Q. But you don't know that?

A. No. It's just basically hearsay.

BY THE COURT: Any additional testimony?

BY MR. BANIK: No additional testimony.

KIRBY YOUNG: Called as on rebuttal.

BY MR. COWLEY:

Q. Do you own this, do you know where this gas station is?

A. Yes, I know where the Mobil station is.

Q. It's right on 249?

A. No. It's on 15.

Q. Do you own it?

A. No, I do not own it.

Q. Does your brother, sister, mother, father...?

A. None of my relatives own the station.

Q. Have they ever owned it?

A. Yes.

Q. When did they own it?

A. My father owned it. Actually it was my grandfather. I'm not sure when. Sometime in the '50's. '60's. My grandfather died. My dad took over and ran the station. In July of 1988, he sold it to Duane Biehler, who is no relative of mine. He has been running it since July of 1988.

Young

Q. Are you still the police officer in Lawrence Township?

A. That's correct.

Q. You will be going where?

A. I will be moving to Altoona.

Q. To be a police officer?

A. Correct.

Q. Did you give him the opportunity to review what's been marked as Commonwealth's exhibit one? To read it?

A. Mr. Waikenis?

Q. Yeh.

A. Yes, I did.

Q. Did you tell him he was being arrested for driving under the influence?

A. Yes. And it's stated in that DL26 form that I read to him.

Q. Did you give him any miranda warnings?

A. Yes. Off a car I carry in my shirt pocket.

Q. When did you do that?

A. When we got to the police station. The Lawrenceville Borough. There's a fire hall.

Q. Did you tell him when you dropped him off that he would be getting charged or citation....?

A. We returned him to his residence at 48 Main Street. When we pulled up out front and parked along the curb. We got out of the vehicle and I removed the handcuffs, and told him at that time he would be receiving information in the mail from Mr. Buckingham which is where I would be filing my charges.

Q. Did you tell him what the charges would be?

A. Not at that time. When I read him the form, DL26, I told him he would be arrested for driving under the influence.

Q. Did you ask him to take a blood test?

A. Yes, I did.

Q. Did you tell him you would take him to the hospital to take a blood test?

A. That was, he was questioning why we were there at the fire station. I said it's because he refused to take a blood test. Had he consented to take a blood test, rather than taking him to the police station, I would have taken him directly to the hospital to have a blood test taken.

Q. Did he refuse to take a blood test at the scene?

A. Yes, he did. That was the reason he was taken to the police station rather than the hospital.

Q. Did he refuse more than once at the scene?

A. Yes.

Q. What would have then been the procedure, okay, take me to the hospital? What would that procedure have been?

A. Then we would have proceeded to transport to the hospital, directly. Rather than stop at the borough building.

Q. So you gave him some more chances at the Borough building to change his mind and...?

A. Correct. Before he lost his driver's license. And I read the form to him. As stated on there, I can read and write the English language. I did read it to him and did sit it down in front of him.

Q. Did he tend to twist the thing?

A. I explained to him, in there it states you have no rights to consult with an attorney prior to making a decision as to whether or not you want to take a blood test. That is stated in that form. And then he tried to twist it around and said, you want me to sign this form to give up my right to talk to an attorney? No. I tried to explain it again. Because this is a civil case and not a criminal case, and I tried to explain it, and he continued to turn it around.

Q. Was he being cooperative?

A. Uncooperative.

Q. Did you smell alcohol on his breath?

A. Yes, I did.

BY THE COURT: Mr. Banik, any questions?

BY MR. BANIK: No questions, your Honor.

BY MR. COWLEY: Commonwealth would rest.

BY THE COURT: Members of the jury, you have heard all of the evidence in this case that's going to be presented. The attorneys will be making their closing arguments to you. I would caution you that the arguments are not themselves evidence, but, merely the attorneys argument of what various inferences may be from the evidence presented. It is not the attorneys recollection or even my recollection which matters in the case. It is for each of you, individually, as jurors, it's your recollection of the evidence that matters. However, to any extent that the attorney's arguments may appeal to your reason and judgment, you certainly may consider them in your deliberations.

