Circuit Court for Baltimore County
Case No: C-03-CR-22-005488

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND*

No. 670

September Term, 2023

SAMUEL B. GILBERT

v.

STATE OF MARYLAND

Graeff,
Friedman,
Beachley,

JJ.

Opinion by Friedman, J.

Filed: July 12, 2024

*This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to MD. RULE 1-104(a)(2)(B).

After a jury trial in the Circuit Court for Baltimore County, appellant Samuel B. Gilbert, was found guilty of illegal possession of a firearm. MD. CODE, PUBLIC SAFETY ARTICLE ("PS") § 5-133(c).[1] The parties stipulated that Gilbert had a prior conviction for a crime of violence that prohibited him from possessing a regulated firearm in the State of Maryland, and there was no dispute that the prior conviction was for first-degree assault. The court imposed a mandatory sentence of five years without the possibility of parole. The two issues presented for our consideration are (1) whether the conviction and sentence for illegal possession of a firearm must be vacated because they were illegal, and (2) whether failure to preserve this issue constitutes ineffective assistance of counsel. For the reasons set forth below, we shall dismiss the appeal.

DISCUSSION

Gilbert argues that both his conviction and sentence must be vacated because they violated the Second Amendment to the United States Constitution,[2] specifically, the test set forth in *New York Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. 1 (2022). Gilbert acknowledges that he failed to raise this contention in the trial court, but he maintains that he can raise it here for the first time because his sentence was illegal under Maryland Rule 4-345(a), which provides that "[t]he court may correct an illegal sentence at any time."

[1] PS § 5-133(c)(1) provides that "[a] person may not possess a regulated firearm if the person was previously convicted of (i) a crime of violence." Section 5-133 of the Public Safety Article was amended effective October 1, 2023, but the quoted provisions of subsection (c) were not changed.

[2] The Second Amendment to the United States Constitution provides that "[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST. amend. II.

According to Gilbert, because, under *Bruen*, he never should have been convicted of violating PS § 5-133(c), the trial court should not have imposed a sentence. Alternatively, Gilbert argues that his trial counsel was constitutionally ineffective for failing to raise this issue below and asks us to address his claim of ineffective assistance of counsel in this direct appeal.

I. PERTINENT SECOND AMENDMENT CASE LAW

We pause briefly to review a line of cases that led to the United States Supreme Court's decision in *Bruen*, the case relied upon by Gilbert, and subsequent cases arising out of it. In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the United States Supreme Court considered whether a District of Columbia prohibition on the possession of usable handguns in the home violated the Second Amendment.[3] *Heller*, 554 U.S. at 573. The Court held that the Second Amendment conferred "an individual right to keep and bear arms" for the purpose of self-defense. *Id.* at 595. The Court wrote that "the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns." *Id.* at 625. The Court explained that:

[3] The District of Columbia law at issue in *Heller* "totally ban[ned] handgun possession in the home" and required "that any lawful firearm in the home be disassembled or bound by a trigger lock at all times, rendering it inoperable." *Heller*, 554 U.S. at 628.

> the inherent right of self-defense has been central to the Second Amendment right. The handgun ban amounts to a prohibition of an entire class of "arms" that is overwhelmingly chosen by American society for that lawful purpose. The prohibition extends, moreover, to the home, where the need for defense of self, family, and property is most acute. Under any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home "the most preferred firearm in the nation to 'keep' and use for protection of one's home and family," …, would fail constitutional muster.

Id. at 628-29.

The Court recognized, however, that this right "is not unlimited" and that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." *Id.* at 626-627 (footnote omitted).

Two years after *Heller*, the United States Supreme Court held "that the Second Amendment right is fully applicable to the States." *McDonald v. City of Chicago*, 561 U.S. 742, 750 (2010). In its plurality opinion, the Court emphasized its prior holding in *Heller*, writing:

> It is important to keep in mind that *Heller*, while striking down a law that prohibited the possession of handguns in the home, recognized that the right to keep and bear arms is not 'a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.' We made it clear in *Heller* that our holding did not cast doubt on such longstanding regulatory measures as 'prohibitions on the possession of firearms by felons and the mentally ill,' 'laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.' We repeat those assurances here.

