[Cite as *State v. Kuhn*, 2003-Ohio-4007.]

STATE OF OHIO, BELMONT COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO	)	CASE NO. 02 BA 7
	)	
PLAINTIFF-APPELLEE	)	
	)	
VS.	)	OPINION
	)	
PHILLIP M. KUHN	)	
	)	
DEFENDANT-APPELLANT	)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from the County Court, Northern Division of Belmont County, Ohio
Case Nos. 01 TR C 01832
01 TR D 01832-02

JUDGMENT: Affirmed.

APPEARANCES:

For Plaintiff-Appellee:

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JUDGES:

Hon. Cheryl L. Waite

Hon. Joseph J. Vukovich
Hon. Mary DeGenaro

Dated: July 25, 2003

WAITE, P.J.

{¶1} This appeal arises from the conviction of Appellant Phillip M. Kuhn in the Belmont County Court, Northern Division, on one count of driving under the influence of alcohol ("DUI") in violation of R.C. 4511.19(A)(3). Appellant pleaded no contest to the charge after the trial court overruled his motion to suppress evidence. Appellant is now appealing the three issues he raised in his motion to suppress: (1) whether the arresting officer had reasonable suspicion to stop the vehicle; (2) whether the field sobriety tests were properly administered; and (3) whether Appellant was properly advised of his *Miranda* rights prior to making an inculpatory statement. The trial court was correct in overruling Appellant's motion to suppress, and the judgment of the trial court is affirmed.

{¶2} On September 7, 2001, Appellant was stopped while driving on Rt. 40 in Belmont County, Ohio. Sergeant Jeffrey L. Bernard ("Sgt. Bernard") of the Ohio State Patrol made the stop after observing Appellant weaving, crossing the centerline, and driving very slowly on the roadway. (Tr., p. 24.) Sgt. Bernard was traveling eastbound and Appellant was traveling westbound at the time. (Tr., p. 22.) After Sgt. Bernard turned so that he was following Appellant's vehicle, he activated his videotaping camera and recorded the events that followed.

{¶3} Sgt. Bernard pulled Appellant's vehicle over to the side of the road. He approached Appellant's vehicle and noticed an obvious odor of alcohol on Appellant's

breath. (Tr., p. 27.) Sgt. Bernard asked Appellant to step out of the vehicle. (Tr., p. 10.) Sgt. Bernard asked Appellant how much he had to drink that evening. (Tr., p. 11.) Appellant told him he had four beers. (Tr., p. 11.) Sgt. Bernard then administered field sobriety tests, including the heel to toe test, the one leg stand test, and the horizontal gaze nystagmus test, all of which Appellant failed. (Tr., pp. 28-32.) Sgt. Bernard administered a portable breath test, which Appellant also failed. (Tr., pp. 32-33.)

{¶4} Sgt. Bernard placed Appellant under arrest and immediately advised him of his *Miranda* rights. (Tr., pp. 16-17.) Sgt. Bernard asked Appellant why he was driving when he had too much to drink, and Appellant answered that he had no one to take him home. (Tr., p. 18.) Appellant was transported to the highway patrol command post and given a breathalyzer test. Appellant registered .193 on the test.

{¶5} On October 24, 2001, Appellant filed a motion to suppress. A hearing on the motion was held on November 14, 2001. On December 6, 2001, the trial court filed a judgment entry overruling the motion to suppress. The court apparently reconsidered its decision the same day and filed a journal entry ordering oral argument on the issue of Sgt. Bernard's compliance with the requirements for administering field sobriety tests.

{¶6} On January 23, 2002, the court filed an entry it styled as "Second Opinion and Judgment," once again overruling Appellant's motion to suppress. After this supplemental opinion, Appellant decided to plead no contest to the DUI charge, and the court accepted the plea. On January 30, 2002, the court convicted Appellant

of the charge of DUI and sentenced him to sixty days in jail, all but six of which were suspended, and a $250 fine. On February 19, 2002, Appellant filed this timely appeal.

