Ngirailild v. ROP, 11 ROP 173 (2004)
DWAYNE NGIRAILILD,
Appellant,

v.

REPUBLIC OF PALAU,
Appellee.

CRIMINAL APPEAL NO. 02-006
Criminal Case No. 01-169

Supreme Court, Appellate Division
Republic of Palau

Argued: March 29, 2004
Decided: June 17, 2004

Counsel for Appellant: Mariano W. Carlos[1]

Counsel for Appellee: David H. Matthews

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; R. BARRIE MICHELSEN, Associate Justice; J. UDUCH SENIOR, Associate Justice Pro Tem.

Appeal from the Supreme Court, Trial Division, the Honorable KATHLEEN M. SALII, Associate Justice, presiding.

MICHELSEN, Justice:

Appellant Dwayne Ngirailild challenges his conviction for trafficking in violation of 34 PNC § 3301. Because we find that the Trial Division did not err in permitting the disclosure of the identity of the confidential police informant to Ngirailild's counsel but not to Ngirailild himself and that the evidence was sufficient to support the conviction, we affirm.

BACKGROUND

On May 18, 2001, a police informant called Detective Felix Francisco to tell him about a planned drug sale. According to his testimony, Francisco and three other officers ⊥174 went to the scene, searched the informant, and, finding nothing, gave him a prerecorded $50 bill.

Francisco testified that he watched the sale from the bathroom of the Koror State finance office. He said the officers watched as the informant approached Ngirailild and gave him money, at which time Ngirailild poured something into informant's palm. After Ngirailild left, the informant brought Francisco a clear plastic straw with a substance that was later proven to be

[1]Mr. Carlos was appointed as new counsel for Ngirailild for purposes of the appeal.

methamphetamine. Police arrested Ngirailild and searched the jeep they had seen him driving. In the jeep, they found a clear plastic straw containing a substance that was later shown to be methamphetamine, marijuana, several empty plastic straws similar to those often used to hold methamphetamine, and a pair of scissors. The prerecorded $50 bill was not found. Ngirailild was arrested and charged with two counts of trafficking in a controlled substance in violation of 34 PNC § 3301, one count of possession of methamphetamine in violation of 34 PNC § 3302(d), and one count of possession of marijuana in violation of 34 PNC § 3302(c).

On the second day of trial, defense counsel filed a motion to reveal the identity of the informant. While the defense was presenting its case, the Trial Division determined that the identity of the informant should be revealed to defense counsel so that the defense could "independently verify . . . facts based on what the officers . . . previously testified to" and decide whether to call the confidential informant as a witness. Defense counsel, who was ordered not to reveal the identity of the informant to Ngirailild, did not call the informant as a witness.

The Trial Division convicted Ngirailild on one of the two counts of trafficking and sentenced him to 25 years' imprisonment and a fine of $50,000. Ngirailild timely appealed, challenging the Trial Division's decision not to require the prosecution to reveal the identity of the confidential informant to him. He also contends the evidence was not sufficient to support the conviction.

ANALYSIS

I. Disclosure of informant

Ngirailild argues that his constitutional right to effective counsel, his right to due process, and his right to examine all witnesses were violated by the Trial Division's decision to limit disclosure of the identity of the informant to his counsel. We begin by noting that his claim of ineffective assistance of counsel is not pertinent to these facts. To succeed on such a claim, a defendant must show (1) that his counsel's performance was deficient and (2) that the deficiency prejudiced the defendant. *Malsol v. ROP,* 8 ROP Intrm. 161, 163 (2000). In this appeal, Ngirailild argues that his attorney could not provide effective assistance because of the Trial Division's decision. But an ineffective assistance claim turns on decisions made and actions taken by counsel, not by the court. Therefore, the remainder of this opinion will address Appellant's claims that his right to due process and to examine witnesses were violated.

