

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 18-0452

CITY OF MISSOULA,

Plaintiff and Appellee,

v.

STEPHEN LEUCHTMAN,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana Fourth Judicial District Court,
Missoula County, The Honorable Robert Deschamps III, Presiding

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

ISSUES PRESENTED.....1

STATEMENT OF THE CASE.....1

SUMMARY OF THE ARGUMENT3

STANDARD OF REVIEW5

ARGUMENT5

I. This Court should decline to review Leuchtman’s statutory and constitutional challenge to his GPS monitoring condition arising from a different case that has already been decided. If this Court does review the claim, it still fails5

 A. Facts related to Leuchtman’s previous and current attempts to challenge his GPS monitoring condition.....5

 B. Leuchtman’s challenge to his GPS Monitoring condition has already been decided and is procedurally barred7

 C. If Leuchtman’s claim is not procedurally barred, the GPS condition was reasonable and appropriate10

 1. Facts10

 2. Merits12

II. This Court should not consider Leuchtman’s claim that the GPS condition is punitive in nature and he is being punished for filing an appeal. If this Court does consider the claim, it still fails16

 A. Leuchtman’s claim is barred16

 B. If this Court considers the issue, Leuchtman’s GPS monitoring condition is not punitive in nature and did not subject him to retribution or punishment17

III. The district court properly affirmed the municipal court’s order denying Leuchtman’s motion to dismiss alleging a statutory speedy trial claim19

 A. Facts.....19

 B. Merits.....22

CONCLUSION24

CERTIFICATE OF COMPLIANCE.....24

APPENDIX26

TABLE OF AUTHORITIES

CASES

<i>Baker v. McCollan</i> , 443 U.S. 137 (1979).....	12
<i>Billings v. Layzell</i> , 242 Mont. 145, 789 P.2d 221 (1990).....	14
<i>Bragg v. McLaughlin</i> , 1999 MT 320, 297 Mont. 282, 993 P.2d 662, <i>overruled on other grounds by Essex Ins. Co. v. Moose’s Saloon, Inc.</i> , 2007 MT 202, 338 Mont. 423, 166 P.3d 451	8
<i>City of Missoula v. Leuchtman</i> , 2017 MT 303N, 390 Mont. 426, 407 P.3d 681	2, 6
<i>Coleman v. State</i> , 194 Mont. 428, 633 P.2d 624(1981).....	9
<i>Galen v. County of Los Angeles</i> , 477 F.3d 652 (9th Cir. 2007)	13
<i>Gollehon v. State</i> , 1999 MT 210, 296 Mont. 6, 986 P.2d 395	8
<i>In re Estate of Snyder</i> , 2009 MT 291, 352 Mont. 264, 217 P.3d 1027	8
<i>Jacobsen v. Allstate Ins. Co.</i> , 2009 MT 248, 351 Mont. 464, 215 P.3d 649	7
<i>Leuchtman v. City of Missoula</i> , 2017 Mont LEXIS 429, 388 Mont. 557, 397 P.3d 459	6, 9
<i>Maryland v. King</i> , 133 S. Ct. 1958 (2013).....	13
<i>Miller v. Eleventh Judicial Dist. Court.</i> , 2007 MT 58, 336 Mont. 207, 154 P.3d 1186	14

<i>Somont Oil Co. v. A & G Drilling</i> , 2008 MT 447, 348 Mont. 12, 199 P.3d 241	8
<i>Stack v. Boyle</i> , 342 U.S. 1 (1951).....	13, 14
<i>State v. Chesarek</i> , 1998 MT 15, 287 Mont. 215, 953 P.2d 698	22
<i>State v. Fitzgerald</i> , 283 Mont. 162, 940 P.2d 108 (1997).....	22, 23
<i>State v. Luke</i> , 2014 MT 22, 373 Mont. 398, 321 P.3d 70	5, 22
<i>State v. Martinez</i> , 2003 MT 65, 314 Mont. 434, 67 P.3d 307	17
<i>State v. Perry</i> , 232 Mont. 455, 758 P.2d 268 (1988).....	9
<i>State v. Pollack</i> , 1998 MT 105, 13, 288 Mont. 436, 958 P.2d 75	23
<i>State v. Southwick</i> , 2007 MT 257,339 Mont. 281, 169 P.3d 698	8
<i>State v. Spady</i> , 2015 MT 218, 380 Mont. 179, 354 P.3d 590	17
<i>State v. Van Dyken</i> , 242 Mont. 415, 791 P.2d 1350 (1990).....	8
<i>State v. Zimmerman</i> , 175 Mont. 179, 573 P.2d 174 (1977).....	8
<i>United States ex rel. Townsend v. Twomey</i> (7th Cir. 1971), 452 F.2d 350, 357, cert. denied, 409 U.S. 854	9
<i>United States v. Montalvo-Murillo</i> , 495 U.S. 711 (1990).....	13