{¶7} This Court has previously concluded that the standard of review of a trial court's ruling on a motion to suppress is limited to determining whether the trial court's findings are supported by competent, credible evidence. *State v. Winand* (1996), 116 Ohio App.3d 286, 288, 688 N.E.2d 9. This standard of review is appropriate because, "[i]n a hearing on a motion to suppress evidence, the trial court assumes the role of the trier of facts and is in the best position to resolve questions of fact and evaluate the credibility of witnesses." *State v. Hopfer* (1996), 112 Ohio App.3d 521, 548, 679 N.E.2d 321. However, once this Court has accepted those facts as true, it must independently determine as a matter of law whether the trial court met the applicable legal standards. *State v. Williams* (1993), 86 Ohio App.3d 37, 41, 619 N.E.2d 1141.

{¶8} Appellant's first assignment of error asserts:

{¶9} "THE COUNTY COURT ERRED IN OVERRULING APPELLANT'S MOTION TO DISMISS BASED UPON THE ARRESTING OFFICER'S LACK OF REASONABLE SUSPICION TO STOP APPELLANT'S MOTOR VEHICLE."

{¶10} Appellant argues that a police officer must have a reasonable suspicion of criminal activity, supported by specific and articulable facts, to justify making an investigatory stop of a vehicle. See *State v. Hodge* (2002), 147 Ohio App.3d 550, 554, 771 N.E.2d 331. Appellant argues that the videotape of the arrest does not present any reasonable and articulable facts to support Sgt. Bernard's decision to make an investigatory stop. Appellant does not make any more of an argument than this, but

simply quotes a part of the suppression hearing transcript. Unfortunately, the actual videotape is not part of the record. We allowed Appellant additional time to file the videotape, but our records show that no video was ever filed. We must, therefore, render our opinion without the benefit of any additional information which may have been supplied by the videotape.

{¶11} Appellee agrees with Appellant's statement of the law governing investigatory stops of vehicles, citing *State v. Bobo* (1988), 37 Ohio St.3d 177, 524 N.E.2d 489, paragraph two of the syllabus, and *Terry v. Ohio* (1968), 392 U.S. 1, 20-21, 88 S.Ct. 1868, 20 L.Ed.2d 889.

{¶12} The Fourth and Fourteenth Amendments to the United States Constitution as well as Section 14, Article I of the Ohio Constitution prohibit any governmental search or seizure, including a brief investigative stop, unless supported by an objective justification. *Terry*, 392 U.S. at 20-21, 88 S.Ct. 1868, 20 L.Ed.2d 889. The determination of whether a stop is warranted depends on whether, considering the totality of the circumstances, the officer had an objective and particularized suspicion that, "criminal activity was afoot." *State v. Andrews* (1991), 57 Ohio St.3d 86, 87, 565 N.E.2d 1271.

{¶13} Appellee contends that any violation of a traffic law may give rise to a reasonable suspicion to make a traffic stop, citing this Court's recent decision in *Hodge*, supra. *Hodge* overruled this Court's former rule as stated in *State v. Drogi* (1994), 96 Ohio App.3d 466, 645 N.E.2d 153, which appeared to allow the trial court to

evaluate the severity of a traffic violation before determining that there were reasonable articulable facts justifying the traffic stop.

{¶14} Appellee contends that Sgt. Bernard observed Appellant commit a traffic violation prior to turning on the videotape. Appellant contends that Sgt. Bernard's testimony about Appellant's erratic driving, constituting a lane violation (see R.C. 4511.25, 4511.33), was sufficient to support the traffic stop.

{¶15} Appellee is correct in this assessment. Regardless of what appears on the videotape, Sgt. Bernard testified about events and traffic violations prior to the time the videocassette machine began recording. Furthermore, the fact that a vehicle is traveling significantly slower than the speed limit for no apparent reason is a factor that may be considered when reviewing the correctness of a traffic stop. *Pepper Pike v. Parker* (2001), 145 Ohio App.3d 17, 20, 761 N.E.2d 1069.

