

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

KELLY ROBERTS,

Appellant,

v.

PALM BEACH COUNTY
SHERIFF'S OFFICE

Appellee.

APPELLATE DIVISION (CIVIL): "AY"

Case No.: 502011AP000038XXXXMB

L.T. No.: 502010SC000888XXXXMB

Opinion filed: **MAR 28 2013**

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

✓ For Appellant: Walter H. Djokic, Esq. P.O. Box 22887, West Palm Beach, FL 33416

✓ For Appellee: Orlando Gonzalez, Esq., 901 N. Olive Ave., West Palm Beach, FL 33401

Appellant, Kelley Roberts, filed a Petition for Issuance of Writ of Replevin seeking the return of his firearms from Appellee, the Palm Beach County Sheriff's Office. The trial court denied the petition as untimely based upon its application of section 790.08, Florida Statutes (2012). Roberts argues that statute is inapplicable because he was not arrested or charged with a crime in connection with the confiscation of his firearms. We agree and reverse for further proceedings.

The Lake Worth Police Department confiscated firearms from Roberts' home after being called there in response to a threatened suicide. Rather than arresting Roberts, law enforcement admitted him to a mental health facility under the Baker Act. No charges were filed. Roberts

subsequently sought return of his firearms from Palm Beach County's Sheriff's Office, which is currently storing them.

Roberts filed a petition for writ of replevin, which the trial court denied as untimely pursuant to section 790.08, Florida Statutes, which provides in pertinent part:

(3) If the person arrested as aforesaid is acquitted of the offenses mentioned in subsection (2), the said weapons, electric weapons or devices, or arms taken from the person as aforesaid shall be returned to him or her; however, if he or she fails to call for or receive the same within 60 days from and after his or her acquittal or the dismissal of the charges against him or her, the same shall be delivered to the sheriff as aforesaid to be held by the sheriff as hereinafter provided. This subsection shall likewise apply to persons and their weapons, electric weapons or devices, or arms who have heretofore been acquitted or the charges against them dismissed.

(5) Weapons, electric weapons or devices, and arms coming into the hands of the sheriff pursuant to subsections (3) and (4) aforesaid shall, unless reclaimed by the owner thereof within 6 months from the date the same come into the hands of the said sheriff, become forfeited to the state, and no action or proceeding for their recovery shall thereafter be maintained in this state.

§ 790.08(3), (5), Fla. Stat. (2012) (emphasis added). Roberts argues, and we agree, that the trial court erred by applying sections 790.08(3) and (5) to this case.

Section 790.08(3) is inapplicable because Roberts was never arrested. The record demonstrates that the only action taken by the police was to transport Roberts to South County Mental Health Clinic under the Baker Act. The Florida Attorney General issued an opinion addressing the applicability of section 790.08 in a similar situation where a person threatened suicide, law enforcement confiscated firearms from that person, and neither an arrest nor subsequent charges occurred. Op. Att'y Gen. Fla. 2009-4. Section 790.08, Florida Statutes, requires the individual to be charged with a criminal offense, and as the Baker Act makes clear that its proceedings are not criminal proceedings. *Id.* In the absence of an arrest and criminal

charges against a person sent for evaluation under Florida's Baker Act, law enforcement may not retain firearms confiscated from such person and retained by that office. *Id.*

Since Roberts was neither arrested nor had charges brought against him, section 790.08(3) is inapplicable, therefore Roberts' firearms were improperly delivered to the sheriff pursuant to that section. Accordingly, the time limit set forth in section 790.08(5) is similarly inapplicable.

Accordingly, the Order Denying the Motion for Issuance of Writ of Replevin is REVERSED. The Palm Beach County's Sheriff's Office argued that it was appropriate to deny the return of Roberts' firearms under section 790.17, Florida Statutes, which provides that it is a misdemeanor to transfer weapons to a person "of unsound mind", but the lower court failed to address this argument in its ruling. Therefore this case is REMANDED for further proceedings for consideration of this issue.

J. KEYSER, KASTRENAKES, JJ., concur.

FINE, J., concurring.

I agree with the majority that section 790.08, Florida Statutes was an improper basis for denying the petition for writ of replevin, and the Order should be reversed. However, I believe the record reflects that Roberts is of sound mind. Roberts' psychiatrist, who has been treating him since 2003, signed a notarized affidavit stating that based on her education, experience, and interaction with Roberts, she has no reason to believe that these firearms should not be returned to him. Therefore, I would REVERSE the Order Denying the Motion for Issuance of Writ of Replevin and direct Palm Beach County Sheriff's Office to return Roberts' firearms.