<i>United States v. Salerno</i> , 481 U.S. 739 (1987).....	9, 12, 13
---	-----------

OTHER AUTHORITIES

Montana Code Annotated

§ 46-9-106.....	14
§ 46-9-108.....	14
§ 46-9-108(1).....	15
§ 46-9-108(1)(e)	15
§ 46-9-108(1)(e)(i).....	15
§ 46-9-108(2).....	15
§ 46-9-109(2).....	15
§ 46-9-111.....	14
§ 46-13-401(2).....	1, 5, 22, 23
§ 46-20-104(2).....	17
§ 46-20-701(2).....	17

Montana Rules of Appellate Procedure

Rule 12(1)(d)	16
Rule 12(1)(g)	16

United States Constitution

Amend. VIII.....	13
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Charles Alan Wright, Arthur R. Miller & Mary Kay Kane,

Federal Practice and Procedure,

Vol. 18B, § 4478.3, 733 (3d ed., West 2005).....	7
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ISSUES PRESENTED

1. Should this Court consider Appellant's challenge to the imposition of a GPS monitoring release condition, when this Court previously deemed waived Appellant's challenge to his release conditions in Appellant's original order of protection case? If so, was the GPS monitoring condition reasonable to ensure Appellant's compliance with the order of protection?
2. Has Appellant waived his argument that his GPS monitoring release condition had the effect of punishing him for filing an appeal by not first raising it in the municipal court and district court? If not, does this claim also fail on the merits?
3. Was Appellant denied a speedy trial under Mont. Code Ann. § 46-13-401(2)?

STATEMENT OF THE CASE

In 2016, Appellant Stephen Leuchtman was convicted in a separate case in the Missoula municipal court for violating an order of protection. (*See* Doc. 12 at 2, attached as Appellee's App. A; DA 18-0586, Doc. 2, 9/20/16 Sent. Order.) Leuchtman appealed to the district court, which affirmed his conviction. (*See* Appellee's App. A at 2; DA 18-0586, Doc. 15.) Leuchtman appealed to this Court,

which also affirmed his conviction. *City of Missoula v. Leuchtman*, 2017 MT 303N, ¶ 6, 390 Mont. 426, 407 P.3d 681.¹

During the order of protection appeal, the municipal court continued previously set conditions of bond, including the requirement that Leuchtman wear a GPS monitoring unit. (See Appellee’s App. A at 2; DA 18-0586, Doc. 2, 9/20/16 Bench Order; 4/13/16 Order Modifying Conditions of Release.) On January 17, 2017, Leuchtman falsely informed the GPS provider Compliance Monitoring Systems that the GPS restriction was lifted. (Appellee’s App. A at 2-3; CD labeled “Sentencing Hearing” at 4:40-6:10; Doc. 1, citation.)

Leuchtman was charged in municipal court with criminal contempt for not wearing his GPS unit. (Doc. 1, Citation; Doc. 1, 12/8/17 Opinion and Order; Appellee’s App. A at 2-3.) Leuchtman filed a motion to dismiss, alleging that the GPS monitoring condition imposed in his order of protection case was an unreasonable condition on his supervision. (Doc. 1, 9/27/17 Motion to Dismiss.) Leuchtman also filed a motion to dismiss alleging a statutory speedy trial violation. (Doc. 1, 11/17/17 Motion to Dismiss.) The municipal court denied both motions. (Doc. 1, 12/8/17 Order; 10/6/17 Order.)

¹ Following remittitur, the municipal court reimposed the 2016 sentencing order. Leuchtman’s second appeal in the order of protection case is pending before this court in DA 18-0586. The City is filing responses to this instant case and DA 18-0586 simultaneously.

Pursuant to a plea agreement, Leuchtman pled no contest to criminal contempt but reserved the right to appeal the municipal court's rulings on his previous motions to dismiss. (CD at 3:51-4:40, 7:00-7:20; Appellee's App. A at 4; Doc. 1, 12/13/17 Sent. Order.) Leuchtman appealed the issues to the district court. (Docs. 2, 7.) The district court affirmed the orders and conviction from the municipal court. (Appellee's App. A.) Leuchtman timely appeals.

STATEMENT OF THE FACTS

Facts related to Leuchtman's statutory speedy trial claim and his GPS monitoring condition are discussed herein.

