Circuit Court for Montgomery County
Case No. C-15-CR-23-000742

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 1102

September Term, 2023

XAVIER SANCHEZ-SANTOS

v.

STATE OF MARYLAND

Wells, C.J.,
Graeff,
Alpert, Paul E.,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Wells, C.J.

Filed: August 2, 2024

*This is an unreported opinion. It 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 Rule 1-104(a)(2)(B).

The key events in this case occurred while the appellant Xavier Sanchez-Santos was at his then-girlfriend, Stephany Avarca-Mejia's, apartment in Gaithersburg. After an argument between the two, Avarca-Mejia called 911 and reported that Sanchez-Santos, who was on probation, fired a "ghost gun" and fled from the apartment complex. Responding officers discovered multiple 9mm shell casings in the parking lot, corroborating both Avarca-Mejia's and her roommate's accounts of the events. The officers went to Sanchez-Santos' residence in Rockville and detained him after he attempted to flee. Sanchez-Santos confessed to possessing a handgun, which the officers discovered in his waistband.

Sanchez-Santos moved to suppress the gun along with other evidence, contending that the arresting officers lacked probable cause. The circuit court denied the motion, ruling that the officers had a reasonably sufficient basis to believe Sanchez-Santos committed the crime of unlawfully transporting a handgun based on the witnesses' accounts, the shell casings, and the timing of events. A jury convicted Sanchez-Santos of carrying a loaded handgun and illegal possession of a firearm after being convicted of a crime of violence. The court sentenced him to fifteen years of incarceration, with all but five years suspended, for illegal possession of a firearm; three years of concurrent incarceration (all suspended) for wearing and carrying a loaded handgun; and five years of supervised probation.

On appeal, Sanchez-Santos submits three questions for our review, which we have rephrased:[1]

1. Did the trial court err by denying a Motion to Suppress all evidence obtained during the warrantless search of Sanchez-Santos on December 11, 2021?

2. Was Sanchez-Santos' sentence unconstitutional?

3. Was Sanchez-Santos' counsel's failure to raise constitutionally based Second Amendment issues ineffective assistance of counsel?

For the following reasons, we answer "no" to each question and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On December 7, 2021, Sanchez-Santos was at Avarca-Mejia's apartment, located at 3 Hermosa Court in Gaithersburg. The encounter between Sanchez-Santos and Avarca-Mejia spiraled into a protracted argument in which Sanchez-Santos accused Avarca-Mejia of infidelity and engaging in prostitution. Avarca-Mejia attempted to walk away; however, Sanchez-Santos attempted to prevent her from leaving the apartment by grabbing her shoulders. Avarca-Mejia demanded that Sanchez-Santos leave her apartment, and he complied.

[1] Sanchez-Santos questions presented verbatim are as follows:

1. Did the circuit court err in denying the Motion to Suppress?

2. Must the convictions and sentences for illegal possession of a firearm and wear & carry of a loaded handgun be vacated because they violated the Second Amendment?

3. Alternatively, must the sentence for wear & carry of a loaded handgun merge into the sentence for illegal possession of a firearm?

After Sanchez-Santos departed, Avarca-Mejia and her roommate, Faith Anamin, left their apartment. At that time, Avarca-Mejia and Anamin saw Sanchez-Santos sitting in a white Chevrolet Camaro outside the apartment building. Immediately thereafter, both women said they heard multiple gunshots and saw muzzle flashes from the white Camaro. Both women believed that Sanchez-Santos was firing a handgun into the air. They then witnessed Sanchez-Santos speed out of the parking lot after the shots were fired.

Avarca-Mejia called 911. During the call, she said that Sanchez-Santos fired multiple rounds from what she believed to be a Glock 19 "ghost gun" that she knew Sanchez-Santos owned. Avarca-Mejia also mentioned that Sanchez-Santos was on probation and was legally prohibited from possessing a firearm. Both Avarca-Mejia and Anamin said they feared that Sanchez-Santos might return and hurt them. Avarca-Mejia described Sanchez-Santos's physical appearance, attire, and his vehicle to the dispatcher. Police officers immediately responded to the scene of the shooting.

