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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0675**

Marcus Fultz, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed April 9, 2018
Affirmed
Peterson, Judge**

Anoka County District Court
File No. 02-CR-14-5496

Bradford Colbert, St. Paul, Minnesota (for appellant)

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Anthony C. Palumbo, Anoka County Attorney, Kelsey R. Kelley, Robert I. Yount,
Assistant County Attorneys, Anoka, Minnesota (for respondent)

Considered and decided by Peterson, Presiding Judge; Worke, Judge; and Ross,
Judge.

UNPUBLISHED OPINION

PETERSON, Judge

In this appeal from the postconviction court's denial of his petition for relief,
appellant argues that the state violated his constitutional due-process rights and the doctrine

of judicial estoppel by using inconsistent factual theories when prosecuting his case and the case against his codefendant. We affirm.

FACTS

On August 23, 2014, both A.M.M. and Y.S. were stabbed in the chest while they sat in A.M.M.'s car at a Fridley parking lot. They had been set up for a robbery by appellant Marcus Fultz, Kevin Moore, and two women. The women went with the victims and a third man from a bar to the third man's apartment, where they "hung out" for about two hours. Then the victims brought the women to the parking lot, where Fultz and Moore planned to rob them. The evening went according to plan until Fultz and Moore began the robbery. When A.M.M. drove into the parking lot, the women ran from his car. Y.S. was sitting in the back seat, and he and A.M.M. were stabbed after Fultz and Moore approached the car with weapons and told them that they were being robbed.

Fultz was charged by amended complaint with six crimes: attempted first- and second-degree murder, aiding and abetting attempted first- and second-degree murder, first-degree assault, and aiding and abetting first-degree assault. Under a plea agreement with the state, Fultz agreed to plead guilty to attempted first-degree murder and aiding and abetting attempted first-degree murder in exchange for dismissal of the other charges and imposition of consecutive sentences totaling 283 months.

When providing the factual basis for his plea at his plea hearing, Fultz admitted to stabbing both of the victims and testified that he stabbed the second victim because he "[t]hought he had a weapon." Upon hearing these statements, the state abruptly withdrew from the plea agreement because Fultz's testimony was inconsistent with his charged

conduct and could provide a factual basis for a claim of self-defense. The prosecutor stated, “I believe that the evidence does not support what Mr. Fultz is indicating” The district court did not accept the plea.

Fultz signed a second plea petition, in which he again agreed to plead guilty to attempted first-degree murder and aiding and abetting attempted first-degree murder in exchange for dismissal of other charges and imposition of executed consecutive sentences that totaled 306 to 314 months. When providing the factual basis for this plea at his second plea hearing, Fultz testified that he stabbed the driver, A.M.M., and Moore stabbed the passenger, Y.S. The district court accepted the plea, convicted Fultz, and sentenced him to 314.5 months.

A separate criminal complaint charged Moore with the same crimes that had been charged against Fultz. At the beginning of Moore’s plea hearing, the state amended the complaint to change the first count from attempted first-degree murder to aiding and abetting attempted first-degree murder. Moore then pleaded guilty to two counts of aiding and abetting attempted first-degree murder in exchange for dismissal of the other charges and imposition of concurrent sentences of 274 months each. When providing the factual basis for his pleas, Moore testified that Fultz stabbed both of the victims.

Following his convictions, Fultz sought review in this court, but his appeal was voluntarily dismissed. Fultz then petitioned for postconviction relief, arguing that the state violated his due-process rights by presenting two inconsistent factual scenarios when prosecuting his and Moore’s cases, and that the state should be judicially estopped from doing so. Fultz asked the postconviction court to “reinstate [his] original plea agreement

and resentence him to 283 months in prison,” consistent with his first plea agreement. Following a hearing, the postconviction court denied the petition. This appeal follows.

D E C I S I O N

An appellate court reviews the denial of a petition for postconviction relief for abuse of discretion. *Miles v. State*, 840 N.W.2d 195, 200 (Minn. 2013). A postconviction court’s decision constitutes an abuse of discretion when the “decision is based on an erroneous view of the law.” *Id.* (quotation omitted). This court gives de novo review to a postconviction court’s legal conclusions, *Leake v. State*, 737 N.W.2d 531, 535 (Minn. 2007), and reviews its findings of fact for clear error. *Doppler v. State*, 771 N.W.2d 867, 875 (Minn. 2009).

As an initial matter, we note that although Fultz seeks reinstatement of his first guilty plea, the state withdrew from that plea, and the district court rejected it after Fultz failed to provide a sufficient factual basis to support it. To be valid, a guilty plea must be accurate, voluntary, and intelligent. *State v. Ecker*, 524 N.W.2d 712, 716 (Minn. 1994). And “[a] proper factual basis must be established for a guilty plea to be accurate.” *Id.* Because Fultz did not provide a proper factual basis for his first guilty plea, it is not valid and cannot be reinstated.

