

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D35514
T/kmb

____AD3d____

Argued - February 10, 2012

RUTH C. BALKIN, J.P.
ARIEL E. BELEN
L. PRISCILLA HALL
ROBERT J. MILLER, JJ.

2010-11812

DECISION & ORDER

The People, etc., respondent,
v Francis C. Lynehan, appellant.

(Ind. No. 2656/10)

Whalen & Whalen, Dover Plains, N.Y. (Thomas J. Whalen of counsel), for appellant.

William V. Grady, District Attorney, Poughkeepsie, N.Y. (Kirsten A. Rappleyea of counsel), for respondent.

Appeal by the defendant from a judgment of the County Court, Dutchess County (Hayes, J.), rendered December 9, 2010, convicting him of driving while intoxicated, upon a jury verdict, and imposing sentence.

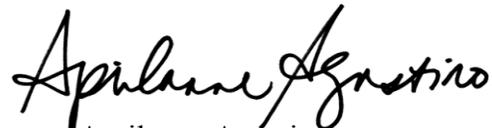
ORDERED that the judgment is affirmed.

The defendant's claim that he was deprived of the constitutional right to the effective assistance of counsel is based, in part, on matter appearing on the record and, in part, on matter outside the record, and thus constitutes a "mixed claim" of ineffective assistance (*People v Maxwell*, 89 AD3d 1108, 1109, quoting *People v Evans*, 16 NY3d 571, 575 n 2, cert denied ____ US ____, 132 S Ct 325). In this case, it is not evident from the matter appearing on the record that the defendant was deprived of the effective assistance of counsel (*cf. People v Crump*, 53 NY2d 824; *People v Brown*, 45 NY2d 852). Since the defendant's claim of ineffective assistance cannot be resolved without reference to matter outside the record, a CPL 440.10 proceeding is the appropriate forum for reviewing the claim in its entirety (*see People v Freeman*, 93 AD3d 805; *People v*

Maxwell, 89 AD3d at 1109; *People v Rohlehr*, 87 AD3d 603, 604).

BALKIN, J.P., BELEN, HALL and MILLER, JJ., concur.

ENTER:


Aprilanne Agostino
Clerk of the Court