No. 2—09—0820
Order filed May 11, 2011

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Winnebago County.
Plaintiff-Appellee,	)	
v.	)	No. 99—CF—1657
BRIAN G. BENNETT, JR.,	)	Honorable Rosemary M. Collins,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE BOWMAN delivered the judgment of the court.
Justices McLaren and Burke concurred in the judgment.

ORDER

Held: Although the trial court erred in barring defendant's proposed successive postconviction petition on the ground that he had not moved for leave to file it—the court had the discretion to allow the filing anyway—the court properly barred it on the ground that he had not satisfied the cause-and-prejudice test; if it was error for the State to participate in the proceedings, its participation did not influence the court's cause-and-prejudice ruling and thus was harmless.

Defendant, Brian G. Bennett, Jr., appeals from a judgment barring him from filing a second petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122—1 *et seq.* (West 2008)). The trial court held that defendant failed to satisfy section 122—1(f) of the Act (725 ILCS 5/122—1(f) (West 2008)). On appeal, defendant argues that the State violated the Act by participating in the

section 122—1(f) proceedings. The State responds that nothing in the Act barred what it did. We do not decide which construction of the Act is correct. We hold that, if, *arguendo*, the State's participation was improper, the error was harmless. Therefore, we affirm.

In 2000, after a bench trial, defendant was convicted of first-degree murder (720 ILCS 5/9—1(a)(2) (West 1998)) and sentenced to 50 years in prison. On direct appeal, this court affirmed. *People v. Bennett*, 329 Ill. App. 3d 502 (2002). In 2004, defendant filed an amended *pro se* petition under the Act. On the State's motion, the amended petition was dismissed. This court affirmed. *People v. Bennett*, No. 2—05—0357 (2007) (unpublished order under Supreme Court Rule 23).

On April 3, 2009, defendant filed, or purportedly filed, a second *pro se* postconviction petition, which is the subject of this appeal. The petition raised a variety of claims, including actual innocence based on newly discovered evidence; ineffective assistance of counsel; constitutional violations by the police and the prosecution; and judicial bias.

On April 17, 2009, the State filed a two-page "Motion to Bar Filing of Successive Post-Conviction Petition," contending that defendant had not satisfied section 122—1(f), which reads:

> "Only one petition may be filed by a petitioner *** without leave of the court. Leave of court may be granted only if a petitioner demonstrates cause for his or her failure to bring the claim in his or her initial post-conviction proceedings and prejudice results from that failure. For purposes of this subsection (f): (1) a prisoner shows cause by identifying an objective factor that impeded his or her ability to raise a specific claim during his or her initial post-conviction proceedings; and (2) a prisoner shows prejudice by demonstrating that the claim not raised during his or her initial post-conviction proceedings so infected the trial that the resulting conviction or sentence violated due process." 725 ILCS 5/122—1(f) (West 2008).

The State argued that, under *People v. DeBerry*, 372 Ill. App. 3d 1056, 1059-60 (2007), a defendant-petitioner seeking to file a successive postconviction petition must first request and obtain the court's permission to do so—which defendant had not. In a single sentence, the motion asserted that defendant had not suggested any reason why he had shown cause and prejudice.

On May 1, 2009, Assistant State's Attorney Steven Biagi appeared and informed the trial judge that he had filed the motion to bar the petition. The judge responded that she would "have to review" the State's motion. On May 15, 2009, Biagi appeared and the following colloquy occurred:

> "THE COURT: On Mr. Bennett, this is up for the first stage on a post-conviction petition.
>
> MR. BIAGI: It is a successive one, Judge. We have filed a motion to bar filing in this one because he did not ask leave to file and did not argue why he should be allowed to, and in this one instance we believe that it's appropriate for us to take a position.
>
> THE COURT: I do have your motion to bar filing. And the Court is going to grant your request to bar the filing of the successive post-conviction petition, as the Court did not give the defendant leave to file, and frankly, there is no merit in it anyway, as he has set forth. But the Court is going to grant your request to strike and to bar that filing."

