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This memorandum is uncorrected and subject to revision before  
publication in the New York Reports.

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No. 229 SSM 26  
The People &c.,  
Respondent,  
v.  
Alfred Stewart,  
Appellant.

Submitted by Ellen Dille, for appellant.  
Submitted by Lori Ann Farrington, for respondent.

MEMORANDUM:

The order of the Appellate Division should be reversed  
and the case remitted to Supreme Court for resentencing.

A defendant has the right to be present at all material  
stages of trial (see People v Ciaccio, 47 NY2d 431, 436 [1979]),  
including sentencing (see CPL 380.40 [1]). We recently held that

a defendant who has been convicted of a felony may waive his right to be present at sentencing, but must do so "expressly" (People v Rossborough, 27 NY3d 485, 488 [2016]). The same principle applies in resentencing. The People do not contend otherwise, but insist that an inmate who wishes to waive his right to be present at resentencing should not be required to convey that waiver by personal appearance in court, and that defendant properly waived his right to be present by having his counsel speak on his behalf. Here, however, there is no record of any form of express waiver by defendant himself, whether oral or in writing, and, thus, the issue raised by the People is not presented. Nor in this case can waiver or forfeiture of the right to be present be inferred from defendant's actions or inaction (see generally People v Corley, 67 NY2d 105, 109-110 [1986]; People v Stroman, 36 NY2d 939, 940 [1975]). Accordingly, defendant did not validly waive his right to be present.

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On review of submissions pursuant to section 500.11 of the Rules, order reversed and case remitted to Supreme Court, Bronx County, for resentencing, in a memorandum. Chief Judge DiFiore and Judges Pigott, Rivera, Abdus-Salaam, Stein, Fahey and Garcia concur.

Decided December 15, 2016