This Court has twice examined the question concerning when an informant's identity must be disclosed. In *Oiterong v. ROP*, 9 ROP 195, 198 (2002), the Court upheld the Trial Division's denial of the defendant's request to compel the government to call a confidential informant as a witness, holding that "[w]hen disclosure is warranted, it is for the purpose of allowing the *defendant* ⊥175 to determine whether he wishes to call the informant as a witness in an effort to rebut the government's case" (emphasis in original). In *Ueki v. ROP*, 10 ROP 153 (2003), the Court adopted the approach described in *Roviaro v. United States,* 77 S. Ct. 263 (1957).

> [T]he question whether an informant's identity must be disclosed turns on whether 'the informer's testimony may be relevant and helpful to *the accused's defense.*'
>
> . . . .
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> Where the disclosure of an informer's identity, or the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way . . . . Whether fundamental fairness requires disclosure in a particular case is a matter of balancing:
>
> We believe that no fixed rule with respect to disclosure is justified. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors.

Ueki, 10 ROP at 159-60 (quoting *Roviaro*, 77 S. Ct. at 628-29). After balancing the relevant factors, the Court in *Ueki* vacated the defendant's conviction because the trial court had allowed the informant's identity to be revealed only to defense counsel for the purpose of determining whether the attorney had a conflict of interest.

Although Ngirailild claims his case is identical to *Ueki*, there are crucial differences. Unlike *Ueki,* defense counsel here was permitted to interview the informant in order to verify the police officers' version of the events, and the defense was told explicitly that it could call the informant as a witness. The fact that the defense did not call the informant suggests that, as a matter of trial tactics, defense counsel did not think that the informant's testimony would help his client. Whether or not that decision was, in hindsight, correct, Ngirailild's Article IV rights were protected by allowing his attorney to make it.[2]

II. Sufficiency of the evidence

Ngirailild also argues that the evidence presented at trial was not sufficient to support his conviction.

> The standard for assessing the sufficiency of evidence ⊥176 requires us to determine whether, viewing the evidence in the light most favorable to the prosecution and giving due deference to the trial judge's opportunity to hear the witnesses and observe their demeanor, any reasonable trier of fact could have

[2]Ngirailild's counsel on appeal said he is not sure whether Ngirailild's trial attorney ever met with the informant. If he did not, or if the decision not to call the informant was unreasonable, those arguments are more properly made in a habeas petition as part of an ineffective assistance of counsel claim.

found that the essential elements of the crime were established beyond a reasonable doubt.

Ueki, 10 ROP at 158.

Ngirailild notes that none of the officers saw the objects that Ngirailild gave to the informant, that the officers lost sight of the informant for a short time before the exchange with Ngirailild, and that the prerecorded bills were never recovered. But police witnessed a hand-to-hand exchange between the informant and Ngirailild; Francisco testified that, after the exchange with Ngirailild, the informant was out of sight for "less than one second"; and police found drugs and drug paraphernalia in Ngirailild's car. Looking at the facts as a whole in the light most favorable to the prosecution, the evidence is sufficient to support a conviction.

[4] Ngirailild also notes that police recovered just .019 grams of methamphetamine from the controlled buy. In *Ueki,* the Court determined that the evidence was not sufficient to support a trafficking conviction when the defendant possessed just .001 grams of the drug, noting that "[i]n prior cases, testimony was elicited to the effect that the smallest saleable dose of methamphetamine is .1grams." *Ueki,* 10 ROP at 158 (citing *Ngirarorou v. ROP*, 8 ROP Intrm. 136, 140 (2000). *Ueki*, however, did not establish a legal minimum for a conviction, and, at trial, Ngirailild offered no evidence that .019 grams is not a saleable or usable amount of methamphetamine. Therefore, although the Trial Division was free to consider the small amount of the drug when considering whether the prosecution met its burden of proof, we cannot say as a matter of law that the amount of drugs allegedly sold was insufficient to support a conviction.

CONCLUSION

For the foregoing reasons, the judgment of the Trial Division is affirmed.