The court entered a written order stating, in part, "No motion for leave to file a successive post-conviction petition was filed with or before the 3 April 2009 petition. Nor has the defendant satisfied the cause and prejudice requirements." After the court denied defendant's motion to reconsider, he appealed.

On appeal, defendant contends that the trial court erred in allowing the State to participate in the preliminary proceedings under section 122—1(f). Defendant observes that, in the first stage of substantive proceedings on a postconviction petition, when the trial court decides whether the

petition is frivolous, the State may not participate. *People v. Gaultney*, 174 Ill. 2d 410, 418-19 (1996). As defendant concedes, the State's mere filing of a motion to dismiss or a responsive pleading at that stage "does not *per se* contaminate" the proceedings. *Id.*, 174 Ill. 2d at 419. If the record does not show that the judge sought input from the State or relied on the State's motion or pleading, a court of review will presume that the judge acted properly. *Id.* at 420. However, if the trial court seeks or relies on input from the State, reversal is required. *Id.* at 419.

Defendant acknowledges that proceedings under section 122—1(f) precede any review on the merits. See *People v. LaPointe*, 227 Ill. 2d 39, 44 (2007) (successive petition is not legally "filed" until it is approved under section 122—1(f)). Thus, defendant does not contend that *Gaultney* directly speaks to whether the State may participate at the section 122—1(f) stage. However, he contends that section 122—1(f) proceedings are similar to first-stage proceedings on the merits, so that what holds for the latter should apply to the former. He reasons that it would be incongruous to allow the State to participate in section 122—1(f) proceedings but then, if the court moves to reviewing the petition on the merits, to exclude the State from the process.

The State responds in part that the trial court acted properly by following *DeBerry*, 372 Ill. App. 3d at 1059-60, which held that a defendant must request and obtain leave of court before filing a successive petition. As defendant notes, however, the supreme court has repudiated at least this part of *DeBerry*. In *People v. Tidwell*, 236 Ill. 2d 150 (2010), the court, observing that the Act makes no mention of a "prerequisite motion seeking 'leave,' nor even of an obligatory request" (*id.* at 157), held that, even if the defendant does not move or otherwise explicitly request permission to file the successive petition, the trial court may, in its discretion, decide the cause-and-prejudice issue (*id.* at 161). Thus, defendant contends, to the extent that the trial court relied on the *DeBerry* rule, the judgment was erroneous.

We agree with defendant that the trial judge erred in relying on the *DeBerry* rule.[1] However, the court gave a second ground for its judgment: defendant's failure to satisfy the cause-and-prejudice test. We affirm the judgment on this independent ground.

Defendant does not contend that he *did* show either that he had cause for his failure to raise his claims in his first petition under the Act or that he would suffer prejudice from being barred from doing so in this action. He asserts only that the State's participation in the proceedings was (1) unauthorized by the Act; and (2) prejudicial. We do not decide whether the State's participation was improper, as we conclude that any error was harmless. If defendant is correct that *Gaultney* and like authority may be extended to proceedings under section 122—1(f), it follows that, per *Gaultney,* the State's improper participation does not always require reversal. Here, reversal is not required.

As noted, the State's motion to bar focused almost entirely on defendant's failure to request leave to file the proposed successive petition. The State's motion argued only in passing that defendant did not show cause and prejudice. The assistant State's Attorney who briefly presented the motion raised this point obliquely if at all. We cannot conclude that the State influenced that part of the judgment that held that defendant failed to satisfy the substantive requirements of section 122—1(f). Thus, the State's input into the proceedings, if error at all, was harmless.

The judgment of the circuit court of Winnebago County is affirmed.

Affirmed.

---

[1]This was not the trial court's fault, of course, as *Tidwell* was issued after the judgment here.