{¶16} Sgt. Bernard observed Appellant's vehicle straddling the right lane and the center turning lane. This is a violation of R.C. 4511.25 or 4511.33. Sgt. Bernard clearly explained that this lane violation was a basis for the stop. Based on this violation, Sgt. Bernard was justified in making a brief traffic stop. Sgt. Bernard observed Appellant driving at an unusually slow speed, which may be a traffic violation in some cases. See R.C. 4511.22 (stopping or slow speed violations). Sgt. Bernard also observed Appellant weaving inside the lane, which may not be a direct traffic violation but is certainly a factor that can contribute to the perception that criminal activity is occurring. Based on the totality of the circumstances, the record shows a

reasonable and articulable basis for making the traffic stop. For these reasons, we overrule Appellant's first assignment of error.

{¶17} Appellant's second assignment of error argues:

{¶18} "THE COUNTY COURT ERRED IN OVERRULING APPELLANT'S MOTION TO SUPPRESS ANY COMMENT ON THE RESULTS OF FIELD SOBRIETY TESTS AS THE STATE OF OHIO FAILED TO ESTABLISH MINIMAL LEVELS OF RELIABILITY AS TO THE INSTRUCTIONS GIVEN CONCERNING AND THE CONDITIONS UNDER WHICH THE FIELD SOBRIETY TESTS WERE PERFORMED, MUCH LESS PROVE STRICT COMPLIANCE WITH THE APPLICABLE STANDARDS."

{¶19} Appellant contends the field sobriety tests should not have been used as evidence because the tests were done incorrectly. It is obvious that any error in administering the field sobriety tests would have been harmless because Appellant was convicted under R.C. 4511.19(A)(3), which requires proof only that a person was operating the vehicle and that the person had the required amount of alcohol in his body. Field sobriety tests are irrelevant in a prosecution under R.C. 4511.19(A)(3), and the field sobriety tests could not have altered the breathalyzer test results. Appellant has not alleged how he may be prejudiced by the introduction of field sobriety tests, and there does not appear to be any possible prejudice that could result from their use at trial.

{¶20} Appellant has also not included the videotape of the field sobriety tests as part of the record. His argument on appeal is that the videotape reveals that the

tests were not performed properly. Without the videotape, Appellant has no argument. It is Appellant's responsibility to produce the record on appeal, including the parts of the record required to evaluate the assignments of error, and this Court will presume the regularity of the proceedings of the lower court in the absence of a proper record on appeal. App.R. 9(B); *State v. Estrada* (1998), 126 Ohio App.3d 553, 556, 710 N.E.2d 1168. It is apparent that the trial court thoroughly reviewed the videotape and found Sgt. Bernard had complied with the requirements of the "DWI Detective and Standardized Field Sobriety Testing Manual." This Court must presume the correctness of the trial court's evaluation of the videotape, absent any contrary record on appeal.

{¶21} Other arguments are usually raised when a criminal defendant challenges field sobriety tests (such as lack of probable cause to arrest), but Appellant does not raise any other arguments. There is no need to evaluate how each field sobriety test was administered because the results of those tests have no evidentiary value in a trial for driving with an unlawful concentration of alcohol, R.C. §4511.19(A)(3).

{¶22} Appellant's third assignment of error asserts:

{¶23} "THE COUNTY COURT ERRED IN OVERRULING APPELLANT'S MOTION TO SUPPRESS APPELLANT'S STATEMENTS ELICITED PRIOR TO APPELLANT BEING ADVISED OF HIS RIGHT NOT TO INCRIMINATE HIMSELF."

{¶24} Appellant appears to argue that Sgt. Bernard failed to explain the *Miranda* rights to him prior to asking him whether or not he had been drinking.

