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STATE OF CONNECTICUT *v.* ANDREW C. HAIGHT (AC 24335)

Foti, West and McDonald, Js.

Argued October 26, 2004—officially released March 29, 2005

(Appeal from Superior Court, judicial district of Stamford-Norwalk, geographical area number twenty, J.R. Downey, J.; Hon. Jack L. Grogins, judge trial referee)

Brenden P. Leydon, with whom, on the brief, was *Mark D. Phillips*, for the appellant (defendant).

Sarah Hanna, special deputy assistant state's attorney, with whom, on the brief, were *David I. Cohen*, state's attorney, and *Robert G. Hall, Jr.*, supervisory assistant state's attorney, for the appellee (state).

Opinion

FOTI, J. The defendant, Andrew C. Haight, appeals from the judgment of conviction, rendered after the trial court accepted his conditional plea of nolo contendere,[1] of operating a motor vehicle while under the

influence of intoxicating liquor in violation of General Statutes § 14-227a. The court accepted the defendant's plea after it denied his motion to dismiss.[2] On appeal, the defendant claims that the court improperly denied his motion to dismiss because there was insufficient evidence to sustain the charge. We agree and reverse the judgment of the trial court.

The record reflects that the court held an evidentiary hearing on the defendant's motion to dismiss and denied the motion orally at the conclusion of the hearing. The court subsequently filed a memorandum of decision encompassing its ruling, which included the following facts.[3] At or around 12:30 a.m. on October 20, 2001, Kevin J. Dowling, a New Canaan police officer, was driving along Elm Street when he observed the defendant's Lexus RX300 parked in a parking space with its headlamps illuminated. He did not observe anyone in or around the motor vehicle and drove around the block. Dowling returned to the vehicle and observed the defendant inside of the vehicle, asleep. Dowling looked inside the vehicle and saw that the keys were in the ignition in the off position. The vehicle was not running. Dowling attempted to rouse the defendant, to no avail. Dowling then opened the driver's door and a warning chime in the vehicle sounded, indicating that the keys were in the ignition and that the door was open. The defendant was placed under arrest and subsequently submitted to breath tests, which he failed.[4]

In its memorandum of decision, the court stated that ''[i]t is for the trier of facts, with all the relevant testimony and evidence, to determine if there was 'operation' with the insertion of the car key and turning on of car lights which alone or in sequence would set the car in motion.'' The court concluded that the evidence was sufficient to sustain the charge and denied the motion to dismiss. On appeal, the defendant claims that the court improperly denied the motion because the state did not establish a prima facie case. Specifically, the defendant posits that the fact that the key was in the vehicle's ignition, in the off position, absent other circumstances, is insufficient to demonstrate operation for purposes of § 14-227a.

We begin our discussion by addressing the propriety of the court's action on the defendant's motion to dismiss for insufficient evidence prior to trial. We note that the state did not object to the evidentiary hearing; in fact, it participated in the hearing.[5] ''Dismissal under [General Statutes] § 54-56 for insufficient cause to justify the prosecution requires the court explicitly to weigh all the competing factors and considerations of fundamental fairness to both sides—the defendant, the state and society, and presumably the victim. . . . This difficult and delicate process necessarily involves a careful consideration by the court of such factors as the strength of the state's case, the likelihood of convic-

tion, the severity of the crime, its effect on the victim, the strength of the defendant's defense, the defendant's personal situation, and all the other myriad factors that underlie a judgment regarding fundamental fairness.'' (Citation omitted.) *State* v. *Dills*, 19 Conn. App. 495, 503–504, 563 A.2d 733 (1989).

The evidentiary insufficiency prong of § 54-56 does not apply when probable cause has been found by the issuance of a warrant, in which case a trial first must transpire. Id., 503. Pursuant to § 54-56, a court, on motion by the defendant, may dismiss pending criminal charges if ''there is not sufficient evidence or cause to justify'' the continued prosecution. See *State* v. *Kinchen*, 243 Conn. 690, 701, 707 A.2d 1255 (1998). Practice Book § 41-8 (5) provides that in criminal matters, a motion to dismiss is the proper vehicle to make a claim of insufficiency of the evidence. The denial of such a motion may form the basis of an appeal following a judgment of conviction rendered after a conditional plea of nolo contendere. See *State* v. *Vickers*, 260 Conn. 219, 221, 796 A.2d 502 (2002); *State* v. *Wiggs*, 60 Conn. App. 551, 552, 760 A.2d 148 (2000). In the present case, the defendant was not arrested pursuant to a warrant.

