****

The ''officially released'' date that appears near the beginning of each opinion is the date the opinion will be published in the Connecticut Law Journal or the date it was released as a slip opinion. The operative date for the beginning of all time periods for filing postopinion motions and petitions for certification is the ''officially released'' date appearing in the opinion. In no event will any such motions be accepted before the ''officially released'' date.

All opinions are subject to modification and technical correction prior to official publication in the Connecticut Reports and Connecticut Appellate Reports. In the event of discrepancies between the electronic version of an opinion and the print version appearing in the Connecticut Law Journal and subsequently in the Connecticut Reports or Connecticut Appellate Reports, the latest print version is to be considered authoritative.

****

MCDONALD, J., dissenting. I disagree that the denial of the motion to dismiss should be reversed.

In granting a motion dismiss for insufficient evidence, the trial court must find that the entire case that the state could present fails to support a reasonable finding that General Statutes § 14-227a has been violated. Cf. *State* v. *Morrill*, 193 Conn. 602, 611, 478 A.2d 994 (1984). In so doing, the court must consider the evidence in the light most favorable to the state. *State* v. *Kinchen*, 243 Conn. 690, 702, 707 A.2d 1255 (1998).

At the hearing, the defendant called as witnesses the arresting police officer and a Lexus automobile mechanic. On the issue of whether the officer's testimony would constitute the state's entire case, the state did not make such a concession, and the officer's testimony that he did not know of any other police reports was not the required conclusive evidence. See *State* v. *Bellamy*, 4 Conn. App. 520, 528, 495 A.2d 724 (1985). The mechanic's testimony did not concern this issue. The mechanic presented the defendant's case, explaining the operation of an ignition switch over the state's objection.

Moreover, our Supreme Court has stated that the question of whether a vehicle was being operated is one of fact to be determined under the particular facts of the case. *Murphy* v. *Commissioner of Motor Vehicles*, 254 Conn. 333, 344, 757 A.2d 561 (2000). In *Murphy*, our Supreme Court noted that in *State* v. *Englehart*, 158 Conn. 117, 256 A.2d 231 (1969), the court "explained how a jury might view 'operation' in light of particular facts. In *Englehart*, the defendant was discovered in her car, stopped in the middle of the road with the headlights on and the motor off, and slumped over the steering wheel. . . . The court stated that, '[from] the evidence . . . [a] jury . . . [could infer] that the defendant, while under the influence of intoxicating liquor, had either driven the vehicle to the point at which it stopped or had attempted to start it after it had stopped . . . . This inference, according to the court, was both reasonable and logical in light of the facts proven." (Citations omitted.) *Murphy* v. *Commissioner of Motor Vehicles*, supra, 345 n.15.

In *Englehart*, the defendant was "slumped over the steering wheel . . . unconscious, 'dead drunk' . . . drooling at the mouth . . . [and] [n]o person other than the defendant was in the car." *State* v. *Englehart*, supra, 158 Conn. 120. Our Supreme Court distinguished *State* v. *DeCoster*, 147 Conn. 502, 162 A.2d 704 (1960), from *Englehart* on the ground that in *DeCoster*, there was evidence that the car's ignition was turned off, that both right tires were flat, and that there was no evidence

that the defendant was in the driver's seat, no evidence that the vehicle's lights were on after dark and no evidence that the vehicle was in a public highway. *State* v. *Englehart*, supra, 123–24.

In this case, at 12:30 a.m., the defendant sat unconscious and alone in the driver's seat of the vehicle with the headlights on and with the key in a position to cause the warning chime to sound when the driver's door was opened.[1] The defendant told the officer that he had been at home that evening and then at Gates Restaurant, in nearby New Canaan, and had consumed three drinks. The police report reflects that the defendant's home was in South Salem, New York. The police report also indicates that the defendant was drooling after he was awakened and that the defendant's Breathalyzer tests at 2 a.m. and 3 a.m. showed blood alcohol levels of 0.176 and 0.172. See *State* v. *Kinchen*, supra, 243 Conn. 703.