When they arrived, the officers interviewed Avarca-Mejia and Anamin separately and obtained individual accounts of the incident. Anamin confirmed the earlier altercation between the couple, the report of multiple gunshots, and the white Camaro speeding away. Avarca-Mejia also thoroughly recounted the events in detail, which reiterated her initial 911 report.

Officers then searched the parking lot and discovered numerous 9mm shell casings in the area where the women saw Sanchez-Santos fire the rounds. Shell casings were scattered far away from one another, which officers believed indicated a driver shooting

from the window from a moving car. The 9mm shell casings were consistent with the ammunition used by a Glock 19, corroborating Avarca-Mejia's account of the gun Sanchez-Santos supposedly owned.

While the officers were at the scene, Sanchez-Santos texted messages to Avarca-Mejia. Officers noted these messages showed that Sanchez-Santos intended to return to the apartment to harm Avarca-Mejia and Anamin. Continuing their investigation and to secure the safety of the women, the officers went to Sanchez-Santos' residence, at 13817 Arctic Avenue in Rockville.

Upon arrival, officers observed a white Camaro parked in front of the building with Sanchez-Santos in the driver's seat. The officers watched Sanchez-Santos exit the vehicle, enter the residence, and quickly return to the Camaro. Sanchez-Santos then spotted the officers and attempted to drive away.

The officers blocked Sanchez-Santos's car with their patrol vehicles and placed him under arrest. During the arrest, Sanchez-Santos admitted to having a handgun in his waistband. The officers recovered a loaded Glock 19. This handgun did not have a serial number and was seized as a "ghost gun." [2]

In the Circuit Court for Montgomery County, Sanchez-Santos moved to suppress the handgun, arguing that the officers lacked sufficient probable cause for a warrantless arrest. The circuit court denied Sanchez-Santos's motion, finding that the officers had

[2] A ghost gun is put together using components purchased either as a kit or as separate pieces. It has no serial numbers and is, therefore, an untraceable firearm. https://en.wikipedia.org/wiki/Ghost_gun.

sufficient probable given the totality of the circumstance. In denying the motion to suppress, the court concluded that an objectively reasonable officer would have believed that Sanchez-Santos committed the crime of unlawfully transporting a handgun and that a warrantless arrest was not only reasonable but justified. The court explained its reasoning as follows:

> [F]irst, you have the testimony or the assertions, not really the testimony, but the assertions of Avarca-Mejia, who states to the police, to the 9-1-1 call, as well as through her interaction with officers on the scene, that the defendant had fired a firearm. Now, her description of exactly how that occurs is somewhat different. In the first sentence, she says she saw him -- she heard the shots, and then it was, I think, the muzzle flash, and then she saw him clear as day.
>
> I understand the Defense's argument that the distance and the lighting may be such, but if someone is out in front of you, holding up what appears to be a firearm, you see muzzle flashes from it, that in and of itself would have been sufficient, in my view, to -- for a reasonable person, as well as a reasonable police officer, to conclude that he was firing a firearm at the time. And so although her statements are somewhat, not inconsistent, but -- and you would think that somebody involved in having just witnessed that or been concerned for their own safety, that people are not -- I noted her cadence, when she was talking to the police, was very excitable. She was talking extremely quickly and seemed to be under -- certainly under stress at the time, and so we have her testimony.
>
> Her testimony is then corroborated by the other roommate who testifies. She testifies, I don't -- or testifies -- she states to the police, while she didn't see the defendant with the firearm, that she did hear gunshots and then immediately saw a vehicle which was similar in kind to the defendant's vehicle leaving the scene at that time. I note there's a bit of an inconsistency `there with the 9-1-1 call, which would have happened, I guess, very soon after, where they keep saying he's leaving, but the temporal time I'm not sure is that inconsistent given the quickness in which the 9-1-1 call was purportedly made.
>
> So you have two witnesses who say that the defendant -- or heard -- or both heard and one saw the defendant with at least muzzle flashes in the parking