Appellant believes that his confession about drinking four beers should have been suppressed because the confession was the result of custodial interrogation. Appellant also contends that any further evidence related to drinking alcohol should have been suppressed as fruit of the poisonous tree.

{¶25} Appellee correctly cites *Berkemer v. McCarty* (1984), 468 U.S. 420, 104 S.Ct. 3138, 82 L.Ed.2d 317, for the proposition that a motorist is not in "custody" with respect to the requirements of the *Miranda* rule simply because he has been stopped by a police officer by the side of the road for questioning. It is well established that *Miranda* warnings must be given only where the individual being questioned is in custody, in other words, only when the questioning is part of a "custodial interrogation." *California v. Beheler* (1983), 463 U.S. 1121, 1124, 103 S.Ct. 3517, 77 L.Ed.2d 1275. When determining whether an individual is in custody for purposes of *Miranda*, the court must decide whether there was either a formal arrest made, or a restraint of the individual's freedom of movement commensurate with that of a formal arrest. Id. at 1125. A person will be viewed as being in custody when a formal arrest has occurred or when a restraint on one's freedom of movement has occurred to the degree associated with arrest. *Oregon v. Mathiason* (1977), 429 U.S. 492, 495, 97 S.Ct. 711, 50 L.Ed.2d 714.

{¶26} *Berkemer* noted that an ordinary traffic stop does curtail the freedom of action of the detained motorist and imposes some pressures on the motorist to answer questions, but does not sufficiently impair the motorist's exercise of his privilege

against self-incrimination to require that he be warned of his constitutional rights. *Berkemer,* 468 U.S. at 421, 104 S.Ct. 3138, 82 L.Ed.2d 317.

{¶27} This Court has held, in accordance with *Berkemer,* that:

{¶28} "While the Miranda doctrine has been held to apply to custodial interrogation of a suspect accused of a misdemeanor traffic offense, it does not apply to roadside questioning of a motorist detained pursuant to a traffic stop. * * * Although an individual is suspected of driving under the influence of alcohol, the mere fact that an officer's investigation focuses on the individual does not trigger a need for the Miranda warnings." *State v. Latham* (June 12, 1999), 7th Dist. No. 96-BA-30, citing *Berkemer*, supra, and *Minnesota v. Murphy* (1984), 465 U.S. 420, 104 S.Ct. 1136, 79 L.Ed.2d 409.

{¶29} Based on *Berkemer*, there was no custodial interrogation when Sgt. Bernard initially questioned Appellant because Appellant was not in custody for purposes of the *Miranda* requirements. For this reason, Appellant's third assignment of error is without merit.

{¶30} We are somewhat at a loss to understand the dissenting opinion in this case, which would reverse Appellant's conviction based on a videotape that is not in the record. It is clear from Appellant's arguments that the videotape of the traffic stop would not change the outcome of this appeal. Sgt. Bernard's testimony, rather than the videotape, established that there was probable cause to make the traffic stop. And Appellant cannot succeed in his second and third assignments of error even if we assume, for the sake of argument, that everything he says about the videotape is true.

Therefore, even assuming that Appellant's allegations about the facts contained in the videotape are true, his assignments of error do not have merit.

{¶31} App.R. 9(E) provided Appellant with certain remedies to correct the problem of the missing video:

{¶32} "(E) Correction or modification of the record

{¶33} "If any difference arises as to whether the record truly discloses what occurred in the trial court, the difference shall be submitted to and settled by that court and the record made to conform to the truth. If anything material to either party is omitted from the record by error or accident or is misstated therein, the parties by stipulation, or the trial court, either before or after the record is transmitted to the court of appeals, or the court of appeals, on proper suggestion or of its own initiative, may direct that the omission or misstatement be corrected, and if necessary that a supplemental record be certified and transmitted. All other questions as to the form and content of the record shall be presented to the court of appeals."