The sole issue to be decided on appeal is whether the court properly denied the defendant's motion to dismiss in light of the evidence presented. Our review of the court's ultimate legal conclusion and resulting denial of the motion to dismiss is de novo. *Pitchell* v. *Hartford*, 247 Conn. 422, 429, 722 A.2d 797 (1999).

''The definition of operation of a motor vehicle is well established. One need not drive a vehicle to operate it. . . . Operation occurs when a person in the vehicle intentionally does any act or makes use of any mechanical or electrical agency which alone or in sequence will set in motion the motive power of the vehicle.'' (Internal quotation marks omitted.) *State* v. *Gordon*, 84 Conn. App. 519, 527, 854 A.2d 74, cert. denied, 271 Conn. 941, 861 A.2d 516 (2004). Engaging a motor vehicle's ignition affects or could affect the vehicle's movement and may be sufficient to constitute operation. See *State* v. *Ducatt*, 22 Conn. App. 88, 93, 575 A.2d 708, cert. denied, 217 Conn. 804, 584 A.2d 472 (1990). We conclude, however, that the state did not factually support its allegation of operation by presenting evidence that a key was in the motor vehicle's ignition, while such key was neither in the ''on'' nor ''start'' positions of the ignition,[6] even when the motor vehicle's headlamps were illuminated.

The defendant in *State* v. *DeCoster*, 147 Conn. 502, 162 A.2d 704 (1960), was convicted of operating a motor vehicle while intoxicated. In *DeCoster*, the evidence supported a finding that a police officer found the defendant, who was intoxicated, slumped over the steering wheel of his motor vehicle. Id., 504. The vehicle's key was in the ignition, but the ignition was in the off posi-

tion. Id. The two right tires on the motor vehicle were flat, and the vehicle exhibited body damage on its right side. Id. Four traffic signs close to where the motor vehicle was stopped had been knocked down. Id.

In reversing in part the conviction on the ground of insufficient evidence, our Supreme Court in *DeCoster* concluded that the state had failed to demonstrate the critical nexus between intoxication and operation; that is, the state failed to demonstrate how much time had transpired between the moment the defendant last operated his motor vehicle and the moment he was discovered sitting in the motor vehicle. Id., 505. The court noted that although the evidence supported an inference that the defendant's motor vehicle had struck the signs along the nearby intersection, there were no witnesses who had observed the defendant operating the motor vehicle and no evidence to show how long it had been stationary. Id., 504.

As in *DeCoster*, there is no evidence in the present case demonstrating when the defendant operated his motor vehicle in relation to his intoxication. The evidence does not demonstrate that the defendant was operating his motor vehicle when Dowling discovered him. Apart from evidence concerning the defendant's physical condition and position in the vehicle, there is only evidence of a key in the motor vehicle's ignition and the motor vehicle's headlamps having been turned on. Taken individually or together, this evidence is not sufficient to demonstrate that the defendant had engaged the mechanical or electrical equipment of his motor vehicle so as to activate the motive power of the vehicle. In the present case, the evidence of operation as required by § 14-227a is lacking.[7]

The judgment is reversed and the case is remanded with direction to grant the defendant's motion to dismiss and to render judgment thereon.

In this opinion WEST, J., concurred.

[1] The defendant's plea was accepted pursuant to General Statutes § 54-94a and Practice Book § 61-6.

General Statutes § 54-94a provides in relevant part: "When a defendant, prior to the commencement of trial, enters a plea of nolo contendere conditional on the right to take an appeal from the court's denial of the defendant's . . . motion to dismiss, the defendant after the imposition of sentence may file an appeal within the time prescribed by law provided a trial court has determined that a ruling on such motion . . . to dismiss would be dispositive of the case. The issue to be considered in such an appeal shall be limited to whether it was proper for the court to have denied . . . the motion to dismiss. . . ."

Practice Book § 61-6 (a) (2) (i) provides in relevant part: "When a defendant, prior to the commencement of trial, enters a plea of nolo contendere conditional on the right to take an appeal from the court's denial of the defendant's . . . motion to dismiss, the defendant after the imposition of sentence may file an appeal within the time prescribed by law. The issue to be considered in such appeal shall be limited to whether it was proper for the court to have denied . . . the motion to dismiss. . . ."

[2] The defendant based his motion to dismiss on insufficient evidence and insufficient probable cause to justify the bringing or continuing of the information and to justify placing him on trial.

