IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA.

JOE C. GUIDO,

Appellant,

v.

PALM BEACH COUNTY SHERIFF'S OFFICE,

Appellee.

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APPELLATE DIVISION (CIVIL): "AY"
Case No.: 502010AP000015XXXXMB
L.T.: 502009SC010869XXXXMB

Opinion filed: SEP 0 1 2011

Appeal from the County Court in and for Palm Beach County, Judge Caroline Shepherd.

For Appellant: John C. Guido, 4945 Ohio Rd, Lake Worth, FL 33463.

For Appellee: Glenn S. Cameron, Esq., 901 N. Olive Ave., West Palm Beach, FL 33401.

PER CURIAM.

AFFIRMED. *See Applegate v. Barnett Bank of Tallahassee*, 377 So. 2d 1150 (Fla. 1979); § 790.17(1), Fla. Stat. (2009).

BROWN, HAFELE, JJ., concurring.

COX, J., dissenting.

The majority relies upon *Applegate v. Barnett Bank of Tallahassee*, 377 So. 2d 1150 (Fla. 1979) to deny Mr. Guido the relief that he requests. *Applegate,* at first glance and without further inquiry, suggests that because there was no transcript and the appellant, having failed to include an adequate record, the appellate court was without the ability to determine if there was competent substantial evidence at trial. The application of *Applegate* in this case is not

appropriate for two reasons. The first is the case of *Hill v. Hill*, 778 So. 2d 967 (Fla. 2001), which was decided after the *Applegate* decision. There, Justice Pariente, in her specially concurring opinion, analyzed *Applegate* in conjunction with the Florida Rules of Appellate Procedure. Justice Pariente concluded, among other things, that neither *Applegate* nor the Rules were intended to operate to preclude the review on the merits. 778 So. 2d at 969 (Pariente, J., concurring specially). Four years later, the Florida Supreme Court in Amendments to the Florida Rules of Appellate Procedure, 894 So. 2d 202 (Fla. 2005) specifically addressed the *Hill* case and amended Florida Rule of Appellate Procedure 9.220 to allow the court, when it finds that an appendix is incomplete, to direct a party to supply the omitted parts. 894 So. 2d at 204. That rule amendment went on to provide that "no proceeding shall be determined until an opportunity to supplement the appendix has been given." *Id.* The concept that appellate courts proactively obtain the necessary record to decide cases on the merits was not new. Florida Rule of Appellate Procedure 9.200(f)(2), adopted in 1977, had read as follows:

> If the court finds the record is incomplete, it *shall* direct a party to supply the omitted parts of the record. *No proceeding shall be determined, because of an incomplete record, until an opportunity to supplement the record has been given* (emphasis added).

It is not surprising that Mr. Guido, with no legal training, is unaware of this rule. Similarly, he is probably unaware that pursuant to Rule 9.200 ("The Record") the parties may prepare a stipulation showing how the issues to be presented arose and were decided by the lower tribunal. The procedure is set forth in subsection (a)(4) which reads as follows:

> The parties may prepare a stipulated statement showing how the issues to be presented arose and were decided in the lower tribunal, attaching a copy of the order to be reviewed and as much of the record in the lower tribunal as is necessary to a determination of the issues to be presented. The parties shall advise the clerk of their intention to rely on a stipulated statement in lieu of the record as early in advance of filing as possible. The stipulated statement shall be

filed by the parties and transmitted to the court by the clerk of the lower tribunal within the time prescribed for transmittal of the record.

Subsection (b)(4) provides as follows:

> **If no report of the proceedings was made, or if the transcript is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection. The statement shall be served on the appellee, who may serve objections or proposed amendments to it within 10 days of service. Thereafter, the statement and any objections or proposed amendments shall be submitted to the lower tribunal for settlement and approval. As settled and approved, the statement shall be included by the clerk of the lower tribunal in the record.**

Therefore, if we as the appellate court believe that the record is inadequate, not only do we have the ability, but we have the responsibility, to compel a record utilizing the available Rules of Appellate Procedure and not to simply cite *Applegate* and abandon the appellate process.

The second reason for not applying *Applegate* is that there are no factual issues in dispute. The Answer Brief of the Palm Beach County Sheriff's Office ("Sheriff's Office") sets forth a concise statement of facts which when applied to the record that does exist, sets forth a sufficient basis for reversal of the trial court. The Sheriff's Statement of Facts in summary is substantially as follows:

> The case originated on September 11, 2009 at 2:00 a.m. when the Appellant (Mr. Guido) telephoned the Palm Beach County Suicide Hotline and stated that he wanted to take a lethal injection. He advised the Suicide Hotline operator that he had firearms in his residence. Palm Beach County Sheriff's Office was called to report a possible suicide attempt. Deputies arrived at Mr. Guido's residence, and upon arrival Mr. Guido exited his residence and met the Deputy Sheriff outside. Mr. Guido was asked if had firearms and he advised that he had a .45 caliber Derringer in his bedroom. Mr. Guido had been consuming alcohol and was holding a glass of beer when the Deputies made contact with him. Mr. Guido engulfed himself in a conversation with the Deputy concerning unemployment benefits due him from the State of South Dakota. At the conclusion of the investigation, the Deputy seized the firearm for the safety of Mr. Guido and others. Several days later, Mr. Guido presented himself at the Palm Beach County Sheriff's Office and demanded the return of his firearm, but the Sheriff's

Office took the position that pursuant to section 790.17(1), Florida Statutes they could not return the firearm to him.

