



**ARIZONA SUPREME COURT
ORAL ARGUMENT CASE SUMMARY**



**STATE OF ARIZONA v. PETE J. VANWINKLE
CR-11-0083-PR**

PARTIES:

Petitioner: Pete J. VanWinkle

Respondent: State of Arizona

FACTS:

In February 2008, close friends Joel, Mike, Cory, and Gerry were together with Pete VanWinkle (a recent acquaintance) in Joel's second floor apartment. Mike, who had scratched a lottery ticket and found he had won \$50, was showing the ticket to Joel as they sat on the living room couch watching TV. Gerry was getting a drink in the adjacent kitchen, and Cory was using the bathroom down the hall.

VanWinkle, sitting in a chair slightly in front of Mike, stood up, stretched, took out a pistol, and shot Mike in the side of the head. Gerry confronted VanWinkle and disarmed him after a brief struggle. Cory (who also carried a gun), hearing the gunshot, came out of the bathroom and tackled VanWinkle to prevent him from fleeing. Joel called 911 and headed down the stairs to meet the police and explain the situation.

When police arrived, Cory was still attempting to restrain VanWinkle on the second floor landing. Gerry had left. Joel met the responding officers. The police ordered both Cory and VanWinkle to "put their hands up," then ordered Cory to walk down the stairs backward. At the bottom of the stairs, they disarmed Cory and took him into custody, but Joel told them, "That's not the shooter. The shooter is still up there." On the ground, Cory identified VanWinkle to police as "the shooter." VanWinkle, who was within earshot of Cory, said nothing in response. Police then ordered VanWinkle down the stairs and took him into custody. The gun was found on the apartment floor. Police analysis established that a "fired projectile" found on the couch had been fired from it. A firearms expert testified that testing of gunshot residue found on the hands of VanWinkle and Joel could not tell him with certainty who actually fired the gun, and no fingerprints were found on the weapon.

At trial, a witness (Officer Price) testified over defense counsel's objection about VanWinkle's silence when Cory, standing on the ground with police, identified defendant on the second floor balcony as being "the shooter." The trial court's reasoning for overruling the objection was, "He's pre-custody; and this isn't interrogation." The prosecutor then called the jury's attention to that silence twice during closing argument. VanWinkle objected and later moved for a mistrial, arguing that the State violated his Fifth Amendment right against self-

incrimination. The trial court denied the motion because there was “no *Miranda*-induced silence.”

The jury convicted VanWinkle. Besides the “shooter” statement and VanWinkle’s silence in response, evidence at trial included the fact that the four long-time friends all directly or circumstantially identified VanWinkle as the shooter; when police arrived his holster was empty and his gun was found on the living room floor; his gun was positively identified as the gun that shot Mike; while in jail he made calls to Cory apologizing for shooting Mike and asking Cory not to testify against him; and he told someone in the same pod at the jail that he was there because he shot someone in the face (said he “wanted to kill somebody to see how it feel[s]”).

The court of appeals affirmed. Assuming for purposes of its discussion that VanWinkle was in custody and was precluded from leaving the apartment from the time police officers surrounded him with guns drawn, it analyzed the case as involving “post-arrest, pre-*Miranda* silence.” It first said that his silence in the face of Cory’s accusation was properly admitted as a tacit admission, where the statement of fact was made within his hearing, and VanWinkle did not contest that he heard the statement or argue that his silence was irrelevant or its use unduly prejudicial. Next, it said that the admission of testimony about VanWinkle’s silence did not violate his right against self-incrimination and *Miranda* because no police interrogation led to his tacit admission that he was the shooter. It agreed with the basic legal proposition argued by the State, but cited a different Arizona case to support its decision that VanWinkle’s “alleged admission by silence ‘cannot properly be considered the result of police interrogation’ [or a psychological ploy by police to elicit incriminating information,] and the Constitution did not forbid its use at trial.” In conclusion, the court of appeals (reviewing for harmless error) said the prosecutor’s comments on VanWinkle’s silence were proper because they suggested a reasonable inference to be made from properly admitted evidence, and they contained no appeal to the jury’s passion or prejudice.

ISSUE:

As framed by petitioner: The Court of Appeals held that a defendant’s post-arrest, pre-*Miranda* silence could be used by the prosecution as an admission of guilt, even if defendant did not testify at trial, as there was no governmental action that prompted defendant to remain silent.

As framed by the State: Were Appellant’s Fifth or Fourteenth Amendments [sic] rights violated where the prosecutor elicited testimony and commented upon Appellant’s failure to respond to a witness’[s] statement that Appellant was the “shooter” where there was no state action, Appellant was not in custody, and Appellant had not been advised of his *Miranda* rights?

This Summary was prepared by the Arizona Supreme Court Staff Attorney’s Office solely for educational purposes. It should not be considered official commentary by the Court or any member thereof or part of any brief, memorandum or other pleading filed in this case.