SUMMARY OF THE ARGUMENT

This Court should decline to consider Leuchtman's challenge to the imposition of his GPS monitoring condition. This Court has already determined that Leuchtman waived arguments related to his release conditions by raising them for the first time in *City of Missoula v. Leuchtman*, the order of protection appeal. In this appeal, Leuchtman raises the same statutes, cases, and arguments as he did in *City of Missoula v. Leuchtman*. Leuchtman's appeal of this issue is barred by either *res judicata* or the law of the case. If this Court considers the claim, the GPS monitoring condition was reasonable because the municipal and district

courts assessed Leuchtman's ability to pay, the potential harm to the victim, and the necessity for real-time monitoring based on allegations of Leuchtman repeatedly violating the order of protection by contacting the victim.

For the first time in this instant appeal, Leuchtman argues that the municipal court's continuation of his GPS monitoring condition while his order of protection appeal was pending had the effect of punishing him for filing an appeal. This claim was not raised before the municipal court or the district court, thus, it is waived. If this Court considers the claim, the intent of the condition was not to punish Leuchtman, but to ensure his compliance with the order of protection and the safety of the victim. The costs associated with GPS monitoring are not related to retribution or punishment, but to cover the cost of monitoring.

The district court properly affirmed the municipal court's denial of Leuchtman's statutory speedy trial motion to dismiss. The omnibus hearing was continued multiple times at the behest of Leuchtman based on: (1) his frequent motions to disqualify judges; (2) his motion to continue the second omnibus hearing; and (3) his vacillations between wanting private counsel, a public defender, and eventually deciding to proceed pro se. The delay in this case was attributable solely to Leuchtman because the City was ready to proceed at the first omnibus hearing and did not ask for any continuances. Thus, good cause existed to extend the six-month statutory speedy trial period.

STANDARD OF REVIEW

On an appeal from a lower court, the district court functions as an intermediate appellate court. *State v. Luke*, 2014 MT 22, ¶ 9, 373 Mont. 398, 321 P.3d 70 (citations omitted). When reviewing the decision of the district court in such an appeal, this Court reviews the case as if the appeal had originally been filed in this Court, applying the appropriate standard of review. *Id.*

Whether the right to speedy trial has been violated is a question of law, and this Court reviews the trial court's legal conclusions to determine whether the court's interpretation of law is correct. *Luke*, ¶ 10. This Court will not disturb any factual findings underlying the trial court's application of Mont. Code Ann. § 46-13-401(2) unless those findings are shown to be clearly erroneous. *Id.* The court's application of controlling legal principles to its factual findings is a mixed question of law and fact, which the Court reviews *de novo*. *Id.*

ARGUMENT

I. This Court should decline to review Leuchtman's statutory and constitutional challenge to his GPS monitoring condition arising from a different case that has already been decided. If this Court does review the claim, it still fails.

A. Facts related to Leuchtman's previous and current attempts to challenge his GPS monitoring condition

Throughout the municipal court and district court proceedings in the original order of protection case, Leuchtman did not raise any issues with his release

conditions arising from the protection order. Leuchtman contested his conditions of release and bond conditions before this Court for the first time, arguing the conditions were unreasonable and prejudiced him. *Leuchtman*, ¶ 6. This Court declined to consider Leuchtman's arguments, reasoning: "We will not consider Leuchtman's claims regarding bond revocation and conditions of release because they were not raised in the District Court." *Id.* ¶ 7.

Next, although Leuchtman was not incarcerated, he attempted to collaterally attack the GPS monitoring condition by filing a petition for a writ of habeas corpus in this Court, where he specifically contested "the bail condition of GPS monitoring" which he contended would "result in his incarceration unless the Court steps in." *Leuchtman v. City of Missoula*, 2017 Mont LEXIS 429, 388 Mont. 557, 397 P.3d 459. This Court denied the petition.

In this instant criminal contempt case, Leuchtman challenged the GPS monitoring condition in both the municipal court and district court. The district court's order affirming the municipal court's conviction noted:

The decision to place the Appellant on GPS monitoring as a condition of release was made after evidence and argument was presented in a half-hour contested hearing before the Municipal Court in a case which he has since unsuccessfully appealed to both this Court and the Montana Supreme Court. The order requiring the GPS unit was not appealed and should have been when the case it pertained to was appealed. At a minimum, Leuchtman could have sought relief from the GPS order in this or the Supreme Court, but did not. His failure to seek an appeal or other relief from the underlying order is arguably fatal to his current appeal.

(Appellee's App. A at 4-5.)

B. Leuchtman's challenge to his GPS Monitoring condition has already been decided and is procedurally barred.

As an initial matter, Leuchtman attempts to contest the GPS monitoring condition in this instant criminal contempt proceeding separate from the underlying order of protection proceeding from which the condition was imposed.² As such, the issue is not properly before this Court. In any event, Leuchtman's claim has already been decided and is either barred by *res judicata* or the law of the case.