{¶34} At oral argument, we granted Appellant ten days to file a motion pursuant to App.R. 9(E) to correct the omissions in the record or to submit a copy of the videotape. Although the dissent concludes that we denied Appellant's App.R. 9(E) motion, no such motion was ever filed. At any rate, we presented a remedy to Appellant and he failed to take advantage of it.

{¶35} The dissent would have us completely change the rules and presumptions that Ohio's appellate courts use in reviewing trial court cases. The dissent's conclusion that an Appellant has no duty to check to see if the record on

appeal is correctly transmitted is simply incorrect. "This court has repeatedly stressed that it is an appellant's responsibility to provide the court with a record of the facts, testimony, and evidence in support of their assignments of error." *State v. Funkhouser*, 7th Dist. No. 02-BA-4, 2003-Ohio-697. If the complete record is properly ordered but is not transmitted to the Court of Appeals, there are steps that the Appellant can take to correct the problem. A criminal defendant who files an appeal does not automatically win the appeal, as the dissent apparently believes, simply because some item of evidence is misplaced or destroyed. We gave Appellant an opportunity to correct the record and he chose not to respond. That is Appellant's prerogative, but it does not prevent us from ruling against Appellant based on the record as submitted.

{¶36} The dissent's reliance on *Cobb v. Cobb* (1980), 62 Ohio St.2d 124, 403 N.E.2d 991, is misplaced. In *Cobb*, the Eighth District Court of Appeals denied a timely filed App.R. 9(E) motion and dismissed an appeal because the record did not contain a particular motion and corresponding judgment entry. The Supreme Court held that this was an abuse of discretion by the Court of Appeals. Id. at 127. The Supreme Court did not hold that the appeal should be sustained, but rather, only that the appellant should have been permitted to supplement the record so that the appeal could be heard on the merits. Our opinion today is in complete conformity to *Cobb.* Appellant never filed an App.R. 9(E) motion. Nevertheless, we granted him an opportunity to file the motion or find a copy of the videotape. The deadline passed, and we proceeded to rule on the merits. We have not dismissed this appeal or denied

Appellant the chance to supplement the record. Nothing we have done conflicts with the principles set forth in the *Cobb* case.

{¶37} The dissent's conclusion that a due process violation has occurred is also erroneous because Appellant has not taken advantage of the due process opportunities available to him. A party who fails to utilize the remedies provided by App.R. 9 cannot later assert errors that could have been cured through App.R. 9:

{¶38} "Not only did appellant fail to take advantage of App.R. 9(C) or 9(E) in the trial court and court of appeals, he also failed to supplement the record even after we granted his motion to supplement. 'In the absence of an attempt to reconstruct the substance of the remarks and demonstrate prejudice, the error may be considered waived.'" *State v. Tyler* (1990), 50 Ohio St.3d 24, 41-42, 553 N.E.2d 576, quoting *State v. Brewer* (1990), 48 Ohio St.3d 50, 61, 549 N.E.2d 491, 502.

{¶39} Having reviewed the merits of this appeal based on the evidence in the record, we overrule Appellant's three assignments of error. The judgment of the trial court is affirmed in full.

Judgment affirmed.

Vukovich, J., concurs.

DeGenaro, J., dissents; see dissenting opinion.

DeGenaro, J., dissenting.

{¶40} I must respectfully dissent from the majority's opinion because we cannot presume the regularity of the trial court's proceedings in light of the circumstances in this case. Kuhn's second and third assignments of error are based on the allegedly exculpatory content of the videotape of his traffic stop. As the majority succinctly states, "[w]ithout the videotape, Appellant has no argument." Opinion at ¶20. But the majority states it is Kuhn's responsibility to produce the record on appeal and presumes the regularity of the trial court's proceedings in the absence of that videotape. When an appellant has properly ordered the clerk to prepare and transmit the record for appellate review, we should not punish that appellant when the clerk of courts fails to transmit a proper record. Furthermore, it is a due process violation to affirm Kuhn's conviction without access to this allegedly exculpatory evidence when he is materially prejudiced by its absence from the record.

