

★ DWI VERDICT

Overturmed

- Marks first conviction set aside in lab controversy
- Experts predict ruling will trigger wave of appeals

BY ANN GIVENS

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A Nassau judge yesterday threw out a Hicksville woman's drunken driving conviction because of "potentially tainted evidence" from the county police crime lab, a ruling that could spur a flood of challenges to other convictions.

Judge George Peck ruled that in Erin Marino's nonjury case, he may have ruled differently had he known about the problems at the lab, which did not surface until about four months after her conviction.

"I expect an avalanche of motions and litigation stemming from this decision," said William Kephart, president of the Nassau Criminal Courts Bar Association.

Lawyers and experts have said it is impossible to know how many cases could be affected, since no one knows how far back the error-plagued lab's problems go. District Attorney Kathleen Rice's office has said

the lab tested drug samples from about 900 cases a year since 2007, and 10 percent of those are being retested.

Prosecutors said they plan to appeal Peck's decision to grant a new trial to Marino. Rice's office had no further comment.

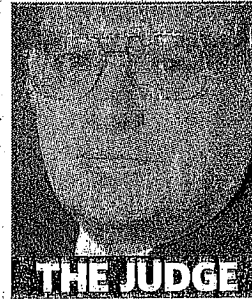
Brian Griffin, the Garden City lawyer representing Marino, called for Rice to suspend prosecutions and retest all evidence that came through the lab.

"Whatever the lab has put out will not be believed by a jury," Griffin said.

Marino was convicted in August of aggravated vehicular assault for slamming into a minivan while driving drunk on June 25, 2009, on Route 106 in Glen Cove.

Her lawyer sued Dec. 14 to overturn the conviction — 11 days after the police crime lab was put on probation by a national lab accreditation agency that cited 26 violations.

Rice and Nassau County Executive Edward Mangano closed the lab's drug-testing unit on



George Peck

PHOTO BY RICK KOPSTEIN

The case: Erin Marino, 30, of Hicksville, who was convicted last year of aggravated vehicular assault, argues that the verdict against her should be thrown out. Her attorney says the verdict in the nonjury trial would likely have been different if the judge had heard evidence of testing errors at the Nassau County police crime lab.

The decision: Nassau County Judge George Peck agrees yesterday to vacate the verdict, saying that it's wrong for prosecutors to support closing the lab based on testing problems while maintaining in court that the lab tests are still reliable.

Impact: Prosecutors say they will appeal. But the president of the local defense bar association says the decision opens the door for "infinite" challenges.

Feb. 10 and shut the entire lab a week later, after revelations supervisors may have failed to disclose inaccurate testing.

Peck said that was the right move — and at odds with the prosecution's argument in the Marino case.

He asked how the district attorney's office can "publicly give a vote of no confidence to the laboratory results, and then in good conscience argue in a court of law that the factors that form the basis of the vote of no confidence be excluded from jury consideration."

Of the lab closing, the judge added, "you can't shield the basis

for those actions from a jury."

In particular, Peck cited a court document by Rice's chief of staff, Albert Teichman, seeking appointment of a special prosecutor "to ascertain whether any acts of criminality were committed, including whether there was an attempt to cover up errors or misconduct at the laboratory."

In court last week, Maureen McCormick, chief of the district attorney's Vehicular Crimes Bureau, said the lab problems affect drug cases, but should not affect drunken driving cases like Marino's. A campaign against drunken drivers has been one of the

hallmarks of the 5-year-old Rice administration.

McCormick said while the device used to measure liquid in blood-alcohol tests had not been calibrated in several years, it functioned properly when scientists tested it. McCormick said that meant the device had worked correctly the entire time.

Even as the challenge to Marino's conviction was under way, police revealed that in nine drunken driving cases tested Oct. 15, 2010, defendants' paperwork had been stapled to the wrong test results.

With Kathleen Kerr

Crime lab woes may choke Nassau courts

BY KATHLEEN KERR

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Nassau's courts may soon be choked with traffic from lawyers seeking to undo DWI guilty verdicts against their clients, legal experts said yesterday.

Judge George Peck's decision to set aside the guilty verdict for Erin Marino of Hicksville because of sloppy evidence-testing at the county police crime lab could spur a steady stream of legal wrangling in other driving while intoxicated cases, tying up judges already burdened by

heavy caseloads, some of the experts said.

"I would not be surprised if the Nassau County courts were deluged within a month," said University of Utah law professor Daniel Medwed, a nationally recognized expert in wrongful convictions. "This decision will provide an incentive for other defendants to file similar motions. The whole issue is scientific evidence."