4:06 P.M. - CLOSING TO JURY BY STEPHEN BANIK, ESQ.

4:17 P.M. - CLOSING TO JURY BY JOHN COWLEY, ESQ.

4:28 P.M. - CLOSING CHARGE TO THE JURY BY THE COURT AS FOLLOWS:

Members of the jury, you have heard all of the evidence

in this case, and you've heard the attorney's closing arguments to you for your consideration. It is my duty to instruct you on the law which you will apply to the facts which you find them in this case.

You will apply only the law in which I instruct you and have instructed you so far in this trial. You will not apply any other law that you know or you think you know.

If you wish further instructions in the law after you begin your deliberations, or if you wish some clarifications of these instructions, you may through your fore-person send out a written request and I will consider whether to give you any additional instructions. However, you should not rely on that and you should listen closely to the law as I instruct you now.

You must accept and follow my rulings and instructions on the law, however, I am not the trier of the facts, as I have told you at the outset of this trial. It is not for me to decide what are the true facts in this case. You the jury are the sole and the only judges of those facts. It is your responsibility to weigh the evidence, and based upon that evidence and the logical inferences which

flowed from that evidence, to find the facts, to apply the rules of law as I give you to those facts, and then decide whether or not the defendant has or has not been proven guilty of the charge of driving under the influence of alcohol.

In determining the facts you are to consider only the evidence which is presented in court and the logical inferences to be drawn from that evidence. You are not to rely upon supposition or guess on any matters not in evidence. You should not regard as true any evidence which you find to be incredible, even if it is uncontradicted. Your determination of the facts should not be based upon any sympathy for or prejudice against, either the defendant or any of the other witnesses that have testified in this trial, or upon which attorney has made a better speech throughout the trial, or which attorney you like better.

I don't propose to refer to the evidence very much, if at all, in this charge to you. However, if I do, I would just remind you again, it is not my recollection of the evidence that matters. It is your recollection of that evidence and it is your responsibility throughout your deliberations to consider all of the evidence that you believe is material in deliberating upon your verdict.

A fundamental principle in our system of criminal law is that a defendant is presumed to be innocent. The mere fact that he was arrested and is charged with a crime is not evidence of guilt. Furthermore a defendant is presumed to remain innocent throughout the course of the trial, unless and until you conclude, based upon your careful and impartial consideration of the evidence, that the Commonwealth has proven him guilty beyond a reasonable doubt of the charge made against him. It is not the defendant's burden to prove that he is not guilty. Instead it is the Commonwealth that always has the burden of proving each and every element of the charge and that the defendant is guilty of that crime beyond a reasonable doubt.

If the evidence fails to meet the Commonwealth's burden, then your verdict must be not guilty. On the other hand, if the evidence does prove beyond a reasonable doubt, that the defendant is guilty of the crime charged, then your verdict should be guilty.

Now, I want to discuss something briefly, the term reasonable doubt. Although the Commonwealth has the burden of proving that the defendant is guilty beyond a reasonable doubt, that does not mean that the Commonwealth must prove its case beyond all doubt, nor to a

mathematical certainty. Nor must the Commonwealth demonstrate the complete impossibility of innocence. A reasonable doubt is a doubt that would cause a reasonably careful and sensible person to pause, hesitate, or refrain from acting upon a matter of highest importance in his or her own affairs. A reasonable doubt must fairly arise out of the evidence presented or out of the lack of evidence with respect to some element of the crime charged.

A reasonable doubt must be a real doubt. It may not be an imagined one nor may it be a doubt manufactured to avoid carrying out an unpleasant duty. So to summarize, you may not find the defendant guilty based upon mere suspicion of guilt. The Commonwealth has the burden of proving the defendant guilty beyond a reasonable doubt and if the Commonwealth met that burden, then the defendant is no longer presumed innocent and you should find him guilty. On the other hand, if the Commonwealth has not met its burden, then you must find him not guilty.

