*Orrukem v. ROP*, 11 ROP 177 (2004)

**MILONG ORRUKEM,**
**Appellant,**

**v.**

**REPUBLIC OF PALAU,**
**Appellee.**

CRIMINAL APPEAL NO. 03-006
Criminal Case No. 02-149

Supreme Court, Appellate Division
Republic of Palau

Decided: June 29, 2004

Counsel for Appellant: Carlos H. Salii

Counsel for Appellee: David Matthews

BEFORE: LARRY W. MILLER, Associate Justice; ALEX R. MUNSON, Part-Time Associate Justice; J. UDUCH SENIOR, Associate Justice Pro Tem.

Appeal from the Supreme Court, Trial Division, the Honorable R. BARRIE MICHELSEN, Associate Justice, presiding.

PER CURIAM:

The Trial Division found Milong Orrukem guilty of trafficking in a controlled substance in violation of 34 PNC § 3301. Although Orrukem filed a timely notice of appeal, his appointed counsel, Carlos Salii,[1] claims to have reviewed the record, and, finding no substantial ground for appeal, has moved to withdraw and have the appeal dismissed pursuant to *Orrukem v. ROP*, 5 ROP Intrm. 256 (1996) and *Anders v. California*, 89 S. Ct. 1396 (1967).

Mr. Salii has determined that Orrukem's best chance to succeed on appeal is through an entrapment defense, although Mr. Salii finds that argument to be without merit. Orrukem received notice of his attorney's motion and has not responded.

We agree with Mr. Salii's contention that there are no non-frivolous grounds for appeal. Because entrapment is an affirmative defense and was not raised at trial, Orrukem could not raise an entrapment defense on appeal. *See Fanna Mun. Gov't v. Sonsorol State Gov't*, 8 ROP Intrm. 9 (1999) (holding that a party cannot raise an issue on appeal that it failed to raise at trial); *Kumangai v. Isechal*, 1 ROP Intrm. 587, 589 (1989) (stating that failure to raise affirmative

[1]The Court appointed Mr. Salii to handle the appeal after Orrukem's trial attorney moved to withdraw from the case.

defense constitutes waiver of the defense). As ⊥178 a result, Orrukem could only raise an entrapment defense as part of a claim for ineffective assistance of counsel. Therefore, to succeed, Orrukem would have to show not only that he was prejudiced by the decision not to raise an entrapment defense below, but also that his attorney's decision not to raise the defense was unreasonable. *See Malsol v. ROP*, 8 ROP Intrm. 161, 163 (2000) ("A defendant has an ineffective assistance of counsel claim where counsel's performance was deficient and the deficiency prejudiced the defense."); *Strickland v. Washington*, 104 S. Ct. 2052 (1984) ("Ineffectiveness will generally not be found where the conduct the defendant complains of represents an exercise of his or her attorney's discretion as to tactics or strategy.").

Since the defense did not present evidence to support an entrapment defense, the record does not support a finding that the decision not to present an entrapment defense was unreasonable or that Orrukem was prejudiced by the decision. *Cf. Saunders v. ROP*, 8 ROP Intrm. 93, 96 (2000) (holding that ineffective-assistance claims should be heard on direct appeal only if the record is sufficiently developed to permit meaningful appellate review). Finding no other non-frivolous grounds for appeal, we grant counsel's motion to withdraw and dismiss this appeal.