The law of the case doctrine expresses generally the courts' reluctance to reopen issues that have been settled during the course of litigation. *Jacobsen v. Allstate Ins. Co.*, 2009 MT 248, ¶ 29, 351 Mont. 464, 215 P.3d 649. Applying the law of the case doctrine *generally* arises in the context of binding both the parties and the district court to the decisions of this Court in any *subsequent* proceedings. *Jacobsen*, ¶ 29 (stating that in this context, the concept is properly referred to as the "Mandate Rule") (*citing* Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* vol. 18B, § 4478.3, 733 (3d ed., West 2005)).

² Leuchtman also contests the GPS monitoring condition in his second appeal of the order of protection case, DA 18-0586, pending before this Court.

A claim is barred by *res judicata* if four criteria are met: the parties or their privies are the same; the subject matter of the claim is the same; the issues are the same and relate to the same subject matter; and the capacities of the persons are the same in reference to the subject matter and the issues. *Bragg v. McLaughlin*, 1999 MT 320, ¶ 16, 297 Mont. 282, 993 P.2d 662, *overruled on other grounds by Essex Ins. Co. v. Moose’s Saloon, Inc.* 2007 MT 202, ¶ 16 n.2, 338 Mont. 423, 166 P.3d 451. Principles of *res judicata* procedurally bar a party from raising issues that were or could have been raised on direct appeal. *Gollehon v. State*, 1999 MT 210, ¶ 51, 296 Mont. 6, 986 P.2d 395.

The principle at stake here—irrespective of its label as “*res judicata*”³ or “law of the case”—is that once an issue has been finally decided, it cannot again be litigated. *State v. Zimmerman*, 175 Mont. 179, 185, 573 P.2d 174, 177 (1977); *see also In re Estate of Snyder*, 2009 MT 291, ¶ 6, 352 Mont. 264, 217 P.3d 1027 (“The law-of-the-case doctrine is based on policies of judicial economy and

³ The law of the case doctrine is only technically distinguishable from the interrelated theory of *res judicata*. *See Somont Oil Co. v. A & G Drilling*, 2008 MT 447, ¶¶ 9-11, 348 Mont. 12, 199 P.3d 241 (distinguishing law of the case from *res judicata*, the latter doctrine being applicable to actions not “still pending” and acts to bar a party from relitigating a claim that it has already had an opportunity to litigate); *cf. State v. Southwick*, 2007 MT 257, ¶ 15 n.1, 339 Mont. 281, 169 P.3d 698 (“‘[W]hether labeled *res judicata* or law of the case, the effect is the same,’ because both doctrines prevent appellants from raising issues previously decided by the Court.”) (*quoting State v. Van Dyken*, 242 Mont. 415, 426, 791 P.2d 1350, 1356 (1990)).

finality of judgments . . . a prior decision of this Court resolving an issue between the same parties is binding and may not be relitigated.”). One of the primary reasons for adherence to the principle is judicial economy.

[R]elitigation would mean a waste of judicial effort, risking a cluttering of the court’s limited resources with collateral attacks already decided on the merits. As one court put it, “judicial economy dictates restrictive limitations of reruns.” *United States ex rel. Townsend v. Twomey* (7th Cir. 1971), 452 F.2d 350, 357, *cert. denied*, 409 U.S. 854

Coleman v. State, 194 Mont. 428, 438-39, 633 P.2d 624, 630 (1981); *accord State v. Perry*, 232 Mont. 455, 463-64, 758 P.2d 268, 273-74 (1988).

Leuchtman has already contested his conditions of release and bond conditions in his previous direct appeal in the order of protection case. The claims previously raised in *Leuchtman* were based on *United States v. Salerno*, 481 U.S. 739, 754 (1987) and Mont. Code Ann. § 46-9-108, the same authorities Leuchtman relies upon in this appeal. Appellant’s previous opening brief contained the same arguments—and, in some instances—the exact same language raised in this instant appeal. (*Compare* Appellant’s Br. at 9-18 to DA 17-0155, 6/22/17 Appellant’s Opening Br.) This Court declined to consider Leuchtman’s release conditions in *Leuchtman* because he waived them. *Leuchtman*, ¶ 7. Moreover, Leuchtman specifically contested the GPS condition in his petition for writ of habeas corpus and this Court denied the petition. Leuchtman’s claim has already been litigated

and he should not get a third chance to litigate his claim in a wholly separate proceeding. Under either the law of the case or *res judicata*, the claim fails.