You must consider and weigh the testimony of each of the witnesses and give it such weight as in your judgment it is fairly entitled to receive. The matter of the credibility of a witness, that is whether his or her

testimony is believable and accurate in whole or in part is solely for your determination. I will briefly mention a few factors which might bear in that determination, for instance, whether the witness had any interest in the outcome of the case or has a friendship or an animosity towards other persons concerning the case. The behavior of the witness on the witness stand, and his or her demeanor or manner of testifying may be considered. And whether he or she shows any bias or prejudice which might color his or her testimony. The accuracy of his or her memory and recollection. The consistency or inconsistency of his or her testimony, as well as its reasonableness or unreasonableness in light of all of the circumstances and evidence in the case.

Now the defendant, Mr. Waikenis, took the witness stand in this case. In considering the defendant's testimony, you are to follow the same general instructions I gave you for the credibility of any other witness. You should not disbelieve the defendant's testimony merely because he is the defendant. In weighing his testimony, however, you may consider the fact that he has a vital interest in the outcome of this trial. You may take the defendant's interest into account, along with all of

the other facts and circumstances bearing upon credibility in deciding what weight his testimony deserves.

If you conclude that one of the witnesses has testified falsely, and did so intentionally, about any fact which is necessary for your decision in this case, then for that reason alone, you may, if you wish, disregard everything that that witness said. However, you are not required to disregard everything the witness said for this reason. It is entirely possible that the witness testified falsely and even intentionally so in one respect but truthfully about everything else. If you find that to be the situation, then you may accept that part of his or her testimony which you believe and which you find truthful and you may reject that part which you regard to be false and not worthy of belief. If you find that there were conflicts in the testimony, you the jury have the duty of deciding which testimony to believe. You should first, however, try and reconcile, that is fit together the testimony, if you can fairly do so. Discrepancies and conflicts between the testimony of different witnesses may or may not cause you to disbelieve some or all of that witness's testimony. However, you should remember that two or

more persons witnessing the same event may recall things differently and it is not uncommon for a witness to be innocently mistaken in his or her recollection of how something happened.

If you can not reconcile a conflict in the testimony, then it is up to you to decide which testimony, if any, to believe, and which to reject as untrue and inaccurate. In making this decision, you should consider whether the conflict involves a matter of importance to your decision in this case, or some mere unimportant detail, and whether the conflict is brought about by an innocent mistake or by an intentional falsehood.

The important thing in weighing the testimony is the quality of the testimony of each witness. You should also consider the extent to which conflicting testimony may be supported by other evidence.

Now evidence may be of two different types in any criminal case. On the one hand there is direct evidence, which is testimony by a witness from his or her own knowledge and recollection, such as something he saw, himself or herself, and the other type of evidence is circumstantial evidence, which is testimony about facts which point to the existence of other facts in question.

I think direct testimony is obvious and I would not explain that further to you, but, to keep in your mind, with circumstantial evidence, let me give you an example. If you retired to bed some evening in the winter time, and it was a clear night and the streets were clear and dry, and you awoke in the morning, and there was snow on the street and on the sidewalk, and you saw footprints in the snow, you would properly conclude that the snow had fallen during the night while you were sleeping, although you didn't see it snow, and you would also conclude that somebody had walked through the snow, because of the footprints, so, although you didn't see anyone actually walk through the snow. That's an example of circumstantial evidence.

In deciding whether or not you should accept any circumstantial evidence that may exist in this case, you must be satisfied, first of all, that the testimony of the witness who may be presenting circumstantial evidence is truthful and accurate and secondly that the existence of the facts that the witness testifies to leads to the conclusion that the facts in question also happen.

You should not decide this case on the basis of which

side presented the greater number of witnesses and the greater amount of evidence. Instead you should decide the case upon which witness you believe and which evidence to accept, based upon whether or not the testimony and the evidence is believable.

