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This memorandum is uncorrected and subject to revision before  
publication in the New York Reports.  
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No. 230 SSM 19  
The People &c.,  
Respondent,  
v.  
Kenneth Moore,  
Appellant.

Submitted by Kristina Schwarz, for appellant.  
Submitted by Yuval Simchi-Levi, for respondent.

MEMORANDUM:

The order of the Appellate Term should be reversed,  
defendant's guilty plea vacated and the accusatory instrument  
dismissed. Defendant was charged with four counts of criminal  
possession of a controlled substance in the seventh degree (Penal

Law § 220.03). At arraignment, there was a brief discussion between defense counsel, the assistant district attorney and the court concerning the terms of a disposition, which then lead to defendant's plea and sentencing on the controlled substance counts. The court did not address defendant and defendant did not speak; nor was defendant advised of any constitutional rights he was waiving. Defendant now claims his constitutional rights were violated because the record fails to establish his plea was knowing, voluntary and intelligent.

In People v Tyrell, we held that "[p]resuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused intelligently and understandingly rejected his constitutional rights. Anything less is not waiver" (22 NY3d 359, 365-66 [2013] [citation and quotation marks omitted]). The People concede that under Tyrell defendant's plea must be vacated and, as defendant has completed his sentence, remittal is unnecessary (see id. at 366).

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On review of submissions pursuant to section 500.11 of the Rules, order reversed, plea vacated and the accusatory instrument dismissed, in a memorandum. Chief Judge Lippman and Judges Graffeo, Read, Smith, Pigott, Rivera and Abdus-Salaam concur.

Decided October 23, 2014