C. If Leuchtman’s claim is not procedurally barred, the GPS condition was reasonable and appropriate.

1. Facts

On April 13, 2017, the municipal court held a motion hearing in the underlying order of protection case regarding the City’s request that Leuchtman be placed on GPS monitoring. (CD labeled “Motions Hearing,” available in case DA 18-0586 (Leuchtman’s other pending appeal.)⁴) Leuchtman submitted an income expense sheet approximating his monthly income and expenses and argued that he could not afford the costs of GPS monitoring. (CD at 2:20-4:50.) The municipal court inquired about some of Leuchtman’s expenses. (CD at 4:55-5:50.) Upon the court’s inquiry, the City averred that it could not independently verify Leuchtman’s expenses without any supporting documents. Defense counsel stated that Leuchtman also acknowledged that “it is an estimated monthly income. . . .” (CD at 15:00-15:30.)

In support of the City’s motion for GPS monitoring, the City noted that Leuchtman had an extensive history of violating the order of protection and

⁴ This information constitutes information outside this record on appeal. The City only provides this information in the event this Court decides to take judicial notice of the other pending appeal, rejects the City’s contention that the issue is procedurally barred, and proceed to the merits.

“persistence . . . to attempt to continue to reach out and initiate contact” with the victim. The City cited the record indicating “communications that [Leuchtman] had made” to the victim saying “I saw you [in locations in Missoula]” which caused the City concern because Leuchtman purportedly lived in Hamilton. The City observed that it had no ability in real time to monitor his physical presence through other means. The City argued that such monitoring ensured the “safety of the victim” and ensured the City’s ability to verify Leuchtman’s location. (CD at 5:50 -8:45.)

The municipal court noted that it was “clear from the transcripts” that Leuchtman “isn’t getting it. He’s not getting that there are these restrictions that he needs to follow.” (CD at 11:00-11:20.) The municipal court noted that the record showed a “history” of noncompliance with the order of protection and Leuchtman did not believe that he “needs to follow it.” (CD at 11:48-12:05.)

Upon inquiry from the court, Leuchtman stated he was employed as a political consultant. (CD at 8:50-9:00.) The court rejected the notion that Leuchtman could not afford GPS monitoring, observing that Leuchtman had just posted \$20,000 in bond, hired a private attorney for his pending cases, and had family support. (CD at 13:10-14:02.) The court ordered that Leuchtman be monitored via GPS and noted it would not “break the bank” under the

circumstances. (CD at 21:15-21:30; *see* DA 18-0586, Doc. 2, 4/13/16 Order Modifying the Conditions of Release.)

On appeal in this case, the district court noted that the issue was likely procedurally barred but observed it “also fails on the merits” because the GPS monitoring condition was “based on substantial evidence that it was necessary to insure [sic] the Defendant’s compliance with his release conditions and that he had the financial means to pay for it.” (Appellee’s App. A at 5.) The district court observed that the municipal court considered Leuchtman’s individualized circumstances, the need to protect the victim, and Leuchtman’s compliance with his release conditions. (Appellee’s App. A at 6.)

2. Merits

The Eighth Amendment to the United States Constitution provides, in part, “[e]xcessive bail shall not be required. . . .” The Supreme Court has assumed without deciding that this prohibition applies against the states. *Baker v. McCollan*, 443 U.S. 137, 144 n.3 (1979). It has also suggested the excessive bail clause applies to conditions of pretrial release as well as the amount of or availability of bail. *See United States v. Salerno*, 481 U.S. 739, 754 (1987). The Court explained, “[t]he only arguable substantive limitation of the [Excessive] Bail Clause is that the Government’s proposed conditions of release or detention not be

‘excessive’ in light of the perceived evil” to be prevented, or, stated conversely, in light of the valid interests the government seeks to protect. *Id.*

Appropriate functions of bail and conditions of release include not only ensuring the defendant appears for trial but also ensuring the safety of the victim and the community and preventing recidivism while the arrestee is awaiting trial. *See, e.g., Salerno*, 481 U.S. at 747, 754-55; *United States v. Montalvo-Murillo*, 495 U.S. 711, 714 (1990) (observing that among the considerations at a bail hearing are whether the defendant poses a risk of flight or a threat to the community); *Maryland v. King*, 133 S. Ct. 1958 (2013) (citing *Salerno* and explaining “[a]n arrestee’s past conduct is essential to an assessment of the danger he poses to the public, and this will inform a court’s determination whether the individual should be released on bail.”) Even if a condition of release is imposed for such valid purposes, it may be excessive under the Eighth Amendment if it is not “reasonably calculated to fulfill” the government’s valid purposes. *Galen v. County of Los Angeles*, 477 F.3d 652, 659-60 (9th Cir. 2007) (citing *Stack v. Boyle*, 342 U.S. 1, 5 (1951), and *Salerno*, 481 U.S. at 754).

Whether the amount of bail or conditions of release are excessive must be based on an assessment of the facts of the particular case, including “the nature and circumstances of the offense charged, the weight of the evidence against him, the financial ability of the defendant to give bail and the character of the defendant.”