> lot, and then you had another that heard shots and saw a vehicle similar to the one that the defendant drives. So that corroborates what Avarca-Mejia -- or stated to the police.
>
> So the police have statements about the use of a handgun, and then you have further corroborating information. You have shell casings that are found at the scene, one in the vicinity where the alleged -- where Avarca-Mejia stated that the shooting was occurring. The rest were scattered about the parking lot, many of which would have been -- were outside of sort of what you would consider to be the direct view of the defendant, and that is certainly some fodder for trial in terms of what she was able to see.
>
> I did note that one of the police officers in the body cam noted that one of the shell casings had been run over. I don't know if it was run over and how -- there wasn't really a lot of information as to how many vehicles or cars, but there were an awful lot of police officers there, and I noted that the one shell casing was right where the responding officer's vehicle was.
>
> So whether the officer spread out the shell casings or not, I just don't know, but the shell casings in and of themselves are corroborative of the fact that shots were fired, and I guess you could make the argument that Avarca-Mejia, who was upset at the defendant, obtained 16 or so shell casings and threw them out on the parking lot and called the police to sort of frame up the defendant, but that's not -- I don't think that's very plausible, and in fact, her statement was that she heard eight or nine shots, and then I believe there was some 16 shell casings recovered.
>
> And whether the shell casings would match to the firearm or not or be associated with it, that's not the issue for probable cause. The issue is whether or not a reasonable police officer, having that information, would believe that the defendant had committed the crime of transporting a handgun in his motor vehicle, and since he left the scene and there was no firearm recovered at the scene, that the wear, carrying, or transporting of a handgun, I believe, would have been met and that there was probable cause to believe, to believe that.

Subsequently, Sanchez-Santos went to trial and was convicted of carrying a loaded handgun and illegal possession of a firearm after being convicted of a crime of violence. He was sentenced to fifteen years of incarceration, with all but five years suspended, for

illegal possession of a firearm; three years of concurrent incarceration (all suspended) for wear and carry of a loaded handgun; and five years of supervised probation. This timely appeal followed.

DISCUSSION

I. The Circuit Court Did Not Err in Denying the Motion to Suppress Evidence Obtained During the Warrantless Search of Sanchez-Santos on December 11, 2021.

A. Parties' Contentions

Sanchez-Santos contends that the circuit court erred by denying his motion to suppress the handgun obtained during his arrest. He argues that the police officers did not have probable cause to arrest him for wearing, carrying, or transporting a handgun under Crim. Proc. § 2-203. Specifically, he asserts that the limited evidence available to the officers at the time of the arrest, even when reviewed under the totality of the circumstances, was insufficient to create probable cause. In his telling, the eyewitnesses, Avarca-Mejia and Anamin, were biased, their recitation of the events was not properly corroborated, and they were the only people within a populated apartment complex to report the sound of gunshots to police. Furthermore, the responding officers said that Avarca-Mejia would have had great difficult seeing what she allegedly saw and stated her story did not make sense. Lastly, Sanchez-Santos claims the State never clarified what time the police actually arrested him. Without clarifying the timing, so he argues, the State could not prove he committed the offenses at the time the police arrested him.

The State contends that the circuit court correctly denied the motion to suppress because the police had probable cause. At the suppression hearing, the evidence showed that Avarca-Mejia reported that Sanchez-Santos fired a handgun in her presence. Her report was corroborated by her roommate, Anamin, and further supported by observations the police made of Sanchez-Santos entering and exiting a vehicle matching the description the two women provided. Additionally, the police found shell casings in the area where the shooting was reported. Given this information, the police had probable cause to believe that Sanchez-Santos was in possession of a handgun. The State's position is that probable cause is determined from the perspective of an objectively reasonable police officer and does not require corroboration of every detail of a witness's report. Furthermore, the State asserts that the precise time of arrest is not critical in this case as the events unfolded quickly and provided an unbroken chain of events justifying the warrantless arrest.

B. Standard of Review

When reviewing a circuit court's denial of a motion to suppress evidence, the Appellate Court of Maryland is "limited to the record developed at the suppression hearing." *Pacheco v. State*, 465 Md. 311, 319 (2019) (citing *Moats v. State*, 455 Md. 682, 694 (2017)); *see also Longshore v. State,* 399 Md. 486, 498 (2007) (Our decision is based "solely upon the facts and information contained in the record of the suppression hearing.") We assess the record and view the evidence "presented at the [suppression] hearing, along with any reasonable inferences drawable therefrom, in a light most favorable to the prevailing party." *Davis v. State,* 426 Md. 211, 219 (2012). In our review, we "extend

great deference to the suppression judge with respect to the determination and weighing of first-level findings of facts, which we will not disturb unless clearly erroneous." *Williamson v. State,* 413 Md. 521, 531–32 (2010). Lastly, we give no deference "to the question of whether, based on the facts, the trial court's decision was in accordance with the law." *Seal v. State,* 447 Md. 64, 70 (2016); *see also Norman v. State*, 452 Md. 373, 386 (2017).