{¶41} The videotape Kuhn refers us to was jointly offered into evidence at Kuhn's suppression hearing and admitted by the trial court. For some reason, that videotape was not in the record transmitted to us. Kuhn's brief urges this court to review the videotape to resolve his assignments of error, so at oral argument we informed counsel that the videotape was not in the record. Subsequently, the trial court clerk informed us that Kuhn's counsel asked the clerk to locate the videotape and that it had been lost. Because the videotape is missing, we are unable to review the merits of Kuhn's arguments.

{¶42} The majority relies on the familiar rule that when the portions of the record an appellant relies upon are missing, we must presume the regularity of the trial court proceedings. Opinion at ¶20. I completely agree that when an appellant does not provide this court with the portions of the record necessary to resolve his appeal, we must presume the regularity of the proceedings. But that rule only applies when the appellant has failed to meet his duty under the appellate rules to inform the clerk what portions of the record to prepare for appeal. If an appellant in a criminal case has done all he can to ensure that this court has a complete and accurate record and

he is materially prejudiced because portions of the record are still missing, then due process requires that we reverse his conviction.

{¶43} App.R. 10(A) states that the appellant has the duty to take any action necessary to enable the trial court clerk to assemble and transmit the record. This includes ordering "a complete transcript or a transcript of the parts of the proceedings not already on file as the appellant considers necessary for inclusion in the record and file a copy of the order with the clerk" in writing at the time the appellant files a notice of appeal. App.R. 9(B). The trial court clerk then has the duty to prepare and transmit the record to the court of appeals. App.R. 10(B). The Ohio Supreme Court has long held that an appellant should not suffer because of the apparent nonfeasance of the trial court clerk in failing to transmit pertinent portions of the record. *Cobb v. Cobb* (1980), 62 Ohio St.2d 124.

{¶44} In *Cobb*, the appellants properly ordered that the trial court prepare the record in accordance with App.R. 9(B). At oral argument before the Eighth District Court of Appeals, appellants were first informed that pertinent parts of the record, including the motion for relief and the judgment entry granting relief which was being appealed from, were not included in the record. Appellants filed a App.R. 9(E) motion to correct the omission, but before the appellate court ruled on the motion it dismissed the appeal.

{¶45} The Ohio Supreme Court recognized that although App.R. 9(B) and 10(A) give the appellant the duty to order that the record be prepared, App.R. 10(B) gives the clerk the duty to transmit the record to the court of appeals. So it specifically held that the Appellate Rules do not require that an appellant supervise the actions of the trial court clerk to ensure that he transmits every portion of the requested record. "We cannot accept such a strained interpretation, for it would render meaningless the duty imposed upon the clerk, by App.R. 10(B), to transmit the record to the Court of Appeals." Id. at 125. Once an appellant has asked the reporter and clerk to prepare and transmit the record, he has no duty to double-check that a complete record was, in fact, filed. The Ohio Supreme Court found the court of appeals abused its discretion when it dismissed the appeal because pertinent portions of the record were missing.

{¶46} I realize the majority is not making precisely the same mistake as the Eighth District did in *Cobb*, but it is making the same fundamental mistake. It is preventing Kuhn from arguing his assignments of error in the manner he wishes because the videotape is missing. Kuhn is "suffer[ing] because of the apparent nonfeasance of the trial court clerk in failing to transmit pertinent elements of the record." *Cobb* at 125. See, also, *Sauvey v. Ford*, 6th Dist. No. L-02-1227, 2003-Ohio-222 (The court reporter, not the appellant, bears the responsibility of assuring that the exhibits to the transcript are transferred to the appellate court).