Stack, 342 U.S. at 5-6 n.3. The test remains whether other reasonable, less restrictive means exist that will achieve the government’s compelling interests—the protection of the victim and society, preventing recidivism, and ensuring the defendant’s appearance at trial. *Billings v. Layzell*, 242 Mont. 145, 151-52, 789 P.2d 221, 225 (1990).

Consistent with these constitutional principles, Montana’s bail statutes provide that a person charged with a noncapital crime “shall be released pending trial if reasonable conditions can be imposed to protect the community or any particular individual” and to ensure the appearance of the defendant at trial.

Miller v. Eleventh Judicial Dist. Court., 2007 MT 58, ¶ 8, 336 Mont. 207, 154 P.3d 1186 (citing Mont. Code Ann. §§ 46-9-106, -108, and -111). When determining whether detention or release is appropriate and on what conditions, the court “shall take into account the available information” regarding the following factors:

- (a) the nature and circumstances of the offense charged, including whether the offense involved the use of force or violence;
- (b) the weight of the evidence against the defendant;
- (c) the history and characteristics of the defendant, including:
 - (i) the defendant’s character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to alcohol or drug abuse, criminal history, and record concerning the appearance at court proceedings; and

- (ii) whether at the time of the current arrest or offense, the defendant was on probation, on parole, or on other release pending trial, sentencing, appeal, or completion of sentencing for an offense;
- (d) the nature and seriousness of the danger to any person or the community that would be posed by the defendant's release; and
- (e) the property available as collateral for the defendant's release to determine if it will reasonably ensure the appearance of the defendant as required.

Mont. Code Ann. § 46-9-109(2).

Montana Code Annotated § 46-9-108(1) contains a nonexclusive list of pretrial conditions that may be imposed to “reasonably ensure the appearance of the defendant as required or that will ensure the safety of any person or the community[,]” including the condition that the defendant shall avoid all contact with the alleged victim of the crime. Mont. Code Ann. §§ 46-9-108(1), (1)(e), (1)(e)(i). However, “[t]he court may not impose an unreasonable condition that results in pretrial detention of the defendant and shall subject the defendant to the least restrictive condition or combination of conditions that will ensure the defendant's appearance and provide for protection of any person or the community.” Mont. Code Ann. § 46-9-108(2).

The GPS monitoring condition was reasonable and was appropriately tailored to achieve the government's compelling interest in protecting the victim and enforcing the order of protection. The district court considered allegations

regarding Leuchtman's frequent violations of the protection order and communications with the victim, which necessitated real-time monitoring to ensure he was not violating the order of protection. (Appellee's App. A at 5-6.) The district court considered the municipal court's assessment of Leuchtman's estimated financial ability to pay GPS monitoring, his employment, his family support, and his financial posture to conclude that he had the ability to pay for GPS monitoring. (*Id.*) The district court properly determined that the GPS condition was reasonable and appropriate.

II. This Court should not consider Leuchtman's claim that the GPS condition is punitive in nature and he is being punished for filing an appeal. If this Court does consider the claim, it still fails.

A. Leuchtman's claim is barred

Leuchtman argues that the municipal court's continuation of the GPS condition while his appeal was pending "had the effect of punishing" him for filing an appeal. (Appellant's Br., Headnote III at 18-19.⁵) Leuchtman does not cite to the record or present any authority supporting his claims. Apart from Leuchtman failing to comply with this Court's Rules of Appellate Procedure (Rules 12(1)(d) and (g)) and his challenge to his GPS condition being waived in his order of

⁵ Leuchtman omitted page numbers in his opening brief. The City estimates the page numbers.

protection case as stated above, this argument is not properly before this Court because it was also waived in this case.

Leuchtman never raised this argument in the municipal court or district court in this criminal contempt case, thus, the courts never had the opportunity to consider the argument. (*See* Doc 1, 9/27/17 Motion to Dismiss (GPS Monitoring condition); Doc. 7 (Leuchtman’s district court opening brief).) “The rule is well established that this Court will not address an issue raised for the first time on appeal. A party may not raise new arguments or change its legal theory on appeal. The reason for the rule is that it is fundamentally unfair to fault the trial court for failing to rule on an issue it was never given the opportunity to consider.” *State v. Martinez*, 2003 MT 65, ¶ 17, 314 Mont. 434, 67 P.3d 307 (citations omitted); *see also* Mont. Code Ann. § 46-20-104(2) (“Failure to make a timely objection during trial constitutes a waiver of the objection except as provided in 46-20-701(2).”). This Court should not consider this issue.

B. If this Court considers the issue, Leuchtman’s GPS monitoring condition is not punitive in nature and did not subject him to retribution or punishment.