C. Analysis

Under Maryland Code. Annotated, Criminal Procedure § 2-203(b)(8), a police officer may arrest without a warrant "if the police officer has probable cause to believe that the person has committed a crime," including " the wearing, carrying, or transporting of a handgun under § 4-203 or § 4-204 of the Criminal Law Article." Md. Code Ann., Crim. Proc. §§ 2-203(a), (b)(8); see also *Berryman v. State*, 94 Md. App. 414, 424 (1993) ("In order to arrest a person without a warrant, the officer must have probable cause to believe that the person has committed, is about to commit, or is committing a crime."). The Supreme Court of Maryland explained that:

> Probable cause exist[s] where the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found. Probable cause is a fluid concept incapable of precise definition or quantification into percentages because it deals with probabilities and depends largely on the totality of the circumstances.

State v. Johnson, 458 Md. 519, 535 (2018); *see also Donaldson v. State*, 416 Md. 467, 481 (2010) ("Our determination of whether probable cause exists requires a nontechnical, common-sense evaluation of the totality of the circumstances in a given situation in light

of the facts found to be credible by the trial judge."). Therefore, "to justify a warrantless arrest, the police must point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warranted the intrusion." *Donaldson*, 416 Md. at 481 (quoting *State v. Wallace* 372 Md. 137, 148 (2002)).

We have articulated that "probable cause is investigatively (sic) in the eye of the trained beholder. The eye of the beholder is a critical facet of probable cause." *Freeman v. State*, 249 Md. App. 269, 280 (2021). The Supreme Court of Maryland has also recognized the value of the special interpretive skill officers learn, stating:

> We understand that conduct that would seem innocent to an average layperson may properly be regarded as suspicious by a trained or experienced officer, but if the officer seeks to justify a Fourth Amendment intrusion based on that conduct, the officer ordinarily must offer some explanation of why he or she regarded the conduct as suspicious; otherwise, there is no ability to review the officer's action.

Ransome v. State, 373 Md. 99, 111 (2003); *see also Crosby v. State*, 408 Md. 490, 508 (2009) ("In making its assessment, the court should give due deference to the training and experience of the law enforcement officer who engaged the stop at issue. Such deference allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that might well elude an untrained person.").

Applying the above, we conclude the police had probable cause to stop, search, and subsequent arrest Sanchez-Santos. As the circuit court noted in its findings, Avarca-Mejia reported to police that Sanchez-Santos fired a handgun from a moving vehicle in public view. Her report was corroborated by her roommate, Anamin. This fact was seemingly

confirmed by the shell casings spread across the parking lot. Police saw for themselves that Sanchez-Santos exited and returned to a white Chevrolet Camaro that matched the description of the car that Avarca-Mejia and Anamin provided. Additionally, the police saw that Sanchez-Santos continued to text and threaten Avarca-Mejia after he left her apartment. Given the totality of the circumstances, we conclude the officers reasonably believed that Sanchez-Santos was in possession of a handgun and that he could return to harm Avarca-Mejia and Anamin.

Sanchez-Santos argues that Avarca-Mejia was a biased party and that the State did not sufficiently corroborate her report that Sanchez-Santos fired a gun. He cites federal cases to support this argument, such as *Alabama v. White*, 496 U.S. 325 (1990) and *Florida v. J.L.*, 529 U.S. 266 (2000), as well as one Maryland case, *Ames v. State*, 231 Md. App. 662 (2016). But, as Sanchez-Santos readily admits, these cases involved corroboration of an anonymous tip. For example, *Ames* held that the police did not have reasonable suspicion to justify a *Terry* stop and frisk because they did not engage in independent verification of a anonymous tip before accosting Ames. *Id*. at 671. Under the reasoning of those cases, corroboration is required to ensure the anonymous information the officers received is trustworthy before moving to detain or arrest an individual. Here, probable cause did not stem from an uncorroborated anonymous tip, but, rather, came directly from Avarca-Mejia and Anamin, Thus, corroboration of an anonymous source was not at issue. But even if the initial information had come from an anonymous source, the police had sufficient independent corroboration of that information, as we have discussed.