In this case, the defendant, Joseph Charles Waikenis, has been charged with unlawfully operating or being in physical control of a motor vehicle upon a public highway in the Commonwealth of Pennsylvania, under the influence of alcohol to a degree which rendered him incapable of safe driving. Specifically the defendant is charged with operating a 1982 GMC truck, with New York registration PJ4698, in Lawrence Township, Tioga County, Pennsylvania, while under the influence of alcohol to a degree that rendered him incapable of safe driving.

In order to find the defendant guilty of the charge of driving under the influence of alcohol, incapable of safe driving, you must be satisfied that the following two elements have been proven by the Commonwealth beyond a reasonable doubt.

First that the defendant drove or operated or was in control of the motor vehicle upon a highway, and secondly, that the defendant drove, operated or was in

control of that vehicle while under the influence of alcohol to a degree which rendered him incapable of safe driving.

The defendant need not have been drunk or severely intoxicated, or driving wildly or irradically, to commit this crime. It is enough that alcohol has substantially impaired the defendant's normal mental or physical facilities which were essential to the safe operation of his vehicle.

In other words, when I use the term being substantially impaired, you can not find the defendant guilty unless you are satisfied beyond a reasonable doubt that he was under the influence to a degree that rendered him incapable of safe driving.

Now, you need to consider all of the relevant evidence when you are deciding whether the Commonwealth has proven beyond a reasonable doubt these elements. The Commonwealth argues that the testimony tends to show that the defendant refused to give a sample of his blood, indicates that he was conscious that he was driving under the influence of alcohol and was incapable of safe driving.

The defense counsel would argue that this evidence means no such thing. If you believe that the defendant was

asked for and refused to give a sample of his blood for testing, then you may consider that fact, along with all of the other relevant evidence when you are deciding whether the defendant was under the influence of alcohol. YOu may give the defendant's refusal whatever weight and meaning you think it deserves. Before you retire to decide this case, I want to give you a few final guidelines and they won't be too much longer. First of all, when you go out to begin your deliberations, the first thing you should do is select one of the twelve of you to act as the fore-person in this case. And that will be the person that will sign and date the verdict slip and return with that slip to the court room and present it to the court. The verdict slip is very simple and I will read it to you. It says, we the impaneled jury in the above captioned matter hereby find the defendant, Joseph Charles Waikenis, and then there is a spot that says guilty with a line, or not guilty with a line. To count one, driving under the influence of alcohol to a degree which rendered him incapable of safe driving. You will check whichever appropriate line you find based upon your deliberations, and the jury fore-person will sign the slip and return, and then you will all

return to the court room.

Your decision in this case is very important. Remember your responsibility as jurors to perform your duties and reach a verdict based upon the evidence presented. You may properly draw upon your every day knowledge of common sense and you should keep your deliberations free of any bias or prejudice. Both the Commonwealth and the defendant has the right to expect you to consider the evidence conscientiously and to apply the law as I outlined it to you.

Again, you should not concern yourselves with any possible future consequences of your verdict, including what the penalty might be should you find the defendant guilty. The question of guilt and the question of penalty are separate and I will be imposing any penalty should you find the defendant guilty.

Your verdict in this case, as in all criminal cases, must be unanimous. This means in order to return a verdict, each of you must agree to it. You have a duty to consult with each other and to deliberate with a view towards reaching an agreement, if it can be done without doing any violence to your personal and individual judgment.

Each of you must decide the case for himself or herself.

And in the course of deliberation, each juror should not hesitate however to reexamine his or her own views and change his or her own opinions if convinced it's erroneous. However, no juror should surrender an honest conviction as to the weight or effect of the evidence solely because of the opinion of his or her fellow jurors or for the mere purpose of returning a unanimous verdict.

I would also like to suggest that you will be able to deliberate more easily and in a way that will be better for all concerned if each of you treats your fellow jurors and their views with the same courtesy and respect as you would other persons in your every day life.

