STATE OF IDAHO)
County of BOUNDARY)ss

FILED_____

AT_____ O'Clock ___M
CLERK, DISTRICT COURT

_____
Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF BOUNDARY

JAMES BEAUMONT COOK, Petitioner, vs. **STATE OF IDAHO**, Respondent.	Case No. **B CV 2008 277** **ORDER DISMISSING POST-CONVICTION RELIEF PETITION**

I. INTRODUCTION AND PROCEDURAL BACKGROUND.

This matter is before the Court following Petitioner James Beaumont Cook's (Cook) filing of Petition for Post-Conviction Relief pursuant to I.C. § 19-4901, *et seq*. Cook filed a *pro se* Petition for Post-Conviction Relief on August 5, 2008. On that same date, Cook filed a Motion and Affidavit in Support for Appointment of Counsel, and an affidavit in support of such. On August 13, 2008, the State of Idaho filed an Answer to Petition for Post-Conviction Relief. In that Answer the State alleges that Cook has failed to substantiate that his attorney's acts fell below the acceptable objective standard of professional competence or performance, and failed to allege such acts created a substantial likelihood of a different verdict or resolution. Answer to Petition for Post-Conviction Relief, p. 2, ¶ VII, p. 3, ¶ IX. On August 15, 2008, District Judge Verby entered an Order Appointing Counsel and Granting Motion for Fee Waiver, appointing Linda Payne

as Cook's attorney in this action. On September 19, 2008, Judge Verby disqualified himself from this case, and on September 23, 2008, Administrative District Judge John Patrick Luster signed the Order of Reassignment, assigning Cook's Post-Conviction case to the undersigned.

Cook's *pro se* Petition for Post-Conviction Relief indicates that he pled guilty. Petition for Post Conviction Relief, p. 2, ¶ 5. However, a review of the Register of Actions shows that a jury trial began December 12, 2005, which resulted in a judgment of conviction on December 15, 2005. In any event, following that jury verdict of guilty, Cook was sentenced in the underlying criminal matter, Boundary County Case No. CR 2005-1605, on February 9, 2006, as follows:

> **Trafficking in Marijuana, I.C. § 37-2732B(a)(1)(C), five years determinate and two years indeterminate.**

In this post-conviction relief case Cook alleged only claims of ineffective assistance of counsel. On September 26, 2008, this Court filed a "Notice of Intent to Dismiss Post-Conviction Relief Petition", informing Cook and his counsel that Cook's claims will be dismissed for failure to meet the two-prong standard established to prevail on a claim of ineffective assistance of counsel unless the petitioner can show an arguable basis for relief by filing no later than October 31, 2008, at 10:00 a.m. Notice of Intent to Dismiss Petition for Post-Conviction Relief, pp. 3, 4.

Petitioner challenges his conviction on the following grounds:

> Ineffective Assistance of Counsel, defense attorney Serra Woods failed to motion district court to suppress evidence when defendant requested she do so. Evidence suppressed in Case No. 2005-597 State vs. Tweekie is the same evidence used in Case No. CR 2005-1605 State vs. Cook conviction. That evidence suppression in case no CR 2005-597 (see attached order granting suppression) could entitle evidence suppression in case CR 2005-1605.

Petition for Post-Conviction Relief, p. 2. Cook basically claims he requested his trial attorney file a motion to suppress, that the evidence used to convict him was the same evidence suppressed in a companion (Tweedie's) case, and since the evidence was suppressed in Tweedie's case, that would "entitle evidence suppression in case CR 2005-1605" (Cook's case).

Judge Verby ordered the appointment of the Kootenai County Public Defender on August 15, 2008, and subsequently disqualified himself on September 22, 2008. This Court, after being assigned the post-conviction case, filed its Notice of Intent to Dismiss Post-Conviction Relief Petition on September 26, 2008. The Court ordered Cook's petition be dismissed on October 31, 2008, "unless prior to 10:00 o'clock on said date Cook shall file a reply showing some arguable basis for relief." Notice of Intent to Dismiss, p. 4. Specifically, this Court warned Cook:

> In this case, the petitioner has alleged only claims of ineffective assistance of counsel. For reasons that will be set forth below, those claims will be dismissed for failure to meet the two-prong standard established to prevail on a claim of ineffective assistance of counsel, unless the petitioner can show an arguable basis for relief by filing no later than October 31, 2008, at 10:00 a.m.

Notice of Intent to Dismiss Petition for Post-Conviction Relief, p. 3. This Court held:

> At this point the petitioner has failed to establish why the outcome of the trial would have been different had his attorney Serra Woods made a motion to suppress. Cook must both allege prejudice (which he has not) and present admissible evidence as to how prejudice will be shown, how the outcome of trial would have been different. Where the names of witnesses and the information they would have presented would not have changed the outcome of the defendant's trial, counsel's failure to discover the information through interviews of those witnesses did not violate the defendant's constitutional right to effective assistance of counsel. *Drapeau v. State,* 103 612, 651 P.2d 546 (Ct.App. 1982). In addition to demonstrating deficient performance, the petitioner must also demonstrate prejudice, i.e., that counsel's conduct contributed to the conviction. *Id.*

> While defense counsel's failure to contact a named witness as an alibi witness central to the defense and defense counsel's performance may well have been deficient in this regard, there was no prejudice because the witness's testimony would not have established the defendant's whereabouts at the time the crime was committed. *Cunningham v. State,* 117 Idaho 428, 788 P.2d 243 (Ct.App. 1990).

