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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Respondent*,

v.

DONALD LEE DEMPSEY, JR., *Petitioner*.

No. 1 CA-CR 15-0657 PRPC
FILED 12-19-2017

Petition for Review from the Superior Court in Maricopa County
No. CR 2011-149644-001
The Honorable Richard L. Nothwehr, Judge *Pro Tempore*

REVIEW GRANTED; RELIEF GRANTED; REMANDED

COUNSEL

Maricopa County Attorney's Office, Phoenix
By Diane Meloche
Counsel for Respondent

Donald Lee Dempsey, Jr., Winslow
Petitioner Pro Se

MEMORANDUM DECISION

Judge Randall M. Howe delivered the decision of the Court, in which
Presiding Judge James P. Beene and Judge Kent E. Cattani joined.

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H O W E, Judge:

¶1 Donald Lee Dempsey, Jr., petitions this Court for review of the summary dismissal of his petition for post-conviction relief. We review a trial court's summary dismissal of a petition for post-conviction relief for an abuse of discretion. *State v. Bennett*, 213 Ariz. 562, 566 ¶ 17 (2006). We have considered the petition for review and for the reasons stated, grant review and relief.

FACTS AND PROCEDURAL HISTORY

¶2 A jury convicted Dempsey of one count of possession of a dangerous drug for sale and two counts of misconduct involving weapons. The trial court sentenced him as a repetitive offender to concurrent, mitigated prison terms, the longest being 14 years on the drug conviction. This court affirmed the convictions and sentences on appeal. *State v. Dempsey*, 1 CA-CR 13-0681, 2014 WL 4724750 (Ariz. App. Sep. 23, 2014) (mem. decision).

¶3 Dempsey filed a timely notice of post-conviction relief. After his appointed counsel notified the trial court that counsel found no basis for post-conviction relief, Dempsey filed a timely petition for post-conviction relief form with boxes checked indicating claims to be raised, together with a motion for extension of time to file a compliant petition in which he referenced his incarcerated status and lack of training and access to a law library. In the sections of the petition for providing facts supporting the claims and issues being raised, Dempsey wrote: "Will fully brief within extension time frame." Noting that a petition had been filed, the trial court denied the motion for an extension as "moot." The State responded noting that the form petition failed to comply with Arizona Rule of Criminal Procedure 32.5's requirements. Although it is not included in the record on review, Dempsey filed a revised petition for post-conviction relief within the period of his extension request and the State moved to allow a response to Dempsey's revised petition for post-conviction relief. Without addressing either Dempsey's revised petition or the State's motion to allow a response to the revised petition, the trial court summarily dismissed the proceedings, ruling that the form petition "fails to identify either factual or legal issues to address in this PCR matter." This petition for review followed.

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DISCUSSION

¶4 On review, Dempsey contends that the trial court abused its discretion by summarily dismissing the proceedings based on his original deficient petition without providing him an opportunity to correct the petition to comply with Rule 32.5. This rule provides that upon a filing of a petition for post-conviction relief that fails to comply with the rule's requirements for the contents of a petition, the petition "shall be returned by the court to the defendant for revision with an order specifying how the petition fails to comply with the rule" and the defendant shall have 30 days to file a compliant petition. Ariz. R. Crim. P. 32.5. It is only if the defendant fails to return a compliant petition after being given the opportunity to do so that the trial court is to dismiss the proceedings. *Id.*

¶5 Here, both Dempsey and the State understood that the form petition filed by Dempsey together with his request for an extension did not comply with Rule 32.5. It appears that the trial court was unaware of this in ruling Dempsey's request for an extension of time to file a compliant petition was moot. Under these circumstances, the trial court's summary dismissal of the proceedings based on inadequacy of the form petition without providing Dempsey the opportunity to file a compliant petition as provided in Rule 32.5 was an abuse of discretion. *See State v. Linares*, 241 Ariz. 416, 418 ¶ 6 (App. 2017) ("An abuse of discretion occurs if the superior court misapplies the law or legal principles, or makes a decision unsupported by facts or legal policy."). Accordingly, we vacate the trial court's order summarily dismissing the proceedings.

¶6 Dempsey further requests that this court review and grant relief on his revised petition for post-conviction relief. The revised petition is not included in the record transmitted to this court, however. But even if it were included, the ruling on a petition for post-conviction relief is a matter for the trial court in the first instance.

CONCLUSION

¶7 For the foregoing reasons, we grant review and relief and remand for further proceedings consistent with this decision.

