

# Recent Case Report

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## People v. Shafrir

(2010) \_\_ Cal.App.4<sup>th</sup> \_\_ [2010 WL 1189584]

### Issue

If an officer's decision to tow a vehicle was objectively reasonable, is the towing nevertheless unlawful if the officer's department did not require that he also consider a standardized list of criteria?

### Facts

At about 3:40 A.M., CHP officers Michael Tenney and Leo Smith were patrolling the San Francisco-Oakland Bay Bridge and were about to enter the span from Treasure Island when a new Mercedes Benz sped past them toward Oakland. They eventually caught up with the car (having clocked its speed at over 110 m.p.h.) and signaled the driver to stop. The driver and sole occupant, Gideon Shafrir, complied by exiting the freeway and stopping at the corner of MacArthur Boulevard and Market St., which was known to the officers as a "high crime area." Shafrir was arrested after the officers determined there was probable cause to believe he was under the influence of alcohol.

Before transporting Shafrir to jail, the officers decided to tow his car from the scene for safekeeping pursuant to Vehicle Code § 22651(h) which authorizes towing when an officer makes a custodial arrest of the driver. Specifically, the officers determined that towing was necessary because it would have been unsafe to simply park and lock a "brand new Mercedes" in "a neighborhood in which auto theft and other crimes were common."

Because CHP policy requires that officers inventory the contents of vehicles before they are towed, Officer Smith conducted an inventory search and, while inventorying the contents of the trunk, found a box containing three "large" bags of marijuana and a paper bag containing \$50,000 in cash. As a result, Shafrir was charged with, among other things, possession of marijuana for sale.

### Discussion

Although Shafrir conceded that the officers' decision to tow the vehicle was objectively reasonable, he contended that officers should not be permitted to tow vehicles unless the decision to do so was both objectively reasonable and based on standardized list of criteria. And because the CHP does not require that its officers consider such a list, he argued that the evidence should have been suppressed.

Shafrir's argument was based on the United States Supreme Court's decision in *Colorado v. Bertine*<sup>1</sup> in which the Court, in the course of upholding an inventory search of a car, pointed out that nothing in its prior cases "prohibits the exercise of police discretion so long as that discretion is *exercised according to standard criteria* and on the basis of something other than suspicion of evidence of criminal activity."<sup>2</sup> Shafrir urged the court to rule that meant that, even when towing was plainly necessary, officers may

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<sup>1</sup> (1987) 479 U.S. 367.

<sup>2</sup> Emphasis added.

not do so unless they first mentally review a list of relevant circumstances compiled by their departments.

The court refused to do so, ruling instead that towing is lawful under the Fourth Amendment if the officer's decision to move the vehicle to a tow yard or other safe location was objectively reasonable. In the words of the court, "[T]he ultimate determination is properly whether a decision to impound or remove a vehicle pursuant to the community caretaking function, was reasonable under all the circumstances."<sup>3</sup> Consequently, because Shafrir had been arrested, and because of the obvious threat to his new Mercedes if it were left unprotected in a high-crime area of Oakland, the court ruled that the inventory search was lawful, and that the evidence discovered in the trunk was admissible.<sup>4</sup> POV

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<sup>3</sup> **NOTE:** The court also pointed out that both California and federal courts have interpreted the quoted language in *Bertine* as merely saying "that an impoundment decision made pursuant to standardized criteria is more likely to satisfy the Fourth Amendment than one not made pursuant to standardized criteria." Citing *People v. Needham* (2000) 79 Cal.App.4<sup>th</sup> 260; *People v. Steeley* (1989) 210 Cal.App.3d 887; *U.S. v. Coccia* (1<sup>st</sup> Cir. 2006) 446 F.3d 233; *U.S. v. Smith* (3d Cir. 2008) 522 F.3d 305. BUT ALSO SEE *U.S. v. Proctor* (D.C. Cir. 2007) 489 F.3d 1348.

<sup>4</sup> **NOTE:** The court pointed out that, even if officers were required to consider a standardized list of circumstances, it appears that officers Tenney and Smith did so. For one thing, they considered that Vehicle Code § 22651(h) authorizes towing when an officer makes a custodial arrest of "a person driving or in control of a vehicle." Said the court, "In this case, the reliance on section 22651, subdivision (h), is sufficient to satisfy *Bertine*" because that reliance was "coupled with testimony indicating a reasonable community caretaking justification"; e.g., high-crime area, there was no passenger in the vehicle who could have driven it away.