

IN THE COURT OF APPEALS OF IOWA

No. 6-708 / 05-0819
Filed January 31, 2007

DAVID EARL MONTGOMERY,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Black Hawk County, George L. Stigler, Judge.

David Montgomery appeals the dismissal of his postconviction relief application. **AFFIRMED.**

Randal J. Giannetto of the Mowry Law Firm, Marshalltown, for appellant.

Thomas J. Miller, Attorney General, Thomas W. Andrews, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Kimberly A. Griffith, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Vaitheswaran, J., and Robinson, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2005).

VAITHESWARAN, J.

David Montgomery appeals the dismissal of his postconviction relief application. He contends: (1) “trial counsel was ineffective in that he did not convey the benefit of a plea bargain to [him] or the elements of the crime(s) alleged,” and (2) trial counsel provided ineffective assistance by failing “to call any witnesses to testify to his claim other than himself.”

With respect to the first ineffective-assistance-of-counsel claim, we find no indication that Montgomery raised the claim before the postconviction court and no indication that the claim was decided by the postconviction court. Therefore, Montgomery has not preserved error on this claim. *DeVoss v. State*, 648 N.W.2d 561, 563 (Iowa 2002) (“[W]e will not consider a substantive or procedural issue for the first time on appeal.”).¹

The second ineffective-assistance-of-counsel claim is premised on the first. As the first claim was not raised, postconviction counsel could not have been ineffective in failing to call witnesses on that claim.

We affirm the dismissal of Montgomery’s application for postconviction relief.

AFFIRMED.

¹ Montgomery also has not articulated any reason, let alone “sufficient reason,” for failing to raise this issue in the postconviction proceeding. See Iowa Code § 822.8 (2003); *Dunbar v. State*, 515 N.W.2d 12, 14-15 (Iowa 1994) (stating ineffectiveness of postconviction counsel amounts to sufficient reason to excuse applicant’s failure to raise issue in prior proceedings).