Id., p. 4.

Cook replied in a "Reply to Court's Notice of Intent to Dismiss", filed October 30, 2008, stating he had standing to file a motion to suppress in the trial below as an occasional overnight guest, or in the alternative, that arresting him without a search warrant to a home where he did not reside was unreasonable. Reply to Court's Notice of Intent to Dismiss, pp. 1-2. Cook's attorney stated she did not know whether the warrant for his arrest was a felony or misdemeanor warrant and has not received the requested file from his trial attorney. *Id.,* p. 2. Ultimately, "post conviction counsel simply needs more time to investigate the facts and the law to provide this Court with a more accurate and thorough brief on the issue of a motion to suppress." *Id.*

II. ANALYSIS.

The decision to grant or deny a motion for continuance is within the discretion of the Judge. *State v. Wood,* 132 Idaho 88, 106, 967 P.2d 702, 720 (1998). Denial of a motion for continuance is an abuse of discretion only where the defendant can show that his substantial rights have been prejudiced. *Id.*

Here, the arguable basis for relief upon which the petition is based is Cook's argument that a motion to suppress should have been filed in his case below and that he has raised a material issue of fact as to whether he would have succeeded on a motion to suppress. Reply to Court's Notice of Intent to Dismiss, p. 2. This Court quoted the Idaho Court of Appeals decision in *Hassett v. State,* 127 Idaho 313, 316, 900

P.2d 221, 224 (Ct.App. 1995), when warning Cook that his application must contain or be accompanied by something "verified with respect to facts within the personal knowledge of the applicant, and affidavits, records or other evidence supporting its allegations must be attached or the application must state why such supporting evidence is not included with the petition." Notice of Intent to Dismiss Petition for Post-Conviction Relief, p. 2.

Cook attached to his petition the Order Granting Motion to Suppress in Boundary County Case No. CR 2005 597, *State v. Tweedie*, where the district court judge found Tweedie had not voluntarily consented to a search of his sister's home and acreage (where he was acting as caretaker) and granted Tweedie's Motion to Suppress, suppressing evidence seized after a warrantless probation search.

However, Cook, unlike Tweedie, was arrested pursuant to warrant and from the record before this Court it does not appear the arrest warrant was ever challenged. *See* Order granting Motion to Suppress, p. 3 (attached to Petition for Post-Conviction Relief in the instant case). Further, while awaiting transport, Cook stated that a quantity of marijuana found in the kitchen was his. *Id.,* p. 4. The Court reasoned that Tweedie did not voluntarily consent to a search of the building containing the grow operation and the search warrant obtained based on the officer's intrusion onto the premises and initial unlawful search should not have been issued. *Id.* p. 3. But, at the time of this unlawful search, Cook was already being transported to the Boundary County jail pursuant to the arrest warrant and at the time the search warrant was executed, Cook (an occasional overnight guest at Tweedie's sister's home) was presumably still in custody.

Counsel for Cook has argued:

> Whether the warrant for Mr. Cook's arrest was a felony warrant or a misdemeanor warrant is unknown at this time, but may very well be pertinent to the issue of the arrest itself. Though Mr. Cook's trial attorney has, several times promised to provide the underlying criminal file to Mr. Cook's post conviction counsel, she has failed to do so.

Reply to Court's Notice of Intent to Dismiss, p. 2. No reason is stated as to why it would make any difference if Cook had a felony warrant or a misdemeanor warrant for his arrest. Cook cites *State v. Coma,* 133 Idaho 29, 981 P.2d 754 (Ct.App. 1999) elsewhere in his brief, for the proposition that if the evidence was suppressed in Tweedie's case, it should be suppressed in Cook's case. *Id.,* p. 1. A review of *Coma* shows just the opposite. The pertinent portion of *Coma* reads:

> Coma's first challenge to his arrest hinges upon the fact that the arrest warrant which the officer came to execute was a misdemeanor warrant. Coma asserts that under the Fourth Amendment, only a search warrant or a felony arrest warrant will suffice to authorize a police officer's entry into a residence, and therefore the officer's intrusion into Coma's house to effectuate his arrest was illegal.
>
> For this argument, Coma relies upon the United States Supreme Court's decision in *Payton v. New York,* 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980), where the Court considered whether officers may make a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest. The Court held that such a warrantless intrusion violated the Fourth Amendment. At the same time, the Court rejected the notion that only a search warrant would adequately protect the privacy interest at stake. Rather, the Court said that an arrest warrant would serve the constitutional purpose:
>
> > It is true that an arrest warrant requirement may afford less protection than a search warrant requirement, but it will suffice to interpose the magistrate's determination of probable cause between the zealous officer and the citizen. If there is sufficient evidence of a citizen's participation in a felony to persuade a judicial officer that his arrest is justified, it is constitutionally reasonable to require him to open his doors to the officers of the law. Thus, for Fourth Amendment purposes, an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to

believe the suspect is within.

