

In the calculation of his total offense level, he was not given a two-level reduction for acceptance of responsibility under U.S.S.G. § 3E1.1(a) because of his contention that he was not responsible for the charged conduct. Tr. at 51, Feb. 21, 1997.

The petition argues that (1) defendant's counsel was ineffective because she did not inform him that he could lose the two-level reduction if he denied his guilt and moved to withdraw his guilty plea; and (2) absent the motion to withdraw his guilty plea, there was no basis for the denial of the reduction. Petition, at 5.

An ineffective assistance claim requires –

First, the petitioner must show that his or her counsel's performance was deficient – that, under all the circumstances, the attorney's representation fell below an objective standard of reasonableness. . . . Claimants must identify specific errors by counsel, and we must indulge a strong presumption that counsel's conduct was reasonable.

Second, the petitioner must show prejudice. . . . [A] petitioner must demonstrate a reasonable probability that, but for the unprofessional errors, the result would have been different.

Frey v. Fulcomer, 974 F.2d 348, 358 (3d Cir. 1992), cert. denied, 507 U.S. 954, 113 S. Ct. 1368, 122 L. Ed.2d 746 (1993).

Here, ignoring the obvious incongruity between a denial of guilt and acceptance of responsibility, and even assuming

³(...continued)
Court of Appeals affirmed.

counsel's ineffectiveness,⁴ defendant is unable to show prejudice – i.e., that he would have received the reduction had he not moved to withdraw his guilty plea. Application note 3 to Section 3E1.1 of the guidelines states:

Entry of a plea of guilty prior to the commencement of trial combined with truthfully admitting the conduct comprising the offense of conviction . . . will constitute significant evidence of acceptance of responsibility However, this evidence may be outweighed by conduct of the defendant that is inconsistent with such acceptance of responsibility. A defendant who enters a guilty plea is not entitled to an adjustment under this section as a matter of right.

During the presentence investigation – before moving to withdraw his guilty plea – defendant made statements to the the probation office blaming his ex-wife for the crimes charged. Presentence report, § 29. At his sentencing – after the motion was denied – defendant again attempted to explain his crimes by attributing fault to his ex-wife and by disputing the tax-loss calculation. Tr. at 8-12, Feb. 21, 1997. This conduct was sufficient to negate acceptance of responsibility. See United States v. Ortiz, 878 F.2d 125, 128 (3d Cir. 1989) (defendant who pleaded guilty was not entitled to reduction for acceptance of responsibility where he

⁴ The government's response to the petition includes an affidavit by Carol Carson, defendant's counsel at the guilty plea and sentencing hearings, stating that she advised defendant not to move to withdraw his guilty plea and that in doing so he risked losing the reduction for acceptance of responsibility. Response, exh. a, ¶¶ 4-6. Defendant disputes his attorney's account. Reply, at 1.

At his sentencing hearing, but prior to the imposition of sentence, defendant stated that he believed Carson had done an "outstanding job." Tr. at 50, Feb. 21, 1997.

made statements to probation officer attempting to minimize his role in the transaction); see also United States v. Greene, 71 F.3d 232, 234-35 (6th Cir. 1995) (same); United States v. Dillard, 43 F.3d 299, 305-06 (7th Cir. 1994) (same).⁵

Edmund V. Ludwig, J.

⁵ Defendant continued to deny responsibility after sentence was imposed. On March 4, 1997 he moved for new counsel, asserting that his counsel had "convinced" him to plead guilty. ¶ 4. In his reply brief, he stated that he never agreed to the stipulation of facts in his guilty plea agreement, reply, ¶ 5, despite his clear testimony to the contrary at the guilty plea hearing, tr. at 3, Oct. 23, 1996.