This Court rejected a similar challenge to fees applicable to the 24/7 Sobriety Program, where the defendant asserted that the effect of the fee requirement as a release condition was punitive and amounted to pretrial punishment. *State v. Spady*, 2015 MT 218, ¶ 35, 380 Mont. 179, 354 P.3d 590.

This Court concluded that the fee for the sobriety program was “similar to other fees imposed at the pretrial phase, whereby the defendant forfeits some money for the privilege of release.” *Id.* This Court observed that the fee was “associated entirely with the cost of the testing program, not with traditional notions of punishment such as restitution or retribution.” *Id.* Finally, this Court concluded that the intent of the sobriety program is to protect the public from repeat drunk drivers and provide pretrial prevention options to judges. *Id.* Thus, this Court concluded that the fee was not excessive and had no punitive impact on criminal defendants. *Id.*

The same analysis in *Spady* applies here. Leuchtman forfeited money to pay for GPS monitoring in exchange for his release. The GPS monitoring fee is associated with the cost of monitoring, not for punishment. (*See* DA 18-0586, Doc. 25, “Community Supervision Alternatives,” Supervision Services (detailing costs of maintaining GPS tracking bracelet).) The intent of GPS monitoring was to provide real-time monitoring of Leuchtman, address concerns about potential violations of the order of protection, and to protect the victim. (Appellee’s App. A at 5-6.) The intent of the condition was not to punish Leuchtman. The condition was not punitive and was reasonable.

III. The district court properly affirmed the municipal court's order denying Leuchtman's motion to dismiss alleging a statutory speedy trial claim.

A. Facts

Leuchtman was charged by citation with criminal contempt in municipal court. (Doc. 1, Citation; Doc. 1, 12/8/17 Opinion and Order; Appellee's App. A at 3.) On May 17, 2017, Leuchtman made an initial appearance, pled not guilty, and indicated that he would retain a private attorney to represent him. (Doc. 1, 5/17/17 Order of Release and Order Setting Omnibus; Doc. 1, Acknowledgment of Rights; Doc. 1, 12/8/17 Opinion and Order.)

At the July 18, 2017 omnibus hearing, Leuchtman appeared without counsel. (Doc. 1, 12/8/17 Opinion and Order.) Municipal Court Judge Beal asked if Leuchtman still intended to hire a private attorney or if he would prefer appointment of a public defender. (*Id.*) Leuchtman stated he would request a public defender but might wish to proceed pro se in the future. (*Id.*) Leuchtman also stated he wanted to file motions to disqualify Judge Beal. (*Id.*) Judge Beal transferred the matter to Judge Jenks and reset the omnibus hearing for August 14, 2017. (Doc. 1, 12/8/17 Opinion and Order; Doc. 1, 7/18/17 Bench Order.)

At the August 14, 2017 omnibus hearing, Leuchtman appeared with OPD counsel. (Doc. 1, 8/14/17 Bench Order; Doc. 1, 7/25/17 Notice of Appearance and

Request for Discovery; Appellee's App. A at 3.) Judge Jenks asked Leuchtman if he still wanted OPD to represent him, and Leuchtman stated that he did, but could change his mind at a later date. (Appellee's App. A at 3.) Leuchtman expressed concern with Judge Jenks remaining on the case and stated he intended to move to disqualify Judge Jenks. (Doc. 1, 12/8/17 Opinion and Order; Appellee's App. A at 3.) Leuchtman's OPD counsel moved to continue the omnibus hearing. (Appellant's App. A at 8-9.) Judge Jenks ordered that the omnibus hearing be continued to October 3, 2017 and set a briefing schedule on the motion to disqualify. (Doc. 1, 8/14/17 Order of Continuance; Doc. 1, 12/8/17 Opinion and Order; Appellee's App. A at 3-4.)

On September 5, 2017, Judge Jenks ruled that another judge would be assigned the case and reset the omnibus hearing for September 27, 2017. (Doc. 1, 9/5/17 Bench Order; Appellee's App. A at 4; Doc. 1, 12/8/17 Opinion and Order.) The omnibus hearing was held on September 27, 2017, at which time the court set trial for December 14, 2017. (Doc. 1, 9/27/17 Omni. Hr'g Memo. and Scheduling Order; Doc. 1, 12/8/17 Opinion and Order; Appellee's App. A at 4.) During the omnibus hearing, Leuchtman informed the court that he decided to proceed pro se. (Appellee's App. A at 4.) The court ordered that Leuchtman file "all motions with the Court on or before November 14, 2017." (Doc. 1, 9/27/17 Omni. Hr'g Memorandum and Scheduling Order.)