Id. at 602, 603, 100 S.Ct. at 1388, 63 L.Ed.2d at 660, 661. Focusing like a laser on the Court's reference to “a felony” in the foregoing quotation, Coma argues that *Payton* authorizes home entries with arrest warrants only if the warrant is for a felony, and that misdemeanor arrest warrants may not be executed inside the suspect's home.

We do not read *Payton* to imply such a limitation. The Supreme Court's focus was on the necessity of a magistrate's probable cause review to serve as a tempering check on zealous law enforcement. This purpose is accomplished when an arrest warrant is issued, whether the underlying offense is a misdemeanor or felony. For this reason, courts considering the question have refused to distinguish between felony and misdemeanor arrest warrants. *See, e.g., United States v. Spencer,* 684 F.2d 220, 222-223 (2d Cir.1982); *Smith v. Tolley,* 960 F.Supp. 977, 991-92 (E.D.Va.1997); *People v. LeBlanc,* 60 Cal.App.4th 157, 70 Cal.Rptr.2d 195, 198-99 (1997). Coma cites no authority to the contrary. We therefore conclude that the limited authority recognized in *Payton,* to enter a suspect's home when police reasonably believe the suspect to be within, is not confined to felony warrants but applies to misdemeanor arrest warrants as well. [FN2]

FN2. This authority applies only to entry of the suspect's own residence. In *Steagald v. United States,* 451 U.S. 204, 101 S.Ct. 1642, 68 L.Ed.2d 38 (1981), the Supreme Court held that, absent consent or exigent circumstances, a *search warrant* must be obtained before officers may search for the subject of an arrest warrant in the home of a third party.

133 Idaho 29, 31, 32, 981 P.2d 754, 756-57. (bold added). The bold portion of the above quote from *Coma* makes it clear that it is of no import whether Cook’s outstanding warrant was for a misdemeanor or a felony. Thus, Cook’s argument that: “Whether the warrant for Mr. Cook’s arrest was a felony warrant or a misdemeanor warrant is unknown at this time, but may very well be pertinent to the issue of the arrest itself” (Reply to Court’s Notice of Intent to Dismiss, p. 2), is without merit. It simply is not pertinent to the issue of Cook’s arrest. Cook had an arrest warrant; Tweedie did not. The unlawfulness of Tweedie’s search was based on the fact that Tweedie “consented” based upon the officer’s representations to Tweedie that they had the authority to conduct a “probation search”, when, according to the trial judge in

Tweedie's case, they did not have that authority, and thus, Tweedie's consent was apparently not voluntary. Order Granting Motion to Suppress, pp. 8, 13, citing *Burrell v. McIlroy,* 423 F.3d 1121, 1126 (9th Cir. 2005); *Bumper v. North Carolina,* 391 U.S. 543, 548-49, 88 S.Ct. 1788, 20 L.Ed.2d 797 (1968); and *State v. Schumacher,* 136 Idaho 509, 517, n. 3, 37 P.3d 6, 13, n. 3 (Ct.App. 2001). Cook has not shown why a motion to suppress would have been successful, which means he has not shown why the outcome of trial would have been different had such a motion to suppress been filed.

Again, Tweedie was warned:

> At this point the petitioner has failed to establish why the outcome of the trial would have been different had his attorney Serra Woods made a motion to suppress. Cook must both allege prejudice (which he has not) and present admissible evidence as to how prejudice will be shown, how the outcome of trial would have been different.

Notice of Intent to Dismiss Petition for Post-Conviction Relief, p. 4.

Therefore, even if Cook were able to demonstrate for the Court that his trial counsel's performance was deficient, given the very different facts applicable to his case as compared to Tweedie's, it is unlikely that he would be able to show by a reasonable probability that but for counsel's deficient performance, the outcome of his criminal trial would have been different.

III. CONCLUSION AND ORDER.

Petitioner Cook in his Reply to Court's Notice of Intent to Dismiss has not shown an arguable basis for relief or that further briefing on the matter is necessary. Therefore, this Court properly exercises its discretion and dismisses Cook's Petition for Post-Conviction Relief.

IT IS HEREBY ORDERED that Cook's Petition for Post-Conviction Relief is

DISMISSED.

Dated this 3rd day of February, 2009.

_____
John T. Mitchell, District Judge

CERTIFICATE OF MAILING

I hereby certify that on the _____ day of February, 2009 a true and correct copy of the foregoing was mailed, postage prepaid, or sent by interoffice mail or facsimile to:

Linda Payne (208) 667-8292

Jack R. Douglas (208) 267-5284

CLERK OF THE DISTRICT COURT
BOUNDARY COUNTY

By:_____
Deputy