

IN THE CRIMINAL COURT OF HAMILTON COUNTY, TENNESSEE

STATE OF TENNESSEE,)	
<i>Plaintiff,</i>)	
)	No. 305689
v.)	
)	Division II
IRA THOMAS,)	
<i>Defendant.</i>)	

**DEFENDANT IRA THOMAS' MOTION NO. 1: MOTION TO DISMISS
DEFECTIVE PRESENTMENT PURSUANT TO RULE 12 (b)(2)(B) OF THE
TENNESSEE RULES OF CRIMINAL PROCEDURE**

Comes now the Defendant, Ira Thomas, by and through his attorney, Michael Holloway, pursuant to Rule 12 (b)(2)(B) of the *Tennessee Rules of Criminal Procedure*, and moves this Honorable Court for an Order dismissing Counts One and Two of the Presentment in the above styled case.

As grounds for this Motion, Mr. Thomas would show that the Presentment is defective and does not meet the requirements of Tenn. R. Crim. P. 12 (b)(2)(B) because it fails to properly charge Mr. Thomas with a criminal offense. Furthermore, Mr. Thomas would show that the State's application of the RICO statute is unconstitutional as it relates to Mr. Thomas' conduct and activities.

BACKGROUND

Mr. Thomas is charged in Counts One and Two of a twenty-five count Presentment alleging violations of Tennessee's RICO statute. Count One sets forth the racketeering enterprise and purpose of the enterprise. Paragraph 54 of Count One Section Two of the Presentment alleges the following past convictions as incidents of racketeering activity against Mr. Thomas:

Ira Thomas, aliases "Ira Maddox" and "Mad Max" pled guilty to Aggravated Assault in Hamilton County Criminal Court on October 23, 2012 in Docket number 284577,

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which qualifies as a criminal gang offense as defined under T.C.A. § 40-35-121 (a)(3)(A&B).

Count Two alleges racketeering conspiracy and incorporates the same offenses listed in Paragraph 54 of Count One Section Two. Count Two does not specifically or factually charge alleged incidents of ongoing racketeering activity against Mr. Thomas independent of or in addition to those listed in Paragraph 54 of Count One Section Two.

LAW AND ARGUMENT

A. The Presentment is defective as to Mr. Thomas because the State has alleged *only one* past criminal gang offense.

Count One of the Presentment charges Mr. Thomas with violating T.C.A. § 39-12-204 (c), which states that it is “unlawful for any person employed by, or associated with, any enterprise to knowingly conduct or participate, directly or indirectly, in the enterprise through a *pattern of racketeering activity* or the collection of any unlawful debt.” *Id.* (emphasis added) T.C.A. § 39-12-203 (6) defines a pattern of racketeering activity as:

Engaging in at least two (2) incidents of racketeering conduct that have the same or similar intents, results, accomplices, victims, or methods of commission or otherwise are interrelated by distinguishing characteristics and are not isolated incidents; provided, that at least one (1) of such incidents occurred after July 1, 1986, and that the last of the incidents occurred with two (2) years after a prior incident of racketeering conduct.

Id. Count Two of the Presentment charges Mr. Thomas with violating T.C.A. § 39-12-204 (d), which states, “it is unlawful for any person to conspire to or endeavor to violate subsection (a), (b), or (c).”

As mentioned above, the State is relying on Mr. Thomas’ conviction in Hamilton County Criminal Court docket number 284577 as a prior incident that is part of an ongoing pattern of racketeering activity. The Presentment in the present case fails to list or allege any other conviction for a criminal gang offense that may be used as a predicate act for purposes of Tennessee’s RICO statute. T.C.A. § 40-35-121 (a)(3).

Because Count One of the Presentment, as it relates to Mr. Thomas, fails to properly charge him with a criminal offense, and because Count Two's incorporation of an improper charge, Mr. Thomas respectfully requests this Honorable Court enter an Order dismissing Counts One and Two of the Presentment as they relate to Mr. Thomas.

Alternatively, Mr. Thomas submits that the Presentment is defective as to Mr. Thomas because, in addition to only alleging one isolated incident of felonious conduct that could qualify as a pattern of racketeering activity, the Presentment fails to allege any facts that indicate Mr. Thomas is part of any ongoing criminal enterprise or activity.