When told about Peck's decision, Texas defense attorney Patrick McCann said Nassau's shoddy testing practices rival a

ANALYSIS

scandal that erupted at the Houston crime laboratory about a decade ago.

As in Nassau, Houston's problems grew steadily and eventually included questionable blood typing, DNA work-ups and drug testing. Some prisoners were set free because of the resulting doubts about evidence.

"It sounds like exactly the same thing all over again," said

McCann, former president of the Harris County Criminal Lawyers Association. One of McCann's clients got out of jail as a result of the Houston scandal.

"The crime lab scandal, in general, has the potential to reopen a number of cases," said Brandon Garrett, a law professor who specializes in criminal procedures and wrongful convictions at the University of Virginia. "Each small ruling like this will start to have an im-

Garrett said all cases thrown into doubt by shoddy practices

at the lab should be examined by the courts.

But Gene O'Donnell, a professor of law and police studies at John Jay College of Criminal Justice in Manhattan, said many people probably won't have enough money to hire lawyers to mount legal challenges to drunken driving convictions.

"The question will be how widespread, how many cases are thrown into doubt," O'Donnell said. "It [Peck's decision] suggests there's going to be some significant traffic to submit motions."



PHOTO BY PATRICK E. MCCARTHY

THE ACCUSED

Erin Marino was convicted of aggravated vehicular assault for hitting a minivan while driving drunk.

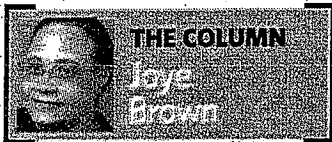


AND SCHINAPP



CK E. MCCARTHY

DA's office should put lab cases on hold



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The Nassau County district attorney's office ought to stop prosecuting cases that rest significantly on evidence vetted through the county's discredited crime lab.

State Supreme Court Justice George Peck, in tossing out a drunken-driving conviction and ordering a new trial for Erin Marino of Hicksville, said as much in his decision yesterday.

Peck noted that District Attorney Kathleen Rice "... certainly can refuse to initiate and continue prosecution based upon tainted evidence."

He's right about that. In one example cited in his decision, Peck leaves no ambiguity about the necessity of re-testing potentially tainted evidence from the lab. "The blood analyst on this case," he said, "mislabelled nine alcohol test results, the effect of which ascribed incorrect results to nine defendants."

In other words, the analyst who tested Marino's blood turns out — months later, after the lab's problems came to light — to be the same analyst responsible for attaching nine other alcohol test results to the wrong case files.

No wonder the judge ordered a new trial. And, in so doing, he likely opened the floodgates for other defense attorneys to challenge crime lab findings introduced as evidence in thousands of past and current court cases.

Rice, uncharacteristically, had no comment on Peck's decision yesterday. In court, an assistant district attorney said the office would appeal.

That's the DA's choice; but it's the wrong one. As it is, Rice's office, recognizing problems at the lab, now gives defense lawyers, as part of the discovery process, copies of a report issued by the evaluation company that put the

lab on probation.

That's not enough, Peck said in his ruling, pointing out the DA's office can't say it has no confidence in the lab and then go into court and stand by the lab's work.

The job of prosecuting, using evidence from the lab got tougher in Marino's case because week after week, as the hearing continued, there were more and more revelations about serious issues — from inaccurate lab testing to indications that supervisors knew but said little about problems at the facility.

Peck, a prosecutor under the late District Attorney Denis Dillon, praised Rice and County Executive Edward Mangano for their "prompt and responsible actions" in closing the lab.

But the damage is done. As it is, Gov. Andrew M. Cuomo has asked an inspector general to investigate what went wrong. That can't be enough.

Today and tomorrow, defendants will go into Nassau criminal courts, where they are presumed innocent. It is up to prosecutors to prove otherwise, beyond a reasonable a doubt.

But the lab's woes are casting shadows of doubt, as Assistant District Attorney Robert Schwartz acknowledged during a hearing on Rice's unsuccessful attempt to push for the appointment of the special prosecutor she wanted. "Many of the cases that this office is currently prosecuting have been put at risk," Schwartz said then. "Many of the cases that this office has prosecuted in the past are also at risk."

So why the appeal of Peck's decision? Why the delay when what's needed is so clear and so necessary?

The acting lab director early on in his investigation found problems while reviewing paperwork. It's time to go even further. Retest lab results for current cases; and Rice should announce she's stopping prosecutions that rely significantly on lab results until new testing can be done.

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NEWSDAY, TUESDAY, MARCH 8, 2011