Moreover, Sanchez-Santos contends that the State failed to establish when probable cause existed, and as result, the underlying information was unreliable. But we agree with the State that the facts here do not present an issue of "stale probable cause," as we discussed in *Gatling v. State*, 38 Md. App. 255 (1977), and on which Sanchez-Santos relies.

In *Gatling*, the appellant was charged with illegal possession of a firearm that was involved in an armed robbery. *Id.* at 256. The victim provided a description of the appellant's physical person and his vehicle. *Id.* Four days later, police officers, using the victim's description of the assailant's vehicle, initiated a traffic stop with the appellant. *Id.* at 257. The officers placed the appellant under arrest and conducted a warrantless search of the vehicle, which uncovered an illegal firearm. *Id.* at 258. The appellant moved to suppress the firearm, but the court denied the motion. *Id.* at 264. We affirmed the circuit court, stating that "it is clear that the gun was of enduring utility to its owner, and that the automobile provided the appellant with a secure operational base for its secretion." *Id.* This Court elaborated, stating:

> We think it evident that it was unlikely that the fruits of the crime were still in the car. The money robbed from Prentiss Benjamin was not likely to be secreted in the vehicle. A different situation, however, existed concerning the weapon. The accused had used a gun in robbing Benjamin and in the course of the robbery had shot Benjamin twice. A prudent and reasonable man might well have had reasonable cause to believe that the gun was being transported in the automobile, particularly when the officer's pat down revealed no weapon on the accused. An experienced police officer would surely have reason to know that it was not unusual for a robber to carry his gun either in the glove compartment or under the seat of his car. Nor would the expiration of the four days make it likely that the accused had removed the instrumentality of the crime from the vehicle.

Id. at 263-64. This conclusion extended to "tests which are to be applied in determining the staleness of probable cause in the execution of a warrant [are] applicable to a warrantless search of an automobile." *Id.* at 263. This analysis remains viable.

The circuit court record illustrates that the events leading to Sanchez-Santos' arrest unfolded rapidly. As a result, like the appellant's gun in *Gatling*, Sanchez-Santos's gun had "enduring utility" because the events—the argument, the discharge of the firearm, the on-going, menacing nature of the texts between Avarca-Mejia and Sanchez-Santos—occurred within a short period of time. In *Gatling*, we found "enduring utility" in the appellant's handgun *four days* after the allegedly crime occurred. Here, the police responded immediately to the scene after the gunshots were reported, found Sanchez-Santos within minutes, arrested him, and recovered the handgun. We conclude that these facts do not present us with an instance of stale probable cause.

Given the totality of the circumstances, it was reasonable for a police officer to believe, *first*, that the gun was being transported in a white Camaro after receiving the reports from Avarca-Mejia. *Second*, Anamin and Avarca-Mejia's statements that Sanchez-Santos discharged a firearm from the car, *third*, the physical evidence of shell casings found in the parking lot where Sanchez-Santos was, and *fourth*, that the officers saw him exit and return a white Camaro within minutes after the shooting, provided an adequate probable cause basis. Therefore, the circuit court correctly determined that the arrest was lawful. Accordingly, we affirm.

II. The Appellant Failed to Raise a Second Amendment Violation Redressable Under Md. Rule 4-345(a), and We Decline to Address His Ineffective-Assistance Claim.

A. Parties' Contentions

Sanchez-Santos asserts that his sentences imposed for violating PS § 5-133(c) and CL § 4-203 are illegal under Md. Rule 4-345(a) due to the State's "inability" to provide a historical analog to the challenged regulations, as required by *New York State Rifle & Pistol Association, Inc. v. Bruen,* 597 U.S. 1 (2022). Sanchez Santos argues that the State was required to "affirmatively prove that its firearm regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms." *Id.* at 19. He further asks the Court to vacate his convictions and sentences under P.S § 5-133(c) and C.L § 4-203(a) on the grounds of ineffective assistance of counsel if we conclude that "post-conviction relief would be inevitable" due to his attorney's failure to assert what would have otherwise been a successful Second Amendment challenge under *Bruen*.