The Lexus mechanic testified that the ignition switch is a cylinder into which the key is inserted and turned to start the engine after which the key would return to the on position, leaving the motor running. The owner's manual for a similar Lexus vehicle introduced by the defendant states that the steering wheel is locked when the ignition switch is in the lock position; see footnote 1; and that the engine immobilizer system is automatically engaged when the key is removed from the ignition switch. Similar evidence could have been presented by the state after developing its case. The state could have established that the key was not in the off position and that the ignition system was unlocked.

The trier of fact could have reasonably found that the defendant had driven from his home in New York to a parking space near the restaurant. There, he drank alcohol and then returned to start the vehicle, which was operable. The vehicle was parked alongside the traveled portion of the highway, and the trier of fact could have reasonably concluded that before passing out, the defendant had begun the process of starting the motor by inserting the ignition key, sufficiently to engage the chime, turning on the lights and preparing to drive away. I would conclude that there was sufficient evidence of the operation of a motor vehicle. The proof gave rise to a situation such as that in *State* v. *Swift*, 125 Conn. 399, 6 A.2d 359 (1939). See *State* v. *Englehart*, supra, 158 Conn. 121. Inserting the key in the ignition switch was ''mak[ing] use of [a] mechanical or electrical agency which alone or in sequence will set in motion the motive power of the vehicle.'' *State* v. *Swift*, supra, 403; see *State* v. *Englehart*, supra, 158 Conn. 121. To the present day, our cases still follow *Swift*. E.g., *State* v. *Gordon*, 84 Conn. App. 519, 527, 854 A.2d 74 (quoting this same definition of ''operation''), cert. denied, 271 Conn. 941, 861 A.2d 516 (2004); *State* v. *Wiggs*, 60 Conn. App. 551, 554, 760 A.2d 148 (2000) (same); *State* v. *Angueira*, 51 Conn. App. 782, 786, 725 A.2d 967 (1999)

(same); *State* v. *Teti*, 50 Conn. App. 34, 38, 716 A.2d 931 (same), cert. denied, 247 Conn. 921, 722 A.2d 812 (1998); *State* v. *Ducatt*, 22 Conn. App. 88, 90, 575 A.2d 708 (same), cert. denied, 217 Conn. 804, 584 A.2d 472 (1990).

After the key had unlocked the ignition switch, freed the steering wheel and disabled the engine immobilizer, it could then be turned to start the engine. Ignition systems have evolved significantly in the forty-five years since *DeCoster*. In this case, ''the controls of a car capable of immediate powered movement [were] under the control of an intoxicated motorist, which is precisely the evil the legislature sought to avoid through [the statute].'' *State* v. *Ducatt*, supra, 22 Conn. App. 93. As in *Ducatt*, the fact that the defendant was dead drunk, which prevented him from turning the key, provides no assurance that the engine would not be started when the defendant came to if the officer had not intervened.

Accordingly, I respectfully dissent.

[1] In considering a motion to dismiss on the ground of insufficient evidence, the court should not itself make findings of fact from the evidence. *Thomas* v. *West Haven*, 249 Conn. 385, 399, 734 A.2d 535 (1999), cert. denied, 528 U.S. 1187, 120 S. Ct. 1239, 146 L. Ed. 2d 99 (2000). The court, however, did make such factual findings, finding that the arresting officer saw the keys in the off position in the ignition switch.

The arresting officer testified at the hearing that he did not recall whether the key was in the on or the off position, and the officer's report makes no mention of the position of the key in the ignition switch. The defense mechanic's testimony concerning whether the warning chime would sound if the key were in the on or off positions in the ignition switch was conflicting. The owner's manual presented by the defendant also illustrated that the Lexus switch had no off position. The vehicle had only lock, accessory, on and start positions. Thus, the court improperly found that the key was in the off position in the ignition switch.