That concludes my instructions on the law at this point.

4:45 P.M. - Tipstaffs sworn

Two alternates excused.

4:46 P.M. - Jury Out

5:51 P.M. - Verdict Reached

5:53 P.M. - Court Room:

VERDICT: Guilty of Driving Under the Influence.

BY THE COURT: Let the verdict be recorded, as just read by the jury.

JURY EXCUSED:

BY THE COURT: Mr. Waikenis, there are some final matters we need to take care of. First of all, there remains counts two and three of the information. Count Two being a charge of fleeing and eluding, and count three being a charge of careless driving. Both under the Motor Vehicle Code, both summary offenses. Based upon the evidence presented here today, I would find you guilty of both of those charges beyond a reasonable doubt from the evidence presented by the Commonwealth. There are certain post-verdict rights that you have and I'm going to go through a brief colloquy with you at this point. I would advise you that the charge of driving under the influence of alcohol is a second degree misdemeanor, and carries a maximum penalty by law of up to two years imprisonment, and up to a $5,000 fine.

In addition, there are certain minimum mandatory sentences the Court must impose by law. If this is a first conviction for you within the past seven years, there is a minimum mandatory forty-eight hour jail sentence I must impose, and a $300 fine.

If this is the second offense within seven years, there is a minimum mandatory thirty days imprisonment.

If it is a third offense within seven years, there is a

minimum mandatory ninety day sentence.

And if this is a fourth offense within the past seven years, there is a minimum mandatory one year imprisonment.

You have the right to file written post-verdict motions, and if you do so within ten days from day. There are two types of motions you can file. The first is a motion for new trial and motion in arrest of judgment. You have a right to file a motion for new trial raising any pre-trial or trial errors you believe were prejudicial to your case or challenging the weight of the evidence or raising any other grounds. If you file the motion for new trial and it is granted, you will receive a new trial.

You also have the right to file motion in arrest of judgment challenging the sufficiency of the evidence, objecting to any errors appearing on the face of the record, or challenging the jurisdiction of this court to have heard this case.

If you file a motion in arrest of judgment and it is granted, the charges against you will be dismissed and you would be completely discharged.

If you file either or both of these motions, I would schedule a date for argument by your counsel and the

District Attorney, and after considering the evidence and briefs of counsel, I would then rule on the motions.

If I grant your motions, I might order a new trial or dismiss the charges and discharge you completely.

Do you understand these rights regarding filing post verdict motions?

BY JOSEPH WAIKENIS: Yes.

BY THE COURT TO JOSEPH WAIKENIS:

Q. If you do not file such motions in writing within ten days from today, the legal effect of your failure to file such motions will be that the verdict against you will stand and you will waive, or give up, any rights to file such post-verdict motions or to challenge your conviction on appeal.

Under the law, only those issues raised in such post verdict motions, can be raised on appeal. Do you understand that?

A. Yes.

Q. If you file such post-verdict motions and they are denied, the Court will set a date for sentencing. Within thirty days of that date, you have the right to appeal your sentence to the Superior Court. Do you understand?

A. Yes.

Q. Under the law, I must advise you that you have the right to the assistance of counsel in preparing and filing post-verdict motions. You also have the right to have counsel argue these motions and write any necessary briefs or memorandum of law. You also have the right to the assistance of counsel in filing, preparing and arguing an appeal to the Superior Court, if I should deny your post-verdict motions and sentence you. If you can not afford to hire counsel, one will be provided for you free of charge. You must discuss the filing of post-verdict motions with your counsel promptly. If you intend to retain other counsel than Mr. Banik, then in order to request court appointed counsel, you must do so immediately, because the pos-verdict motions must still be filed within ten days from today. Therefore whether you continue with Mr. Banik's representation or obtain new counsel, you must make absolutely certain that if you desire to file post-verdict motions, they are filed in writing in ten days. Now do you have any questions about any of these post-verdict rights that I have just advised you about?

A. No.