The State responds that Sanchez-Santos fails to raise a cognizable claim. It argues that *Bruen* provides for case-specific analysis of whether a firearm regulation is proper. Thus, because any failure to meet the standard of *Bruen* would be a procedural and evidentiary issue, it is not the type of "illegality" which comes under our illegal sentence review. Further, the State contends that Sanchez-Santos' ineffective assistance of counsel claim should not be considered on direct appeal.

B. Discussion

We consider Sanchez-Santos' theories—that his sentences were illegal and in violation of the Second Amendment, and that his counsel was ineffective—in turn, and conclude that neither is appropriate for our review.

1. We decline to consider whether Sanchez-Santos' sentences were unlawful.

First, we consider Sanchez-Santos' contention he was unlawfully sentenced. We determine that he waived his challenge to the statutes' constitutionality by failing to argue the issue in the circuit court.

An illegal sentence may be corrected "at any time." Md. Rule 4-345(a). The illegality of a sentence turns on whether the alleged error relates to the Trial Court's "fundamental power or authority" such that a sentence "should have never been imposed or the particular sentence was beyond the limits prescribed by statute or rule." *Farmer v. State,* 481 Md. 203, 223 (2022). An illegal sentence concerns matters of "substantive law, not procedural law." *Bratt v. State,* 468 Md. 481, 497 (2020) (quoting *Corcoran v. State,* 67 Md. App. 252, 255 (1986)).

The crux of Sanchez-Santos' contention that his sentences were illegal is that the State failed to prove that the statutes giving rise to his convictions were lawful under the Second Amendment, and under the standard set forth by the United States Supreme Court in *Bruen*, 597 U.S. at 25. Sanchez-Santos argues that *Bruen*'s holding requires the State to prove that felons were categorically prohibited from purchasing weapons by submitting evidence of a "well-established and representative historical analogue" to the challenged

regulations. *Id.* at 30. Whether a prohibition is permissible is to be "based on the historical record compiled by the parties." *Id.* at 25 n.6. And, Sanchez-Santos argues, "the State cannot prove possession of firearms by felons was not [*sic*] prohibited categorically."

Because Sanchez-Santos predicates the legality of his sentence on the State's alleged inability to satisfy *Bruen*'s evidentiary requirement, his claim is based on procedure, rather than an alleged violation of substantive law. We have said that "[a] Rule 4-345(a) motion may only challenge the narrow category of sentences that are intrinsically and substantively unlawful, not those that may be beset by some arguable procedural flaw." *Grandison v. State*, 234 Md. App. 564, 579 (2017) (citation and internal quotation marks omitted) (emphasis added). Consequently, we hold that Sanchez-Santos does not raise an alleged error reviewable under Rule 4-345(a). *See Bryant v. State*, 436 Md. 653, 665-66 (2014) (Rule 4-345(a) did not permit review of claim that State failed to produce sufficient evidence to link predicate convictions supporting enhanced sentence). Consistent with Maryland Rule 8-131(a), we will "not decide [an] issue unless it plainly appears by the record to have been raised in or decided by the trial court[.]"

2. We decline to consider whether Sanchez-Santos' counsel was ineffective.

As a threshold issue, we consider whether Sanchez-Santos' ineffective assistance claim was one which we may consider on direct appeal. As a general rule, we prefer to address ineffective assistance of counsel claims through the adversarial process of post-conviction proceedings where an evidentiary record on counsel's performance may be developed. But we will review ineffective assistance claims on direct appeal in

"extraordinary cases" where counsel's inadequacy is "'so blatant and egregious' that review on appeal is appropriate." *Mosley v. State*, 378 Md. 548, 562–63 (2003) (quoting *Johnson v. State*, 292 Md. 405, 435 n. 15 (1982)).