{¶47} In this case, a state actor, the clerk or the reporter, lost the videotape. The Due Process Clause of the Fourteenth Amendment to the United States Constitution protects a criminal defendant from being convicted of a crime when the State fails to preserve materially exculpatory evidence. *California v. Trombetta* (1984), 467 U.S. 479, 489. This is because defendants are entitled to the "raw materials" and the "basic tools of an adequate defense" and the State should not deny a defendant those materials and tools. *Ake v. Oklahoma* (1985), 470 U.S. 68, 77. These due process principles do not disappear on appeal. See *Griffin v. Illinois* (1956), 351 U.S. 12 (Due process affords an indigent defendant the right to a trial transcript on appeal). Evidence is materially exculpatory when the evidence possesses an exculpatory value that was apparent before the evidence was destroyed and is of such a nature that the defendant would be unable to obtain comparable evidence by other reasonable means. *Trombetta* at 489.

{¶48} Because of these due process requirements, Ohio requires that all criminal proceedings involving serious offenses be recorded and allows the defendant to request the proceedings be recorded in non-serious offenses. Crim.R. 22. But sometimes portions of a properly ordered transcript are not prepared or the recording of the proceedings are so unclear or inaudible that it is impossible for the court reporter to adequately transcribe the proceedings. In these situations we are not allowed to presume the regularity of the proceedings if the appellant can demonstrate 1) a request was made at trial that the conferences be recorded or that objections were made to the failures to record; 2) an effort was made on appeal to comply with

App.R. 9 and to reconstruct what occurred or to establish its importance; and, 3) material prejudice resulted from the failure to record the proceedings at issue. *State v. Palmer* (1997), 80 Ohio St.3d 543, 554.

{¶49} Of course, the holding in *Palmer* is limited to defects in the transcript, but the principles contained within it are applicable to when other portions of the record are missing as well. For instance, in *State v. King*, 8th Dist. No. 80596, 2002-Ohio-6220, some of the documentary exhibits were missing, but counsel for the appellant was able to obtain a copy of those documents for the appellate court. The appellate court concluded that the appellant was not materially prejudiced by the fact that the appellate court was now examining copies rather than the original documents. Id. at ¶69.

{¶50} The same cannot be said in the present case. The videotape is materially exculpatory since it possesses an exculpatory value that was apparent before the evidence was destroyed and we cannot obtain comparable evidence by other reasonable means. Kuhn's assignments of error are based on the allegedly exculpatory information contained in the properly admitted videotape, but we do not have either the original or a copy of that videotape before us on appeal. Without at least a copy of that videotape, Kuhn cannot reconstruct its contents. And it is clear that he is materially prejudiced by the fact that the videotape is missing as this effectively prevents us from reviewing his second and third assignments of error.

{¶51} The majority disagrees with this conclusion, stating that "even if we assume, for the sake of argument, that everything he says about the videotape is true" Kuhn's arguments would still fail on appeal. Opinion at ¶30. But the majority never explains how this is true. If the videotape in question was properly provided to this court and depicts exactly what he claims it depicts, then how would his arguments fail? For instance, he claims the video will demonstrate that the officer did not properly conduct the field sobriety tests. If this is true, then it would seriously undermine the State's ability to prevail on Kuhn's motion to suppress his breath test. Likewise, Kuhn claims the videotape will show that the comments he wished to suppress were made after he was arrested by the officer, but before he was Mirandized. If this is true, then

it is possible these comments were made as part of a custodial interrogation rather than answers to roadside questioning of a motorist detained pursuant to a traffic stop, so they should be suppressed. The majority itself acknowledges the material prejudice Kuhn suffers when it states that "[w]ithout the videotape, Appellant has no argument." Opinion at ¶20. Clearly, Kuhn is materially prejudiced by the fact that the videotape is missing.

{¶52} The majority's criticism of my conclusion is, for the most part, directed at Kuhn's failure to supplement the record pursuant to App.R. 9(E). The majority correctly states that in *Cobb* the appellant filed a motion to supplement the record when the Eighth District dismissed his appeal. And, although the majority does not mention it, in *Palmer* the Ohio Supreme Court stated that we may only reverse a conviction when material parts of the record are missing if the appellant makes an effort to comply with App.R. 9 and to reconstruct the missing portion of the record or to establish its importance. But what the majority ignores is that the Ohio Supreme Court has not held that an appellant must actually comply with App.R. 9 before this court can address whether he is materially prejudiced by the trial court clerk's nonfeasance. Instead, it recently held that an appellant must make "an effort to comply with App.R. 9 and to reconstruct what occurred or to establish its importance." *Palmer* at 554.