On September 23, 2009, Mr. Guido filed a replevin action for the return of his firearm.

No facts are in dispute. A review of the record and the pleadings shows that Mr. Guido prepared and filed a legally sufficient replevin action. He simply wanted his property back. In Florida, there are no special statutes applicable to the replevin of a firearm. Therefore, the only issue in front of the lower court was whether or not Mr. Guido had complied with chapter 78, Florida Statutes, which he clearly did.

The lower court, however, allowed the Sheriff's Office to argue that section 790.17(1), Florida Statutes applied, alleging Mr. Guido had an unsound mind. However, section 790.17 has no application to a "firearm" unless it is a transfer of a firearm to a minor under the age of eighteen under subsection (2)(a). The flaw in the Sheriff's argument and the error of the trial court were that they appeared to have assumed that the Legislature when utilizing the phrase "any dangerous weapon" meant to include firearms. But the Legislature did not, because the Florida Legislature specifically defined "weapon" under section 790.001(13), which reads as follows:

> **"Weapon" means any dirk, knife, metallic knuckles, slungshot, billie, tear gas gun, chemical weapon or device, or other deadly weapon <u>except a firearm</u> or a common pocketknife, plastic knife, or blunt-bladed table knife.**

The definitional term specifically excludes firearms and the context of the section does not suggest another meaning. The .45 caliber Derringer Mr. Guido had, which the Sheriff's Office still holds, is a firearm. It is clear from the reading of section 790.17, that a firearm was not intended, as it is not mentioned in subsection (1), but it is expressly mentioned in subsection (2)(a).

In reaching this decision, due consideration has been given to *Jones v. Williams Pawn & Gun*, 800 So.2d 267 (Fla. 4th DCA 2001) where the court held that the sale of a handgun to a mentally and emotionally retarded man was a crime under section 790.17(1), Florida Statutes. However in the *Jones* case, the analysis was of the definition of "unsound mind". The court did not analyze whether a "firearm" was a "weapon" (deadly, dangerous, or otherwise). At first blush *Jones* says a "firearm" is a dangerous weapon and is covered under section 790.17(1), Florida Statutes. But the 4th DCA, in *Stanley v. State*, 757 So. 2d 1275 (Fla. 4th DCA 2000) ruled that a "firearm" is specifically excluded from the definition of "weapon". The 2nd DCA in Baldwin v. State, 857 So. 2d 249 (Fla. 2nd DCA 2003) held the specific statutory definition "firearm" to preclude a gun from being a "weapon". And as recently as March 9, 2011, the 4th DCA has again said a gun is a "firearm" and a "firearm" is not a weapon. *See: Crum v. State*, 56 So. 3d 102 (Fla. 4th DCA 2011).

Therefore, the trial court had absolutely no jurisdiction to withhold Mr. Guido's property. Moreover, the lower court had absolutely no authority to direct Mr. Guido to undergo a psychological examination.

This case is so troubling and is a reminder to all of us that notwithstanding our best of intentions, a person with little legal training can be overwhelmed by our judicial system and that an error at any level by our court system can run roughshod over a person's constitutional rights. It is clear that the Sheriff's Office, when presented with a request by Mr. Guido for a return of his firearm had no legal basis to hold it. Mr. Guido complied with chapter 78, which was the only issue that the lower court should have addressed. Section 790.17 is a clear expression of the legislative intent and did not include a firearm. It is not for any court to alter the clear, unambiguous language of section 790.17. Mr. Guido had a constitutional right under article I,

section 8 of the Florida Constitution to keep and bear arms in defense of themselves. He similarly had a constitutional right to due process under article I, section 9 of the Florida Constitution to not have his personal property taken or held without compensation , and probably most chilling he had an absolute right to be free from governmental intrusion into his personal life under article I, section 23 of the Florida Constitution. There was absolutely no basis in law to compel Mr. Guido to obtain a psychological evaluation in order to get his property back, and yet in a public forum we compelled Mr. Guido to submit his most private thoughts and feelings to a stranger and then to allow the stranger's evaluation of Mr. Guido to become part of an open public record.

Notwithstanding our best of intentions and our concerns for the safety of Mr. Guido, we trampled upon Mr. Guido's rights and this court should with all dispatch reverse the lower court and direct that the lower court enter an Order directing the Sheriff's Office to immediately and to forthwith return Mr. Guido's property to him or at the very least reimburse Mr. Guido the value of the property taken which the government still holds and to immediately direct the Clerk of the Court and the Sheriff to remove from the public view and seal all records regarding this incident and these proceedings, allowing access to only Mr. Guido, his counsel, the Clerk of the Court, the Sheriff, and the Chief Judge.