[3] The dissent properly points out that in ruling on a motion to dismiss on

the grounds of insufficient evidence, the court should not make any findings of fact. ''When hearing a motion to dismiss, the court is confined to determining whether the . . . evidence, if believed and if given the benefit of all favorable inferences, makes out a prima facie case. . . . The court, on such a motion, *may not make findings of fact* . . . .'' (Emphasis in original; internal quotation marks omitted.) *State* v. *Perez*, 82 Conn. App. 100, 103 n.5, 842 A.2d 1187, cert. denied, 269 Conn. 904, 852 A.2d 734 (2004). Although the court used the term ''factual findings'' in its discussion of the evidence, we afford the court's recitation of the evidence no deference and base our review on the evidence presented at the hearing, as found in the record.

[4] The defendant does not contest the fact that the evidence supports a finding that he was intoxicated at the time of his arrest. The sole issue is whether the evidence supports a finding that he operated a motor vehicle while intoxicated.

[5] The state also does not challenge the propriety of the hearing on appeal.

[6] During the evidentiary hearing, Dowling testified that he observed the keys in the ignition, but that he either did not notice or did not recall whether the keys were in the ''off position.'' Dowling testified that when he opened the driver's door, a chime sounded. He further testified that he neither observed the vehicle in motion nor felt the vehicle's hood to ascertain whether it was warm. The police report filed by Dowling indicates only that when Dowling opened the driver's door to the vehicle, ''a warning chime sounded indicating the keys were in the ignition and a door was open.''

The defendant elicited testimony from Kenneth Devlin, a Lexus service technician with master certification. Devlin testified that there are four ignition positions on the defendant's Lexus: ''off, accessory, on and start.'' Devlin testified that the car can be considered ''on,'' with its engine running, in only the ''on'' and ''start'' positions. Devlin further testified that the car is ''considered off'' in the other positions. He also testified that the vehicle's chime sounds when the key is in either of those other positions, which he alternatively described as the ''lock'' or ''accessory'' positions. An owner's manual for a Lexus vehicle with an ignition switch similar to that of the defendant's vehicle also suggests that there are four ignition positions: lock, accessory, on and start. Although Devlin testified that the chime would sound with the key in the ''on'' position in the ignition, he immediately thereafter clarified his response. We respectfully disagree with the dissent's characterization of Devlin's testimony as to when the chime sounds as conflicting. See footnote 1 of the dissenting opinion. Further, the owner's manual states that if the key is left in the accessory or lock positions and the driver's door is thereafter opened, ''a buzzer will remind you to remove the key.'' On the basis of that evidence, and viewing that evidence in the light most favorable to the state, we conclude that it would have been unreasonable for a rational fact finder to have found that the key was in either the ''on or ''start'' positions of the ignition when Devlin came upon the vehicle.

[7] The dissent relies on *State* v. *Englehart*, 158 Conn. 117, 256 A.2d 231 (1969), in support of its conclusion that a fact finder reasonably could have found, on the evidence presented, that the defendant was operating his vehicle, or had operated his vehicle, while under the influence of intoxicating liquor. In *Englehart*, the evidence permitted a finding that the defendant was discovered alone in her vehicle. Id., 120. The vehicle was stopped in the center of a road with its headlights illuminated and its motor off. Id. No witnesses observed her driving the vehicle. Id. The defendant was found slumped over the vehicle's steering wheel; she was unconscious and '' 'dead drunk.' '' Id. ''The key was in the ignition switch, which was turned to the 'on' position, the gear shift lever was in the 'drive' position, and the emergency brake was on.'' Id. Our Supreme Court concluded, on the basis of that and other evidence, that it was reasonable for the jury to conclude that the defendant in *Englehart* had operated the vehicle while intoxicated. Id., 124.

We consider *Englehart* to be factually distinguishable from the present case because the evidence here permits only the finding that the defendant's vehicle was not found in the center of a road. The evidence permits no reasonable finding other than that Dowling found the defendant's vehicle parked in a ''legal parking spot'' along a roadway. Dowling referred to it as ''street parking in front of a bank.'' The road on which the state trooper discovered the vehicle in *Englehart* was described as a ''back'' road. Id., 120. Here, the evidence permits only the finding that the defendant's vehicle was parked near a bank and that the defendant told Dowling that he had earlier in the evening been to a restaurant that is a few blocks from the

location of his vehicle. *Englehart* is also factually distinguishable because in the present case, the key was not turned to the ''on'' position in the vehicle's ignition.