

**COURT OF APPEALS OF OHIO**  
**EIGHTH APPELLATE DISTRICT**  
**COUNTY OF CUYAHOGA**

STATE OF OHIO,	:	
	:	
Plaintiff-Appellee,	:	No. 107705
	:	
v.	:	
	:	
ANDRE HOWARD,	:	
	:	
Defendant-Appellant.	:	

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JOURNAL ENTRY AND OPINION

**JUDGMENT: AFFIRMED**  
**RELEASED AND JOURNALIZED: June 13, 2019**

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Criminal Appeal from the Cuyahoga County Court of Common Pleas  
Case No. CR-11-554036-C

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*Appearances:*

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Frank Romeo Zeleznikar, Assistant Prosecuting Attorney, *for appellee*.

Clarissa Smith and James R. Willis, *for appellant*.

MARY EILEEN KILBANE, A.J.:

{¶ 1} Defendant-appellant, Andre Howard (“Howard”), appeals the trial court’s denial of his motion for resentencing. For the reasons set forth below, we affirm.

{¶ 2} In September 2011, Howard was charged with four counts of felonious assault and two counts of improperly discharging a firearm into a habitation, with attached one-, three-, and five-year firearm specifications. Howard was also charged with one count of having a weapon while under disability (“HWWUD”). These charges arose from Howard’s involvement in a drive-by shooting that occurred in June 2011.<sup>1</sup>

{¶ 3} In November 2011, the matter proceeded to a bench trial and Howard was found guilty of all charges. The trial court sentenced Howard to concurrent prison terms of four years on Counts 1-4 (felonious assault), three years on Counts 5-6 (improperly discharging a firearm into a habitation), and one year on Count 7 (HWWUD). The trial court merged the one-year and three-year firearm specifications, but ordered Howard to serve the three-year and five-year firearm specifications consecutively to each other, for an aggregate term of 12 years in prison.

{¶ 4} In December 2011, Howard timely appealed. In the appeal, Howard argued that there was insufficient evidence to sustain his convictions, his convictions were against the manifest weight of the evidence, and he was denied the effective assistance of counsel. This court affirmed Howard’s conviction and sentence in *Howard I*.

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<sup>1</sup> See this court’s opinion in *State v. Howard*, 8th Dist. Cuyahoga No. 97695, 2012-Ohio-3459 (“*Howard I*”), for a detailed recitation of the underlying facts.

{¶ 5} In February 2013, Howard filed a pro se motion to “Correct a Factually Illegal Sentence.” In the motion, Howard argued the trial court should have merged his convictions for felonious assault and improperly discharging a weapon into a habitation, as well as the firearm specifications, because they were allied offenses. The trial court denied the motion and Howard appealed.

{¶ 6} In October 2013, we affirmed the trial court’s decision, in *State v. Howard*, 8th Dist. Cuyahoga No. 99664, 2013-Ohio-4803 (“*Howard II*”), finding that Howard’s motion was an untimely filed petition for postconviction relief. We also found that Howard’s allied offense argument was barred by the doctrine of res judicata, because he could have raised this argument in his direct appeal, but did not. *Id.*

{¶ 7} In April 2018, Howard filed a motion for resentencing. In the motion, Howard argued his underlying convictions were allied offenses and should have merged. Howard also argued the trial court should not have imposed consecutive sentences on the firearm specifications. The trial court denied the motion.

{¶ 8} Howard now appeals, assigning the following three errors for our review:

Assignment of Error One

The trial court erred in imposing consecutive sentences for the firearm specifications in contravention of Ohio’s sentencing statute.

Assignment of Error Two

The trial court erred in imposing consecutive sentences on the three- and five-year gun specifications because the three- and five-year gun

specifications must merge as they arose out of offenses of similar import.

### Assignment of Error Three

The trial court erred in summarily denying [Howard's] motion for resentencing.

{¶ 9} We will discuss the first and second assignments error together because they are interrelated. Howard contends the three-year and five-year firearm specifications are allied offenses and should have merged. As a result, Howard argues the trial court erred in imposing consecutive sentences for the three-year and five-year firearm specifications.

{¶ 10} A review of the history of this case reveals that Howard either raised these arguments before or could have raised them in his direct appeal, but failed to do so.

{¶ 11} Specifically in 2013, Howard raised the allied offenses argument when he appealed the trial court's denial of his motion to "correct a factually illegal sentence." In declining to review Howard's sole assignment of error in *Howard II*, we stated: "[g]iven this was a bench trial with a developed record that would allow for the consideration of the allied-offenses argument on direct appeal, res judicata prevents our review of Howard's appeal." *Id.* at ¶ 10.

{¶ 12} Under the doctrine of res judicata, a final judgment of conviction bars a convicted defendant who was represented by counsel from raising and litigating in any proceeding, except an appeal from that judgment, any defense or any claimed lack of due process that was raised or could have been raised by the defendant at the

trial, which resulted in that judgment of conviction, or on an appeal from that judgment. *State v. Perry*, 10 Ohio St.2d 175, 226 N.E.2d 104 (1967), paragraph nine of the syllabus.

{¶ 13} Further, the law of the case doctrine “is rooted in principles of res judicata and issue preclusion.” *Fritzgerald v. Cleveland Civ. Serv. Comm.*, 8th Dist. Cuyahoga No. 104492, 2017-Ohio-7086, quoting *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332, ¶ 35. The “decision of a reviewing court in a case remains the law of that case on the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels.” *Pipe Fitters Union Local No. 392 v. Kokosing Constr. Co.*, 81 Ohio St.3d 214, 218, 1998-Ohio-465, 690 N.E.2d 515, quoting *Nolan v. Nolan*, 11 Ohio St.3d 1, 3, 462 N.E.2d 410 (1984).

{¶ 14} Howard’s present contention that the imposition of consecutive sentences for the three-and five-year firearm specification was improper flows from his belief that these were allied offenses. However, because Howard raised the issue of allied offenses in a prior appeal, we are now barred from reviewing his current arguments by the doctrine of res judicata.

{¶ 15} Accordingly, the first and second assignments of error are overruled.

{¶ 16} In the third assignment of error, Howard argues the trial court erred in denying his motion for resentencing without stating any basis for its decision.

{¶ 17} Crim.R. 12(F) provides that “where factual issues are involved in determining a motion, the court shall state its essential findings on the record.”

**{¶ 18}** In the instant case, Howard's motion for resentencing only required the trial court to make legal determinations. Because no factual determinations were necessary to rule on the motion, the trial court was not required to issue essential findings on the record.

**{¶ 19}** Accordingly, the third assignment of error is overruled.

**{¶ 20}** Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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MARY EILEEN KILBANE, ADMINISTRATIVE JUDGE

LARRY A. JONES, SR., J., and  
KATHLEEN ANN KEOUGH, J., CONCUR