Fultz argues that the state’s reliance on inconsistent facts when prosecuting his and Moore’s cases violates the doctrine of judicial estoppel and his constitutional due-process rights. Judicial estoppel “is intended to prevent a party from assuming inconsistent or contradictory positions during the course of a lawsuit,” *State v. Pendleton*, 706 N.W.2d 500, 507 (Minn. 2005), in order “to protect the integrity of the judicial process.” *State v.*

Profit, 591 N.W.2d 451, 462 (Minn. 1999). “[T]wo or more defendants may play varied roles in the commission of a crime and prosecutors are not required to present the same evidence and theories in the trials of different defendants,” but, under the doctrine of judicial estoppel, “the state may not, at the core of its case, rely upon factually inconsistent theories and irreconcilable evidence to obtain . . . convictions in separate trials for the same [crime].” *Pendleton*, 706 N.W.2d at 507.

We decline to consider whether the doctrine of judicial estoppel should apply in this case because it has not been recognized in Minnesota. On three occasions, the Minnesota Supreme Court has refused to adopt the doctrine. *Pendleton*, 706 N.W.2d at 507 (stating that “[t]he doctrine of judicial estoppel has not been expressly recognized by this court,” and “we decline to adopt the doctrine at this time”); *Illinois Farmers Ins. Co. v. Glass Serv. Co.*, 683 N.W.2d 792, 801 (Minn. 2004) (stating that “we neither adopt nor reject the doctrine of judicial estoppel”); *Profit*, 591 N.W.2d at 462 (“We have not expressly recognized the doctrine of judicial estoppel and decline to do so here.”). We are an error-correcting court, and it is not our function to adopt a new legal theory. See *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988) (“The scope of review of an appellate court is narrowly defined. The function of the court of appeals is limited to identifying errors and then correcting them.”).

Fultz also appears to make a due-process argument that he claims is “intertwined” with his judicial-estoppel argument: he asserts that the state improperly prosecuted his and Moore’s cases on inconsistent facts. Under the Minnesota and United States Constitutions, due process of law requires that a defendant receive a fair trial. U.S. Const. amend. V,

XIV § 1; Minn. Const. art 1, § 7. These constitutional guarantees “do[] not require a perfect trial, but rather one that is fair and does not prejudice the substantial rights of the accused.” *State v. Marchbanks*, 632 N.W.2d 725, 729 (Minn. App. 2001). “Prosecutors have a duty not to win a case by any means necessary but to see that justice is done,” and “[j]ustice is done only when the accused, regardless of guilt or innocence, receives a fair trial.” *State v. McNeil*, 658 N.W.2d 228, 236 (Minn. App. 2003).¹

“In postconviction proceedings, the defendant has the burden of establishing . . . that he was deprived of fair treatment amounting to a violation of fundamental rights of due process.” *Cable v. State*, 284 Minn. 89, 93-94, 169 N.W.2d 391, 394 (1969). Fultz did not meet that burden. Fultz and Moore were originally charged with the same crimes arising out of the same factual scenario. Fultz pleaded guilty to attempted first-degree murder and aiding and abetting first-degree murder; Moore then pleaded guilty to two counts of aiding and abetting attempted first-degree murder. Only Fultz pleaded guilty to the offense as principal in one of the stabbings—the other three offenses to which they pleaded guilty were aiding and abetting offenses that did not depend upon either Fultz or Moore as the principal actor. Thus, no action taken by the state in either case was based on inconsistencies in the state’s version of the facts.

¹ Normally, by pleading guilty, a defendant waives all nonjurisdictional defects, including claimed constitutional violations. *State v. Lothenbach*, 296 N.W.2d 854, 857 (Minn. 1980). Fultz argues that this rule should not apply to him because the factual inconsistency that supports his constitutional claim did not exist until after Moore entered his plea. At the time of Fultz’s plea, he could not have known of the constitutional claim.

It was only during Moore's testimony at his plea hearing, when Moore offered his version of the facts to support his plea, that any factual discrepancy was created. Contrary to Fultz's earlier admission that he stabbed A.M.M. and Moore stabbed Y.S., Moore testified that Fultz stabbed both victims. Fultz has offered no evidence to show that this factual inconsistency was instigated by the state. While the state amended Moore's complaint at the beginning of his plea hearing to change the first count from attempted first-degree murder to aiding and abetting first-degree murder, this action was not unfair to Fultz and may have merely reflected the state's recognition that it could not prove which of the codefendants stabbed Y.S., although it could prove that both codefendants were culpable for aiding and abetting Y.S.'s stabbing.

Fultz failed to meet his burden of proof to establish a violation of his due-process rights. The postconviction court did not abuse its discretion in dismissing Fultz's postconviction petition.

Affirmed.