On November 17, 2017, three days after the court’s deadline to file motions, Leuchtman filed a motion to dismiss based on an alleged statutory speedy trial violation. (Doc. 1, 11/17/17 Motion to Dismiss.)⁶ On December 8, 2017, the municipal court denied the motion, reasoning that the delay in the case arose “solely from the Defendant’s own decisions to file additional motions and his uncertainty about legal representation.” (Doc. 1, 12/8/17 Opinion and Order.) On December 13, 2017, Leuchtman pled no contest to criminal contempt, reserving his right to appeal the denial of his speedy trial motion. (Doc. 1, 12/13/17 Sent. Order.)

Leuchtman appealed the issue before the district court, arguing he did not ask for a postponement of his case. The district court disagreed, summarizing Leuchtman’s multiple motions to disqualify judges, his assigned counsel’s motion to continue the second omnibus hearing, and Leuchtman’s vacillations between wanting private counsel, a public defender, and eventually deciding to proceed pro se. The district court reasoned that the City did not move or cause any of the continuances and “each delay was caused by actions of the Defendant or his counsel.” The district court concluded that all the delays constituted “good

⁶ Leuchtman also submitted multiple additional pro se motions. (*See* Doc. 1, 5/15/17 Motion to dismiss based on GPS monitoring condition; 9/27/17 2nd Motion to Dismiss GPS based on GPS monitoring condition; 9/27/17 motion to compel.)

cause” sufficient to toll the statutory six-month speedy trial rule. (Appellee’s App. A at 8-9.)

B. Merits

Leuchtman argues that his statutory speedy trial right was violated because he was not tried within the six-month time period as specified in Mont. Code Ann. § 46-13-401(2). (Appellant’s Br. at 20-23, Headnote IV.) Leuchtman argues that he did not “move to postpone the trial nor did he waive his right to a speedy trial.” (Appellant’s Br. at 20.)

Montana Code Annotated § 46-13-401(2) provides:

After the entry of a plea upon a misdemeanor charge, the court, unless good cause to the contrary is shown, shall order the prosecution to be dismissed, with prejudice, if a defendant whose trial has not been postponed upon the defendant’s motion is not brought to trial within 6 months.

“This requirement applies, however, only if (1) the trial has not been postponed upon the defendant’s motion and (2) the State has not shown good cause for the delay.” *Luke*, ¶ 13 (internal citations and quotations omitted.) Any pretrial motion for continuance filed by a defendant which has the incidental effect of delaying the trial beyond the six-month time limit could be said to “postpone trial” for purposes of Mont. Code Ann. § 46-13-401(2). *State v. Fitzgerald*, 283 Mont. 162, 166-67, 940 P.2d 108, 111 (1997); *see also State v. Chesarek*, 1998 MT 15, ¶ 15, 287 Mont. 215, 953 P.2d 698 (the six-month limitation did not continue to apply

after Chesarek’s motion for a continuance). This Court has specifically held that a delay from a defendant’s motion to continue an omnibus hearing constituted a “good cause” exception under Mont. Code Ann. § 46-13-401(2). *State v. Pollack*, 1998 MT 105, ¶¶ 4, 13, 288 Mont. 436, 958 P.2d 75.

As in *Fitzgerald*, Leuchtman “sought or caused several postponements that necessitated the delay of his trial.” *Fitzgerald*, 283 Mont. at 167, 940 P.2d at 111. The municipal court accommodated Leuchtman’s: (1) frequent requests to substitute multiple judges; (2) vacillations between wanting private counsel, obtaining OPD counsel, and proceeding pro-se; (3) multiple pretrial motions, including his counsel’s motion to continue the second scheduled omnibus hearing. Each delay of the omnibus hearing was asked for or caused by Leuchtman. At no point did the City request any continuance for any purpose. The City was instead prepared to proceed with the first omnibus hearing on July 18, 2017. (Doc. 1, 12/8/17 Order.)

The district court correctly affirmed the municipal court’s denial of Leuchtman’s statutory speedy trial claim.⁷

⁷ Leuchtman never raised a constitutional speedy trial claim and disclaims such an analysis before this Court on appeal. (See Doc. 1, 11/17/17 Motion to Dismiss; Doc 7; Appellant’s Br. at 21 (“No *Ariegwe* analysis is necessary. No Constitutional analysis is necessary in this matter.”))

CONCLUSION

This Court should affirm the district court’s affirmance of Leuchtman’s conviction and sentence by the municipal court.

Respectfully submitted this 9th day of September, 2019.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 5,446 words, excluding certificate of service and certificate of compliance.

/s/ Roy Brown
ROY BROWN

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 18-0452

CITY OF MISSOULA,

Plaintiff and Appellee,

v.

STEPHEN LEUCHTMAN,

Defendant and Appellant.

APPENDIX

D.C. Doc 12App. A

CERTIFICATE OF SERVICE

I, Roy Lindsay Brown, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 09-09-2019:

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