**UNITED STATES COURT OF APPEALS**
**FOR THE FIFTH CIRCUIT**

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**No. 94-10609**
**Summary Calendar**

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**UNITED STATES OF AMERICA,**

**Plaintiff-Appellee,**

**versus**

**DONALD RAY ATKINS,**

**Defendant-Appellant.**

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**Appeal from the United States District Court**
**for the Northern District of Texas**
**(4:94-CR-01-A-4)**

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**(February 17, 1995)**

Before JONES, BARKSDALE, and BENAVIDES, Circuit Judges.

PER CURIAM:[1]

Donald Ray Atkins appeals his conviction and sentence, asserting that the district court erred by refusing both to allow him to withdraw his guilty plea and to award him an acceptance of responsbility reduction. We **AFFIRM**.

I.

Indicted with five others, Atkins pleaded guilty to conspiracy to possess and pass counterfeit obligations, in violation of 18

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[1] Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

U.S.C. § 371. He was sentenced, *inter alia*, to 41 months imprisonment.

II.

A.

A district court may permit a defendant to withdraw a guilty plea prior to sentencing "upon a showing by the defendant of any fair and just reason". Fed. R. Crim. P. 32(d). "The defendant has the burden of proving that withdrawal is justified, and the district court's ruling will not be reversed absent an abuse of discretion." ***United States v. Hurtado***, 846 F.2d 995, 997 (5th Cir.), *cert. denied*, 488 U.S. 863 (1988).

Atkins pleaded guilty on April 8, 1994. The plea agreement provided, *inter alia*, that he was satisfied with his counsel and was entering the plea freely and voluntarily. Atkins signed a factual resume, supporting the plea.

Three and a half weeks later, on May 3, Atkins moved to withdraw his plea on the grounds that (1) he is innocent, (2) the Government would not be prejudiced, (3) he did not delay in filing the motion, and (4) a withdrawal would not substantially inconvenience the court or waste judicial resources. He acknowledged, however, that his counsel had provided effective assistance, and that his plea was knowing and voluntary. He stated that the motion was prompted by the fact that a government witness who was to have implicated him in the counterfeiting scheme had given incredible testimony at a co-defendant's trial. The Government opposed the motion, and the district court denied it.

Atkins' motion tracked the seven factors our court has enumerated for district courts to consider when ruling on a motion to withdraw a guilty plea:

> (1) whether the defendant has asserted his innocence; (2) whether withdrawal would prejudice the Government; (3) whether the defendant delayed in filing the motion and, if so, the reason for the delay; (4) whether withdrawal would substantially inconvenience the court; (5) whether close assistance of counsel was available to the defendant; (6) whether the plea was knowing and voluntary; and (7) whether withdrawal would waste judicial resources.

***Id***. (citing ***United States v. Carr***, 740 F.2d 339, 343-44 (5th Cir. 1984), *cert. denied*, 471 U.S. 1004 (1985)). When applying those factors, the district court "should consider the totality of the circumstances". ***Carr***, 740 F.2d at 344.

With respect to the first four ***Carr*** factors, Atkins contends that (1) he asserted his innocence in his motion to withdraw; (2) withdrawal would not have prejudiced the Government because the evidence and witnesses were available, and the Government tried his co-defendants within the same month; (3) he did not delay in filing the motion; and (4) withdrawal would not substantially inconvenience the court because the court set his case on the regular docket for trial and sentencing. As to the fifth ***Carr*** factor, Atkins concedes that his admission that he received adequate assistance of counsel militates against allowing the withdrawal. With regard to the sixth factor, he concedes that his plea was knowing and voluntary, but asserts that the "voluntary nature must be viewed in light of the continued problem of drug addiction [with] which [he] is confronted". His testimony at the

plea hearing, however, indicates that he was not under the influence of alcohol or drugs, having last consumed such substances almost a year earlier. And, his counsel stated at the hearing that he had no reason to think that Atkins was not fully competent to enter a knowing and voluntary guilty plea. Moreover, the district court found that Atkins was competent to enter an informed plea, that the plea was knowing and voluntary, and that it was supported by an independent factual basis. With respect to the seventh ***Carr*** factor, Atkins lists several reasons why the withdrawal would not have wasted judicial resources: all the witnesses were located within the same county and could be summoned easily; all transactions occurred in Fort Worth, Texas; the physical evidence was not voluminous or cumbersome; and the only judicial resources used would have been the "facility of the Trial Court, courtroom, and a fair and impartial jury."