Id. at 786 (internal citations omitted).

More recently, in *Bruen*, the Supreme Court held that the Second Amendment protected the rights of "ordinary, law-abiding citizens" to "carry a handgun for self-defense outside the home." *Bruen*, 597 U.S. at 10. The Court set forth a test for analyzing Second Amendment challenges to firearm restrictions that required an analysis of whether the Second Amendment's plain text covered an individual's conduct. *Id.* at 17, 24. If so, the conduct is presumptively protected and "[t]he government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *Id.* at 24. The government can satisfy its burden by identifying "a well-established and representative historical *analogue*, not a historical *twin*." *Id.* at 30 (emphasis in original). Two important considerations are "how and why the regulations burden a law-abiding citizen's right to armed self-defense." *Id.* at 29. Three of the six justices in the *Bruen* majority wrote that the majority opinion did not disturb prior comments in *Heller* and *McDonald* about possession restrictions for individuals previously convicted of a felony. *See Bruen*, 597 U.S. at 72 (Alito, J., concurring) and 597 U.S. at 80-81 (Kavanaugh, J. concurring, joined by Roberts, C.J.).

Shortly after the Supreme Court's decision in *Bruen*, we issued our opinion in *Fooks v. State*, 255 Md. App. 75, *cert. granted*, 482 Md. 141 (2022). In that case, Fooks raised both facial and as-applied Second Amendment challenges to his conviction under PS § 5-133(b)(2), which prohibited the possession of a regulated firearm after a conviction for a common-law crime that resulted in a sentence of more than two years' imprisonment. Fooks had been convicted of constructive criminal contempt and sentenced to more than four years' imprisonment. *Fooks*, 255 Md. App. at 81-82 and n.3. In rejecting Fooks's

challenges, we recognized that "*Bruen* didn't deal at all with limitations grounded in prior criminal behavior[,]" and determined that the statute was presumptively lawful under *Heller*, given the seriousness of the prior offenses involved. *Id.* at 96-97, 102-03. Further, in rejecting Fooks's as-applied challenge, we held that his prior conviction for criminal contempt resulted in him not being a law-abiding citizen such that his firearm possession "fell outside the scope protected by the Second Amendment." *Id.* at 106. Maryland's Supreme Court granted a writ of certiorari in *Fooks*. *See* 482 Md. 141 (2022). Thereafter, that appeal was stayed pending the decision of the United States Supreme Court in *United States v. Rahimi*, Docket No. 22-915. *See Fooks v. State*, 485 Md. 52 (2023).

On June 21, 2024, the Supreme Court issued its decision in *Rahimi*. *See Rahimi*, 602 U.S. __, 2024 WL 3074728 (June 21, 2024). In that case, Rahimi was convicted of violating a federal statute that prohibited the possession of a firearm after having been subject to a domestic violence restraining order. *Rahimi*, 602 U.S. __, 2024 WL 3074728 at *1. Rahimi conceded that the restraining order against him satisfied the statutory criteria, but asserted that, on its face, the statute violated the Second Amendment.[4] *Id.* The Supreme Court recognized that since the Nation's founding, firearm laws included regulations to stop individuals who threaten physical harm to others from misusing firearms. *Id.* at *5-9. Relying in part on historical surety and "going armed" laws, to which the statute was "relevantly similar," as well as *Heller*, *McDonald*, and *Bruen*, the Court held that when an

[4] The Supreme Court's decision in *Bruen* was issued while Rahimi's case was on appeal. *Rahimi*, 602 U.S. __, 2024 WL 3074728 at *5.

individual has been found by a court to pose a credible threat to the physical safety of another, that individual may at least be temporarily[5] disarmed consistent with the Second Amendment. *Id.* at *11.