Counsel renders ineffective assistance when they (1) performs deficiently—that is, "below an *objective standard of reasonableness* under prevailing professional norms," *Ramirez v. State,* 464 Md. 532, 561 (2019) (emphasis added), and (2) "prejudiced the defense" by erring so seriously as to deny the defendant a fair trial. *Strickland v. Washington*, 466 U.S 668, 686 (1984). In addition, we have previously noted that "counsel's performance is judged upon the situation as it existed at the time of trial." *State v. David*, 249 Md. App. 217, 230 (2021).

Without a full evidentiary record, we cannot say that Sanchez-Santos' counsel provided inadequate legal assistance by declining to challenge Sanchez-Santos' convictions on Second Amendment grounds. At the time of trial, a reasonable attorney in the same position as Sanchez-Santos' counsel could conceivably have declined to advance a *Bruen*-based challenge to C.L § 4-203(a) and PS § 5-133(c) without committing a "blatant or egregious" error, given Sanchez-Santos' previous felony conviction.

Bruen focused exclusively on citizens seeking firearms who were prohibited from possessing them due to a prior criminal conviction; that is, those who sought permits. *See Bruen,* 597 U.S. at 33-34 (employing a historical analysis of "this Nation's historical tradition of firearm regulation.") The United States Supreme Court in *Bruen* emphasized that its holding was not intended to invalidate licensing schemes which "require applicants

to undergo a [criminal] background check" and "are designed to ensure only that those bearing arms in the jurisdiction are, in fact, 'law-abiding, responsible citizens.'" *Id*. at 38 n.9 (quoting *Heller*, 554 U.S. at 63).

We reiterated this stance in *Fooks v. State*:

> *"Bruen* didn't deal at all with limitations *grounded in prior criminal behavior*. The majority opinion refers repeatedly to *law-abiding* citizens' rights to own and carry handguns and takes care to note that its analysis builds on *Heller* and *McDonald*, which . . . expressly did not cast doubt on laws limiting disqualified persons' access to guns."

255 Md. App. 75, 90 (2022) (internal citations omitted) (emphasis added).

Furthermore, a competent attorney could have reasonably concluded that any constitutional challenge by Sanchez-Santos would have failed for lack of standing. In *Williams v. State*, 417 Md. 479 (2011), the defendant also sought to overturn his conviction for unlawful possession of a handgun under CR § 4-203 and argued that Maryland's permitting scheme was unconstitutional. *Id.* at 480. We ruled, and the Supreme Court affirmed, that because Williams failed to apply for a permit to wear, carry, or transport a handgun, he lacked standing to challenge the permitting scheme. *Id.* Similarly, here, nothing in the record suggests that Sanchez-Santos attempted to obtain a permit or that he was denied one.

Where an appellant alleges that counsel was ineffective for failing to raise a legal argument, "the failure to preserve or raise an issue that is without merit does not constitute ineffective assistance of counsel." *Gross v. State*, 371 Md. 334, 350 (2002). We need not fully examine the constitutionality of CR § 4-203 or PS § 5-133 at this juncture, nor need

we determine whether Sanchez-Santos' counsel was ineffective at this time. At this stage, it is enough to conclude that Sanchez-Santos was unlikely to succeed on the merits of his constitutional arguments that a competent attorney could have chosen to not raise them at trial without blatant or egregious error. Therefore, Sanchez-Santos's ineffective-assistance claim is not the proper subject of direct appeal, and we decline to consider it.

III. The Circuit Court Did Not Err in Declining to Merge Sanchez-Santos' Sentences for Wear and Carry of a Loaded Handgun and Illegal Possession of a Firearm After Being Convicted of a Crime of Violence.

A. Parties' Contentions

Sanchez-Santos argues that his sentence for wearing and carrying a loaded handgun, CL § 4-203(a), should have merged into his sentence for illegal possession of a firearm after being convicted of a crime of violence, PS § 5-133(c). He argues that the two convictions were based upon the same acts, and multiple convictions, therefore, violated the Double Jeopardy Clause of the Fifth Amendment to the U.S. Constitution and Maryland's common-law prohibition against double jeopardy. The State responds that it is already a matter of settled law that the legislature of Maryland did not intend for convictions for handgun possession and unlawful possession of a firearm to merge.