{¶53} In this case, Kuhn *did* attempt to comply with App.R. 9. As the trial court clerk informed this court, his counsel contacted the clerk looking for the tape and the clerk's office responded that it was missing. Accordingly, Kuhn could not have supplemented the record with the videotape or a copy of the videotape. Furthermore, it would be impossible to accurately reconstruct the missing videotape at an App.R. 9(E) hearing.

{¶54} A missing videotape of a traffic stop is different from the normal situation where portions of a trial may be unrecorded or documents missing from the file. When the parties are attempting to reconstruct something like an unrecorded sidebar or unrecorded proceedings in chambers, then they are describing what was said in court, not the manner in which it was said, how the person looked when they said it, or other extraneous facts. This is because all we care about on appeal is what was said. This

is just as effectively conveyed by an App.R. 9 alternative as it would be by a transcript; the reconstructed form effectively conveys the substance of the original. We are still able to review the trial court's judgment about the facts presented to it.

{¶55} The same does not necessarily hold true for exhibits. A gun used as a weapon in a crime or bloody clothing which allegedly contains an offender's blood is irreplaceable. Photographs and their negatives can be destroyed. Videotapes can be lost before a copy is made. In these cases, the actual exhibit is what matters. A description of it by the parties in an App.R. 9 alternative simply cannot convey the substance of the original. Kuhn argues that, contrary to the officer's testimony, the videotape will demonstrate that the officer did not correctly administer the field sobriety tests. How can the parties reconstruct the videotape of the officer's instructions about those tests and Kuhn's attempts to perform those tests? They simply cannot. Kuhn also argues the videotape will show he made inculpatory statements after he was arrested, but before he was Mirandized. How are we to judge whether Kuhn's statement is correct? We cannot. In each case, our ability to review the trial court's judgment about the contents of the videotape is destroyed.

{¶56} Since the videotape could not be located and it would be pointless to try to reconstruct it since it is incapable of being reconstructed in an App.R. 9(E) hearing, it would have been futile for Kuhn to file a motion to supplement the record with the videotape. The majority's proposal that appellant file an App.R. 9(E) motion to supplement the record would be a vain act because he has nothing to provide to this court.

{¶57} The videotape's importance is clearly established in Kuhn's brief. It is the basis upon which he argues his second and third assignments of error. Once again, as the majority states, "[w]ithout the videotape, Appellant has no argument." Opinion at ¶20. Again, the majority is penalizing Kuhn for failing to file a motion stating that he cannot make his arguments on appeal without the videotape when it is readily apparent by reviewing his brief. Kuhn should not lose on appeal merely because he has not filed a motion which could not possibly grant him the relief he is seeking.

Kuhn's actions in this case are sufficient under *Palmer* to take advantage of the due process opportunities available to him.

{¶58} I hasten to emphasize I do not believe that a criminal defendant should prevail on appeal simply because some item of evidence is misplaced or destroyed. This would be a ridiculous conclusion. In most cases, that missing evidence is not material to the appeal. But in this case, two of Kuhn's assignments of error challenge the trial court's interpretation of what appeared on the videotape and he did not know it was missing until after oral argument. When a criminal defendant has done everything in his power to provide this court with a complete record of the proceedings, the trial court clerk loses an irreplaceable piece of evidence, and the defendant is materially prejudiced by this nonfeasance, I cannot ignore that the appellant has been denied due process of law. It would be a violation of due process for this court to affirm the trial court's judgment in this case without access to the videotape. For these reasons, I cannot agree with the majority's resolution of this case.