

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MERRIT DEMON MCCRAY,

Defendant-Appellant.

UNPUBLISHED

November 16, 2006

No. 261852

Bay Circuit Court

LC No. 00-001002-FH

Before: Murphy, P.J., and Meter and Davis, JJ.

MEMORANDUM.

Defendant appeals his plea-based probation revocation and the resulting sentence of 23 to 60 months' imprisonment. We affirm.

Defendant was convicted in a bench trial of fleeing and eluding, MCL 750.479a(3), and was sentenced to two years' probation. Thereafter, defendant pleaded guilty to violating the terms of his probation, and he was sentenced to an extended term of probation (three years), 90 days in jail (deferred), and 90 days on an electronic monitoring system. Defendant was again charged with violation of his probation because he was accused of committing assault with the intent to do great bodily harm less than murder, MCL 750.84, and engaging in assaultive, abusive, threatening, and/or intimidating behavior toward the assault victim. After having been convicted of the assault charge, defendant pleaded no contest to the probation violation. The trial court revoked defendant's probation and sentenced him to 23 to 60 months' imprisonment.

Defendant argues that his probation revocation and resulting prison sentence should be set aside because the underlying conviction for assault with intent to do great bodily harm less than murder, which he claims formed the factual basis for his probation revocation, was predicated on a faulty trial. More specifically, defendant asserts that the following errors occurred at his assault trial: (1) the trial court improperly utilized a struck jury method for jury selection; (2) his Sixth Amendment right of confrontation was violated when the prosecution failed to produce the victim at trial; (3) his due process rights were violated when the trial court failed to suppress the in-court identification of an eyewitness whose identification was influenced by an unduly suggestive pretrial photo lineup; and (4) the trial court erred in refusing to grant defendant's request for the appointment of an expert witness in the area of identification, along with refusing to have a hearing to determine the admissibility of such evidence.

First, the trial court here actually relied on the preliminary examination testimony with respect to the assault prosecution in finding the probation violation, and not on the assault trial and conviction, which thereby negates defendant's appellate arguments. Second, even if the underlying conviction formed the basis for the probation revocation, a defendant cannot collaterally attack on appeal the propriety of the conviction that serves as the basis of his probation violation. *People v Maxson*, 163 Mich App 467, 469; 415 NW2d 247 (1987).¹ Finally, regardless of the preceding rule, the alleged errors relative to the assault trial lack merit and are properly rejected for the reasons stated by this panel in *People v McCray*, unpublished opinion per curiam of the Court of Appeals, issued this same day (Docket No. 261851).

Affirmed.

/s/ William B. Murphy
/s/ Patrick M. Meter
/s/ Alton T. Davis

¹ If, however, a plea to a probation violation is accepted solely on the fact that a defendant was convicted of a substantive criminal offense, a subsequent reversal of that conviction in that particular appeal would entitle the defendant to reversal with regard to the probation revocation. *People v Tebedo*, 107 Mich App 316, 322; 309 NW2d 250 (1981). Here, defendant's assault conviction was not reversed. *People v McCray*, unpublished opinion per curiam of the Court of Appeals, issued this same day (Docket No. 261851).