

State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: October 20, 2011

103709

THE PEOPLE OF THE STATE OF
NEW YORK,

Respondent,

v

MEMORANDUM AND ORDER

CHARLES L. CASSARA,

Appellant.

Calendar Date: September 14, 2011

Before: Mercure, J.P., Spain, Malone Jr., Kavanagh and
McCarthy, JJ.

Matthew J. Leonardo, Albany, for appellant.

Louise K. Sira, District Attorney, Johnstown (Chad W. Brown
of counsel), for respondent.

Spain, J.

Appeal from a judgment of the County Court of Fulton County
(Giardino, J.), rendered September 2, 2010, convicting defendant
upon his plea of guilty of the crime of driving while
intoxicated.

Defendant pleaded guilty to one count of driving while
intoxicated (hereinafter DWI) as a class E felony (see Vehicle
and Traffic Law § 1192 [2]; § 1193 [1] [c] [i]) in satisfaction
of an indictment charging him with two counts of DWI, and waived
his right to appeal. The charges followed defendant's arrest
near the scene of a vehicular accident in the City of
Gloversville, Fulton County, and a toxicology test revealing that
defendant had a blood alcohol content of .17 %. Defendant had a

prior DWI conviction within the previous 10 years.¹ In accordance with the plea agreement, County Court sentenced defendant to 1 to 3 years of imprisonment – the minimum permissible sentence (see Penal Law § 70.00 [2], [3] [b]) – with a consecutive sentence of three years of conditional discharge. Defendant now appeals.

We affirm. Defendant's sole assertion on appeal is that trial counsel was ineffective, specifically in failing to request a pretrial probable cause hearing challenging his arrest or a hearing seeking to suppress his statement to the arresting officer that he had consumed a "few" glasses of wine. Defendant, however, failed to move to withdraw his plea or vacate the judgment of conviction, rendering the issue unpreserved for our review (see People v Wicks, 83 AD3d 1223, 1224 [2011]; People v De Berardinis, 304 AD2d 914, 915 [2003], lv denied 100 NY2d 580 [2003]). Further, this contention survives defendant's valid waiver of the right to appeal only to the extent that counsel's alleged ineffectiveness impacted the voluntariness of his plea (see People v Belle, 74 AD3d 1477, 1480 [2010], lv denied 15 NY3d 918 [2010]; People v Stokely, 49 AD3d 966, 968 [2008]).

As the record demonstrates that defendant was fully apprised of the rights he was giving up by pleading guilty, including all of his constitutional rights to present a defense, no basis exists to find that defense counsel's decision not to request a Dunaway or Huntley hearing had any impact upon the knowing and voluntary nature of his plea (see People v Parilla, 8 NY3d 654, 659 [2007]; People v De Berardinis, 304 AD2d at 915; People v Clifford, 295 AD2d 697, 698 [2002], lv denied 98 NY2d 709 [2002]). Further, defendant's appearance, impaired motor skills, slurred speech, positive breath screening test and inability to pass multiple field sobriety tests suggest that a Dunaway hearing would have been futile (see People v Kowalski, 291 AD2d 669, 670 [2002]). Given the results of the toxicology test, it is highly unlikely that a Huntley hearing, even if successful, would have significantly altered defendant's

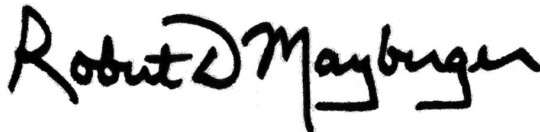
¹ Defendant's criminal record includes four felony and seven misdemeanor convictions.

perception of his chances at an acquittal were he to proceed to trial. Accordingly, we hold that defendant's contentions are barred by his waiver of the right to appeal (see People v Santos-Rivera, 86 AD3d 790, 791 [2011]; People v Gentry, 73 AD3d 1383, 1384 [2010]; People v Leigh, 71 AD3d 1288, 1288 [2010], lv denied 15 NY3d 775 [2010]; People v Clark, 52 AD3d 951, 952 [2008], lv denied 11 NY3d 831 [2008]; People v McDuffie, 43 AD3d 559, 560 [2007], lv denied 9 NY3d 992 [2007]).

Mercure, J.P., Malone Jr., Kavanagh and McCarthy, JJ.,
concur.

ORDERED that the judgment is affirmed.

ENTER:

A handwritten signature in black ink that reads "Robert D. Mayberger". The signature is written in a cursive, slightly slanted style.

Robert D. Mayberger
Clerk of the Court