

IN THE COURT OF APPEALS FOR CLARK COUNTY, OHIO

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	C.A. CASE NO. 2008 CA 87
v.	:	T.C. NO. 03 CR 1002
	:	
CECIL W. HOWARD	:	(Criminal appeal from Common Pleas Court)
	:	
Defendant-Appellant	:	

OPINION

Rendered on the 10th day of July, 2009.

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Attorney for Plaintiff-Appellee

CECIL W. HOWARD, #475021, P. O. Box 56, Lebanon, Ohio 45036
Defendant-Appellant

FROELICH, J.

{¶ 1} Defendant-appellant Cecil Howard appeals from his sentence imposed on remand for his convictions for attempted murder, aggravated robbery, and having a weapon under disability. Howard argues that his indictment was deficient because it contained no mens rea for the charge of aggravated robbery under R.C. 2911.01(A)(1) and that his attempted murder and aggravated robbery convictions were allied

offenses of similar import that should have been merged. Because both arguments are barred by the doctrine of res judicata, we will affirm the judgment of the trial court.

I

{¶ 2} In 2003, Howard was indicted on one count each of attempted murder and aggravated robbery, both carrying firearm specifications, and one count of having a weapon under disability. All charges arose out of Howard's participation in the 2002 robbery of the Beverage Oasis Drive Through in Springfield, Ohio. A jury found Howard guilty as charged, and the trial court sentenced him to a twenty-five-year prison term. We affirmed Howard's convictions and sentence on direct appeal. *State v. Howard*, Clark App. No. 2004CA29, 2005-Ohio-2237. Howard appealed to the Ohio Supreme Court and, in accordance with *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, the Court vacated Howard's sentence and remanded the case to the trial court for re-sentencing. *In re Ohio Criminal Sentencing Statute Cases*, 109 Ohio St.3d 313, 2006-Ohio-2109, ¶68. On remand, the trial court sentenced Howard to an aggregate term of twenty-eight years. We affirmed that sentence in *State v. Howard*, 174 Ohio App.3d 562, 2007-Ohio-4334.

{¶ 3} Nearly one year later, on August 7, 2008, Howard filed motions to vacate his convictions and to merge his sentences, both of which the trial court overruled. Howard appeals.

II

{¶ 4} Howard's first assignment of error:

{¶ 5} "WHERE THE STATE FAILS TO INCLUDE THE REQUIRED MENS REA, WHICH PERMEATES THE DEFENDANT'S ENTIRE CRIMINAL PROCEEDING,

THAT ERROR IS DEEMED TO BE A STRUCTURAL ERROR AND IS IN VIOLATION OF HIS CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW.”

{¶ 6} Howard’s second assignment of error:

{¶ 7} “WHERE THE COURT IMPOSES CONSECUTIVE SENTENCES IN A CASE INVOLVING TWO OR MORE CRIMES WITH THE SAME ANIMUS OR IMPORT.”

{¶ 8} In his first assignment of error, Howard relies on *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, in arguing that his indictment was constitutionally defective because it contained no mens rea for the offense of aggravated robbery under R.C. 2911.01(A)(1). Just as was true in *State v. Henderson*, Montgomery App. No. 22076, 2008-Ohio-6724, this error relates solely to the original trial proceedings that resulted in his conviction and has no bearing on the re-sentencing order from which he currently appeals and is therefore barred by the doctrine of res judicata.

{¶ 9} In his second assignment of error, Howard maintains that his attempted murder and aggravated robbery convictions were required to be merged because they were allied offenses of similar import. However, the trial court was without authority to consider merger because it was beyond the scope of the remand, which was specifically for re-sentencing. See, e.g., *State v. Martin*, Montgomery App. No. 21697, 2007-Ohio-3585. Furthermore, res judicata bars our consideration of this issue because it could have been made in Howard’s original direct appeal. *Id.*, citing *State v. Hutton*, 100 Ohio St.3d 176, 2003-Ohio-5607, ¶37.

{¶ 10} “Under the doctrine of res judicata, a final judgment of conviction bars the convicted defendant from raising and litigating in any proceeding, except an appeal

from that judgment, any defense or 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* (1967), 10 Ohio St.2d 175, 180. Because Howard could have raised both of his arguments in his original direct appeal, they are now barred by the doctrine of res judicata.

{¶ 11} Howard’s first and second assignments of error will be overruled.

III

{¶ 12} Both of Howard’s assignments of error having been overruled, the judgment of the trial court is Affirmed.

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BROGAN, J. and HARSHA, J., concur.

(Hon. William H. Harsha, Fourth District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio).

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