II. ILLEGAL SENTENCE CLAIM

"[I]t is well established that a court may correct an illegal sentence on its own initiative and at any time, even upon appeal." *Mateen v. Saar*, 376 Md. 385, 405 (2003); *see also Garner v. State*, 442 Md. 226, 250-51 (2015) ("The power of the court to correct an illegal sentence exists on appeal even where the illegality of the sentence was not raised in the trial court."). As a preliminary matter, we must determine whether Gilbert's claim is cognizable under Rule 4-345(a). "An illegal sentence, for purposes of Rule 4-345(a), is one in which the illegality 'inheres in the sentence itself[.]'" *Colvin v. State*, 450 Md. 718, 725 (2016) (quoting *Chaney v. State*, 397 Md. 460, 466 (2007)). In other words, the Rule permits the correction of "'inherently illegal' sentences, not sentences resulting from 'procedural error[s].'" *State v. Bustillo*, 480 Md. 650, 665 (2022) (alteration in original) (quoting *Bailey v. State*, 464 Md. 685, 696 (2019)). A sentence is "inherently illegal" if "'there has either been no conviction warranting any sentence for the particular offense or the sentence is not a permitted one for the conviction upon which it was imposed[.]'" *State*

[5] The Court specifically noted that "like surety bonds of limited duration," the statute at issue only prohibited firearm possession so long as the defendant was subject to a restraining order. *Rahimi*, 602 U.S. __, 2024 WL 3074728 at *10. In a concurring opinion, Justice Gorsuch wrote that the opinion did "not resolve whether the government may disarm an individual permanently." *Id.* at *17. In addition, Justice Gorsuch stated, "[n]or do we purport to approve in advance other laws denying firearms on a categorical basis to any group of persons a legislature happens to deem, as the government puts it, not responsible." *Id.* at *16 (internal quotation marks omitted).

v. Williams, 255 Md. App. 420, 439 (2022) (quoting *Rainey v. State*, 236 Md. App. 368, 374 (2018)). Procedural challenges, on the other hand, must be raised by contemporaneous objection. *Colvin*, 450 Md. at 728. Whether a sentence is an illegal sentence under Rule 4-345(a) is a question of law that we review without deference. *State v. Crawley*, 455 Md. 52, 66 (2017) (citing *Meyer v. State*, 445 Md. 648, 663 (2015)).

Gilbert contends that the State failed to meet its burden of establishing that, under *Bruen*, Maryland's firearm regulations are consistent with the nation's historical tradition of firearm regulation. In other words, he maintains that the State failed to produce sufficient evidence of historical gun regulations to support the challenged restriction. Yet, he never raised that issue in the trial court. Gilbert's challenge is procedural in nature and is not cognizable under Rule 4-345(a). *See Bryant v. State*, 436 Md. 653, 665-66 (2014) (claim that State failed to produce sufficient evidence to link predicate convictions supporting enhanced sentence was not cognizable under Rule 4-345(a)). Because Gilbert failed to raise his Second Amendment argument below, the issue was not preserved for our consideration and we decline to address it. MD. RULE 8-131(a) ("Ordinarily, an appellate court will not decide [an] issue unless it plainly appears by the record to have been raised in or decided by the trial court[.]").

III. INEFFECTIVE ASSISTANCE OF COUNSEL

In the alternative, Gilbert asks us to find that his attorney was ineffective because he failed to raise the Second Amendment argument below. We decline to do so. Review of a claim of ineffective assistance of counsel on direct appeal is appropriate "where the critical facts are not in dispute and the record is sufficiently developed to permit a fair

evaluation of the claim." *In re Parris W.*, 363 Md. 717, 726 (2001). We review such claims only in "extremely rare situations," *Crippen v. State*, 207 Md. App. 236, 251 (2012), where the record itself is sufficient to demonstrate that counsel's performance was not only ineffective, but that the ineffectiveness was "blatant and egregious." *Mosley v. State*, 378 Md. 548, 562 (2003) (internal quotation marks omitted). That is not the case here. The record in this case is insufficiently developed to allow us to determine if defense counsel's assistance was ineffective. Gilbert's claim is thus best evaluated in a post-conviction proceeding.

APPEAL DISMISSED. COSTS TO BE PAID BY APPELLANT.