
[ ] Work release [ ] authorized if eligible [ ] required [ ] not authorized [ ] Public work force [ ] authorized [ ] not authorized
[ ] on PROBATION for [ ] VASAP [ ] local community-based probation agency
[ ] DRIVER'S LICENSE suspended for years months days
[ ] Restricted Driver's License per attached order [ ] Ignition Interlock for
[ ] CIVIL REMEDIAL FEE, § 46.2-206.1, payment due to court $; second equal payment to DMV due 14 calendar months from date of conviction; third equal payment to DMV due 26 months from date of conviction.
[ ] RESTITUTION of $ due by payable to with interest thereon from [ ] date of loss or damage [ ] today's date [ ] as condition of suspended sentence
[ ] COMMUNITY SERVICE hours to be completed by and supervised by
[ ] to be credited against fines and costs
[ ] Contact prohibited between defendant and victim/victim's family or household members
[ ] Reimburse Commonwealth for investigatory medical fees [ ] Pay $50 fee to the Court for Trauma Center Fund
[ ] Other:
[ ] Registration pursuant to Code § 9.1-903 for offenses defined in § 9.1-902 is required.
[ ] Remanded for [ ] CCRE Report [ ]
[ ] Bail on Appeal $

DRIVER'S LICENSE/PRIVILEGE TO DRIVE IN VIRGINIA SUSPENDED EFFECTIVE IN 15 DAYS IF FINES, CIVIL REMEDIAL FEE, COSTS, FORFEITURES, PENALTIES OR RESTITUTION ARE NOT PAID. Va. Code § 46.2-395.

February 08, 2008
DATE

JUDGE
C. D. GRIFFITH, JR., JUDGE

FORM CC-1392 MASTER 7/07

COPY

090012

COURT OF APPEALS OF VIRGINIA

UNPUBLISHED

Present: Judges McClanahan, Haley and Petty
Argued at Chesapeake, Virginia

GORDON ANDREW ZEDD

v. Record No. 2621-07-1

COMMONWEALTH OF VIRGINIA

MEMORANDUM OPINION* BY
JUDGE WILLIAM G. PETTY
DECEMBER 2, 2008

FROM THE CIRCUIT COURT OF THE CITY OF NORFOLK
Charles D. Griffith, Jr., Judge

Charles B. Lustig (Thomas B. Shuttleworth; Shuttleworth, Ruloff, Swain, Haddad & Morecock, P.C., on brief), for appellant.

Joanne V. Frye, Assistant Attorney General (Robert F. McDonnell, Attorney General, on brief), for appellee.

The trial court held attorney Gordon Andrew Zedd in contempt of court for advising his client he did not need to appear on the scheduled date of his criminal trial because Zedd assumed that the court would grant his request for a continuance. Zedd argues that the evidence was insufficient to find him guilty of contempt. He also argues that the trial court erred by employing summary rather than indirect contempt procedures, therefore denying him the procedural safeguards afforded under the latter. We disagree and affirm Zedd's conviction.

On appeal, we review the evidence in the "light most favorable" to the Commonwealth. Commonwealth v. Hudson, 265 Va. 505, 514, 578 S.E.2d 781, 786 (2003). Zedd was retained to represent Kiwani Scott in a reckless driving appeal in the Circuit Court of the City of Norfolk. The *de novo* appeal was scheduled for trial on October 2, 2007. The day before the trial, Zedd contacted the assistant Commonwealth's attorney assigned to the case and requested a

* Pursuant to Code § 17.1-413, this opinion is not designated for publication.

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continuance. The prosecutor agreed to a joint continuance because the state trooper, who was the Commonwealth's key witness, was unable to appear in court to testify for personal reasons. Based on his assumption that the case would be continued, Zedd advised his client that he did not need to appear in court on October 2. According to the written statement of facts, "the attorneys did not seek or obtain approval from [the trial court]" for a continuance before the trial date.

On October 2, Zedd and the assistant Commonwealth's attorney presented the trial judge with a signed joint continuance order and asked the court to continue the case until November 6, 2007. The order stated that the good cause for the continuance was: "Trooper is ill; defense attny [sic] excused client." When the trial judge inquired as to the whereabouts of the defendant, Zedd confirmed that he had excused him. Zedd concedes that he knew that the court had not agreed to the continuance request. During this exchange, the only reason that Zedd stated for excusing his client was the unavailability of the state trooper. According to the written statement of facts, "Zedd acknowledged that he had no authority to excuse his client absent judicial approval to do so."[1] The trial court held Zedd in contempt of court "for excusing his client from court without judicial approval." The written statement of facts does not contain any objection by Zedd to the trial court's authority to consider the matter as one of summary contempt.

Zedd argues that there was no evidence of contemptuous intent and, therefore, he cannot be guilty of contempt. Zedd further argues that because the allegedly contemptuous behavior did not occur exclusively in the presence of the trial court, the matter should have been treated as indirect rather than summary contempt.

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[1] The trial judge included this particular fact in the written statement of facts. Zedd objected to its inclusion in the statement of facts, and he contends that he never acknowledged that he lacked the authority to excuse his client.

The issues here are identical to those we recently addressed in Singleton v. Commonwealth, 52 Va. App. 665, 667 S.E.2d 23 (2008). In that case, we held that "[b]y not showing up for trial and advising his client to do the same, Singleton undermined the trial court's authority in a manner warranting the sanction of contempt of court." Id. at 671, 667 S.E.2d at 26. We further held that the appellant's summary contempt argument was waived because it was never raised in the trial court. Id. at 672-73, 667 S.E.2d at 26.[2]

Zedd attempts to distinguish Singleton by noting that there, *both* the attorney and the defendant failed to appear for trial. We find this to be a distinction without a difference. We noted in Singleton that "[t]hough it is often said that 'the question of continuances rests in the sound discretion of the trial court,' Singleton's conduct deprived the court of the opportunity to exercise that judicial discretion." Id. at 670, 667 S.E.2d at 25 (internal citations omitted). Zedd's conduct had the same result.[3]

Therefore, we conclude that Singleton controls our decision and, for the reasons stated therein, we affirm Zedd's conviction.

Affirmed.

A Copy,
Teste:

Cynthia L. McCoy, Clerk

By: Deputy Clerk

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[2] Zedd argues that he did not have an opportunity to object to the trial court's decision to hold him in summary contempt and thus Code § 8.01-384 excused his failure to raise the issue at trial. Zedd, who we note is an attorney, offered no reason why such an objection could not have been made, either before the trial court or in a subsequent motion to set aside the verdict. Accordingly, we are not persuaded by this argument.

[3] Zedd also points out that the assistant Commonwealth's attorney, by excusing his witness, also contributed to the necessity for a continuance. However, Zedd overlooks the fact that the court could have denied the continuance and then dismissed the case if the Commonwealth were unable to proceed.