B. Standard of Review

We examine whether the trial court's decision not to merge sentences was legally correct under a de novo standard of review. *E.g.*, *Clark v. State*, 246 Md. App. 123, 131 (2020) (citing *Blickenstaff v. State*, 393 Md. 680, 683 (2006)). Because a court "may correct an illegal sentence at any time" under Maryland Rule § 4-345(a), we consider whether the

trial court erred in its merger determination, even though the issue is raised for the first time on appeal. *Id.* at 130-31.

C. Discussion

We agree with the State that the Supreme Court of Maryland has already rejected Sanchez-Santos' argument that his convictions should have merged. Sentencing a defendant to multiple punishments for the same criminal offense violates the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution and the common law of Maryland. While a person may be convicted of multiple charges for the same offense, to avoid double jeopardy, the convictions must "merge" into a single sentence. We employ the "same evidence" or "required evidence" test to determine whether two criminal violations must merge, under which we look to see if each "'requires proof of an additional fact which the other does not,' or, stated another way, if '[e]ach of the offenses created requires proof of a different element.'" *Whack v. State*, 288 Md. 137, 142 (1980) (cleaned up). However, we also recognize a pertinent exception to that rule:

> . . . the Legislature may not in certain circumstances intend that separate sentences be imposed for two offenses growing out of the same transaction, even though the two offenses are clearly distinct under the required evidence test. . . . separate sentences may be permissible, at least where one offense involves a particularly aggravating factor, if the Legislature expresses such an intent.

Id. at 142.

In *Whack*, our Supreme Court held that the legislature had, in enacting the statutory predecessor of CR § 4-203, specifically provided that certain other offenses were to be punished as separate offenses. *See Whack*, 288 Md. at 145-150. For previously existing

offenses requiring the same evidence, where the legislature "desired no duplication," it "specifically amended or superseded those other statutes." *Id.* at 146.

In *Frazier* v. State, 318 Md. 597 (1990), the Supreme Court of Maryland further applied *Whack*'s holding to the question of whether possession of a handgun and unlawful possession of a firearm merge.[3] *See id.* at 612-15. The Court found it "significant that the Legislature did not amend or supersede [the felon-in-possession statute]," which evinced the General Assembly's intent to "punish certain conduct more severely if particular aggravating circumstances are present, by imposing punishment under two separate statutory offenses":

> The Legislature's concern about the possession of a handgun, and its additional concern about the aggravating circumstance of the handgun being possessed by a person who has been convicted of a crime of violence, is not unreasonable. When all of this is viewed in the light of the legislative policy declared in [the wear and carry statute], *see supra*, it is plain that the Legislature did not intend to prohibit separate penalties for violation of the two statutes. We hold that the two offenses of which Frazier was convicted do not merge.

Id. at 615. Further, in *Pye v. State*, 397 Md. 626 (2007), the Supreme Court of Maryland reaffirmed that the legislature maintained its intent to allow the two offenses to be imposed separately, despite increasing the associated penalties through amendment in 1996 and 2000.

In short, the Supreme Court of Maryland has fully considered whether PS § 5-133 and CL § 4-203 merge for sentencing and concluded that they do not. However, Sanchez-

[3] The provisions at issue in *Frazier*, codified at that time at Maryland Code, Art. 27, §§ 36B(b), 445(c) [1957], are the direct

Santos notes that, where two offenses do not merge under the required evidence test but it is ambiguous whether the legislature intended for the two offenses to be punished separately, we employ the "rule of lenity" and resolve the ambiguity in the defendant's favor. *See, e.g.*, *Miles v. State*, 349 Md. 215, 227 (1998) ("'When two offenses do not merge under the required evidence test, we have applied as a principle of statutory construction the 'rule of lenity'"); *Alexis v. State*, 437 Md. 457, 484–85 (2014) ("The rule of lenity is a common law doctrine that directs courts to construe ambiguous criminal statutes in favor of criminal defendants").

As we discuss at length above, however, our Supreme Court has found no ambiguity in the legislature's intent regarding whether PS § 5-133(c) and CL § 4-203(a) merge. The holdings in *Frazier* and *Pye* have settled the question. Convictions for the two offenses do not merge. To the extent that Sanchez-Santos requests that we reexamine the issue, we decline.

THE JUDGMENTS OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY ARE AFFIRMED. APPELLANT TO PAY THE COSTS.