

**SUPREME COURT OF THE STATE OF NEW YORK**  
***Appellate Division, Fourth Judicial Department***

**1327**

**KA 14-01139**

PRESENT: SCUDDER, P.J., SMITH, VALENTINO, WHALEN, AND DEJOSEPH, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

CHRISTOPHER ANNIS, DEFENDANT-APPELLANT.

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WAGNER & HART, LLP, OLEAN (JANINE FODOR OF COUNSEL), FOR  
DEFENDANT-APPELLANT.

ERIC R. SCHIENER, SPECIAL PROSECUTOR, GENESEO, FOR RESPONDENT.

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Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Allegany County Court (Thomas P. Brown, J.), dated May 21, 2014. The order denied the motion of defendant pursuant to CPL article 440.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law and the matter is remitted to Allegany County Court for further proceedings in accordance with the following memorandum: Defendant appeals from an order denying, without a hearing, his CPL 440.10 motion to vacate a judgment convicting him following a jury trial of, inter alia, felony driving while intoxicated (Vehicle and Traffic Law §§ 1192 [3]; 1193 [1] [c] [i]). We previously affirmed the judgment of conviction (*People v Annis*, 126 AD3d 1525). With respect to defendant's contention concerning an alleged improper communication between an assistant district attorney and a sworn juror, we conclude that County Court properly denied the motion without a hearing inasmuch as the motion papers "do not contain sworn allegations substantiating or tending to substantiate all the essential facts" of defendant's claim (CPL 440.30 [4] [b]; see *People v Howington*, 122 AD3d 1289, 1289-1290, lv denied 25 NY3d 1165). With respect to defendant's contentions that he was denied a fair trial by prosecutorial misconduct and that the court erred in excluding photographs of the vehicle, we conclude that the court properly denied the motion without a hearing inasmuch as "sufficient facts appear[ed] on the record with respect to [those contentions] to permit adequate review thereof upon" a direct appeal (CPL 440.10 [2] [b]; see *People v Rossborough*, 122 AD3d 1244, 1246) and, indeed, defendant's direct appeal from the judgment was pending.

Defendant's contentions that trial counsel was ineffective in failing to provide an offer of proof regarding the photographs of the vehicle and to object to the prosecutor's summation were not raised in his CPL 440.10 motion and are therefore not properly before us (see

*People v Pennington*, 107 AD3d 1602, 1604, lv denied 22 NY3d 958). With respect to defendant's remaining claims of ineffective assistance of counsel, however, we conclude that nonrecord facts may support defendant's contention that his trial counsel unreasonably withdrew his request for a *Martin* hearing (see *People v Martin*, 143 Misc 2d 341) and failed to request a *Huntley* hearing. In support of his motion, defendant submitted a police report indicating that, in response to an officer's request for a chemical test and before defendant made statements to the police, defendant asked to speak to an attorney. Based on the evidence in the record, "we can discern no tactical reason for trial counsel's" withdrawal of his request for a *Martin* hearing or failure to request a *Huntley* hearing (*People v Dombrowski*, 87 AD3d 1267, 1268). We thus conclude that "a hearing is required to afford defendant's trial counsel an opportunity . . . to provide a tactical explanation for the omission[s]" (*id.* [internal quotation marks omitted]). We therefore reverse the order and remit the matter to County Court to conduct a hearing on defendant's CPL 440.10 motion (see *People v Washington*, 128 AD3d 1397, 1400).