B. The State's reliance on the October 23, 2012, plea to aggravated assault amounts to an unconstitutional application of T.C.A. § 39-12-201, et seq., because the offense was alleged to have been committed prior to the July 1, 2012, incorporation of criminal gang offenses in to Tennessee's RICO statute.

Notwithstanding the foregoing, Mr. Thomas further argues that the State's use of a criminal gang offense which occurred prior to the incorporation of that offense into Tennessee's RICO statute violates the ex post facto clauses of Article I, Section 10 of the United States Constitution and Article I, Section 11 of the Tennessee Constitution as they apply to Mr. Thomas.

Generally, the ex post facto prohibition is aimed at laws that "retroactively alter the definition of crimes or increase the punishment for criminal acts." *Kaylor v. Bradley*, 912 S.W. 2d 728, 732 (Tenn. Cr. App. 1995). The United States Supreme Court has identified four categories of laws that violate the ex post facto clause. *See, Calder v. Bull*, 3 U.S. 386, 390-91 (1798). The Tennessee Supreme Court held that the reach of ex post facto clause in the Tennessee Constitution is broader than the U.S. Constitution. *Miller v. State*, 584 S.W. 2d 758, 761 (Tenn. 1979). In addition to the United States Supreme Court in *Calder*, the Tennessee Supreme Court has held that "every law which, in relation to the offense or its consequences, alters the situation of a person to his disadvantage," violates the ex post facto clause of the Tennessee Constitution. *Id.*

Even if the State could show that the October 23, 2012 plea to aggravated assault qualifies as a criminal gang offense and incident of racketeering activity, the use of this offense as an incident committed in furtherance of racketeering activity, without proof of ongoing criminal activity, amounts to an ex post facto *application* of Tennessee's RICO statute. (emphasis added) The incorporation of criminal gang offenses into Tennessee's RICO statute took effect July 1, 2012. 2012 Tenn. Pub. Acts 1090. The offense date for Mr. Thomas' only alleged incident of racketeering activity was April 23, 2012. At the time of filing this Motion, Mr. Thomas has no pending charges other than the present matter.

Applying Tennessee's RICO statute, without any other proof of ongoing criminal activity, to an isolated felony committed before the incorporation of criminal gang offenses into the RICO statute is a clear violation of the ex post facto clauses of both the Tennessee Constitution and the United States Constitution and runs afoul of the express legislative intent of the RICO statute. T.C.A. § 39-12-202 (b)(1).

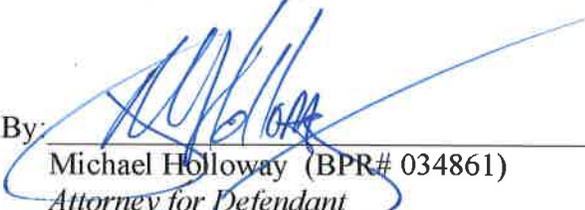
Because of the foregoing, and without proof of any ongoing pattern of racketeering activity, Mr. Thomas respectfully requests this Honorable Court enter an Order dismissing Counts One and Two as they relate to Mr. Thomas. In the alternative to dismissal, Mr. Thomas respectfully moves this Honorable Court for an Order suppressing all evidence related to the commission of a criminal gang offense before July 1, 2012.

CONCLUSION

Mr. Thomas submits the State has alleged, as incidents of racketeering activity, *one* past conviction for an alleged criminal gang offense. (emphasis added) Mr. Thomas further submits that the incorporation of that conviction into Tennessee's RICO statute and application thereof, without proof of further ongoing racketeering activity, is in violation of both the United States Constitution

and the Tennessee Constitution. Therefore, Mr. Thomas respectfully requests this Honorable Court enter an Order dismissing the Counts One and Two of the Presentment against him in their entirety.

Respectfully submitted,

By: 

Michael Holloway (BPR# 034861)

Attorney for Defendant

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CERTIFICATE OF SERVICE

I hereby certify that an exact copy of this pleading has been served personally to the following:

Hamilton County District Attorney
Neal Pinkston, District Attorney
600 Market Street
Chattanooga, Tennessee 37402

This 30th day of November, 2018.



J. Michael Holloway