The district court relied upon the ***Carr*** factors in denying the motion to withdraw. It found that Atkins presented no credible reason for withdrawal, and observed that Atkins failed to explain waiting three and a half weeks after entering his plea before filing his motion. It concluded that the motion was prompted by the acquittal of two of his co-conspirators, and cited ***United States v. O'Hara***, 960 F.2d 11, 14 (2d Cir. 1992), for the proposition that "[a]cquittal of co-conspirators is not a `fair and just reason' for allowing the withdrawal of a guilty plea". The district court also cited the following additional reasons for denying the motion: (1) Atkins received effective assistance of

counsel, (2) the guilty plea was voluntarily, knowingly, and intelligently made, and (3) a withdrawal would waste judicial resources because a trial of Atkins' co-conspirators had already occurred. We hold that the district court did not abuse its discretion in refusing to allow Atkins to withdraw his guilty plea.[2]

B.

The Presentence Investigation Report (PSR) states that "Atkins declined to be interviewed concerning the offense. Therefore, it does not appear he has accepted responsibility as defined in U.S.S.G. § 3E1.1." Atkins objected, asserting that he had "affirmatively rested upon legal rights in refusing to discuss the offense". The district court did not grant the reduction.

For obvious reasons, "the sentencing court's factual determinations on [acceptance of responsibility] are entitled to even greater deference than that accorded under a clearly erroneous standard of review." ***United States v. Mourning***, 914 F.2d 699, 705 (5th Cir. 1990) (superseded in other part by statute). The defendant bears the burden of proving that he is entitled to the reduction. ***United States v. Kinder***, 946 F.2d 362, 367 (5th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S. Ct. 1677, 2290 (1992).

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[2] Atkins asserts that the district court abused its discretion by denying the motion without conducting an evidentiary hearing. He has failed to provide any convincing reasons for the necessity of a hearing, and a review of the record reveals that he did not request one. Under these circumstances, the district court did not abuse its discretion by failing to conduct an evidentiary hearing.

1.

Atkins asserts that the district court implied that he was required to "do more than plead guilty to make a voluntary statement of acceptance of responsibility" and urges us to "further define and interpret the sentencing guidelines to provide true guidance and definition". As is well-established, "[t]he mere entry of a guilty plea ... does not entitle a defendant to a sentencing reduction for acceptance of responsibility as a matter of right." ***United States v. Wilder***, 15 F.3d 1292, 1298 (5th Cir. 1994) (internal quotation marks and citation omitted); *see also* U.S.S.G. § 3E1.1, comment. (n.3) ("A defendant who enters a guilty plea is not entitled to an adjustment under this section as a matter of right."). "Entry of a plea of guilty prior to the commencement of trial combined with truthfully admitting the conduct comprising the offense of conviction, and truthfully admitting or not falsely denying any additional relevant conduct ... will constitute significant evidence of acceptance of responsibility...." U.S.S.G. § 3E1.1, comment. (n.3). But, such "evidence may be outweighed by conduct of the defendant that is inconsistent with such acceptance of responsibility." ***Id***. Atkins did not admit truthfully his conduct comprising the offense of conviction; indeed, he admits that he "refused to discuss the facts of the offense" with the probation officer. Accordingly, the district court did not clearly err in finding that he had not accepted responsibility.

2.

Atkins contends further that, because his motion to withdraw the plea was pending when he was interviewed by the probation officer, he should not be penalized for invoking his Fifth Amendment right to remain silent. Our court rejected a similar contention that an earlier version of § 3E1.1 violated a defendant's constitutional right not to incriminate himself by requiring the defendant to accept responsibility for uncharged criminal conduct. ***United States v. Mourning***, 914 F.2d at 706-07; *see also* ***United States v. Kleinebreil***, 966 F.2d 945, 952-54 (5th Cir. 1992) (no Fifth Amendment violation where district court found defendant had accepted responsibility for marijuana convictions, but denied reduction because defendant refused to accept responsibility for assault conviction, because of pending state charges for attempted capital murder). "[A]fforded a possibility of a more lenient sentence does not *compel* self-incrimination. To the extent the defendant wishes to avail himself of this provision, any `dilemma' he faces in assessing his criminal conduct is one of his own making. The government is permitted to reward contrition. This is not the same as compelling self-incrimination." ***Mourning***, 914 F.2d at 707 (emphasis in original) (citation omitted). Enough said.

III.

For the foregoing reasons, the judgment is

**AFFIRMED**.