

**FILED**  
**United States Court of Appeals**  
**Tenth Circuit**

**UNITED STATES COURT OF APPEALS**

**FOR THE TENTH CIRCUIT**

**October 2, 2026**

**Christopher M. Wolpert**  
**Clerk of Court**

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

DERRIS MAYBERRY,

Defendant - Appellant.

No. 25-1232  
(D.C. No. 1:24-CR-00110-DDD-1)  
(D. Colo.)

**ORDER AND JUDGMENT\***

Before **McHUGH**, **EBEL**, and **KELLY**, Circuit Judges.

Defendant-Appellant Derris Mayberry was convicted of distribution and possession with intent to distribute fentanyl and possession of a firearm or ammunition by a felon. 21 U.S.C. § 841(a)(1), (b)(1)(C); 18 U.S.C. § 2; 18 U.S.C. § 922(g)(1). He was sentenced to concurrent terms of imprisonment of 110 months and three years' supervised release. He appeals from the district court's denial of his motion to suppress evidence recovered during a search incident to his arrest, arguing that the police lacked probable cause for the arrest. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

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\* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

## **Background**

### **A. The Arrest and Search of Mr. Mayberry**

On the evening of March 22, 2024, Officers Selby and Mullen of the Denver Police Department were working undercover in an area known to officers as an “open-air drug market.” ECF No. 31-3 (the “Order”),<sup>1</sup> at 1–2; II Supp. R. 8. Both officers were dressed in plain clothes. Order at 2. Officer Selby held prerecorded cash with which he would attempt to buy fentanyl, while Officer Mullen accompanied him for protection. Id. Other officers waited nearby, conducting surveillance and preparing to make arrests. Order at 1–2.

While standing on the corner of the street, Officer Mullen was approached by a woman, later identified as Janeiry Esteves Gonzales, who offered to sell him “dope.” II Supp. R. 54–55. Officer Mullen asked if she had any “blues”—a street term for fentanyl—to which Ms. Esteves said no, but that she had “a guy that can go get them.” Id. at 55. Officer Mullen said that he did not have cash, but that his “buddy” (Officer Selby) did. Id. Ms. Esteves, accompanied by an unknown female, left to get the pills while Officer Mullen followed the two women from a half block behind. Id. at 55–56. When Officer Selby arrived, Officer Mullen briefed him on his conversation with Ms. Esteves, and the officers followed the two women towards an alley. Id. at 57–61. Officer Mullen introduced Officer Selby to the women while he

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<sup>1</sup> The district court’s order is attached to Mr. Mayberry’s opening brief. ECF No. 31-3.

remained nearby. Id. at 61–62. Officer Selby wore a wire which recorded what transpired next. Id. at 12, 62.

After discussing the terms of the sale, Ms. Esteves asked Officer Selby to come into the alley to complete the deal. Id. at 62–63. Both officers testified that they saw a man, later identified as Mr. Mayberry, standing alone in the alley. Id. at 16, 63–65. Officer Selby refused to go into the alley, telling Ms. Esteves he did not want to get robbed. Ms. Esteves tried to convince Officer Selby to come with her, and at one point assured him “[i]t’s just you, me and her”—apparently referencing the other unknown female. Order at 2; II Supp. R. 83. Eventually, Ms. Esteves entered the alley alone and approached Mr. Mayberry. II Supp. R. 66. Both officers testified that prior to entering the alley, Ms. Esteves’s hands were empty. Id. at 18, 65–66. Both officers also testified that they watched Ms. Esteves the entire time she was in the alley, and that they saw Ms. Esteves and Mr. Mayberry engage in a hand-to-hand exchange. Id. at 17, 66–67. And both officers testified that when Ms. Esteves turned away from Mr. Mayberry and returned to where the officers were waiting, she had a clenched fist. Id. at 16–17, 66–67.

When she returned, Ms. Esteves handed Officer Selby several pills, and Officer Selby handed her a prerecorded \$20 bill. Id. at 17–18, 65–66. Officer Mullen watched Ms. Esteves walk back to Mr. Mayberry in the alley, and Officer Selby aired a description of both Ms. Esteves and Mr. Mayberry over the radio. Id. at 18–19, 67–68. Uniformed officers arrested both Ms. Esteves and Mr. Mayberry a

short time later at a bus stop just around the corner. Order at 3. A search of Mr. Mayberry yielded fentanyl pills, the prerecorded \$20 bill, and a loaded revolver. Id.

### **B. Procedural History**

Mr. Mayberry moved to suppress the evidence recovered from the search, alleging that the officers lacked probable cause to arrest him. I R. 54–59. Officer Selby, Officer Mullen, and Mr. Mayberry testified at the suppression hearing, and the government submitted exhibits in support, including Officer Selby’s wire recording. II Supp. R. 122; I R. 91.

Mr. Mayberry pointed to several inconsistencies between the body-worn camera footage, Officer Selby’s wire recording, and various police reports, arguing, in essence, that the inconsistencies made it unclear whether either officer actually observed Mr. Mayberry participate in any drug transaction. I R. 55–57. Two such inconsistencies are relevant here. First, Officer Selby testified that Ms. Esteves was alone, which was contradicted by Officer Mullen’s testimony and the presence of an unknown female in the body camera footage of Ms. Esteves’s arrest. II Supp. R. 33–35; Order at 5. Second, he testified that while he was arguing with Ms. Esteves about going down the alley, Mr. Mayberry told him not to worry about being robbed. II Supp. R. 37; Order at 5. However, Officer Mullen’s testimony and the wire recording contradicted this testimony; both indicated that it was a random passerby who made those remarks, not Mr. Mayberry. II Supp. R. 71–72; Order at 5.

For his part, Mr. Mayberry claimed that he was not in the alley at all but was waiting for the bus at the bus stop and preparing to smoke marijuana when

Ms. Esteves and others approached him, prompting him to give them some marijuana, possibly in exchange for the \$20 prerecorded bill. II Supp. R. 104–06. He claimed that the fentanyl pills found on him were for his personal use due to pain he suffered from a car accident. Id. at 103–04.

The court denied the motion, finding the officers had probable cause to arrest Mr. Mayberry. Order at 1–7. The court noted the inconsistencies in Officer Selby’s testimony, but found that even if Officer Selby’s testimony were to be disregarded entirely, there was still sufficient reason for law enforcement to have probable cause to arrest, and therefore search, Mr. Mayberry. Id. at 5–7.

### **Discussion**

On appeal, Mr. Mayberry argues that the district court erred in denying his motion to suppress because the police lacked probable cause for the arrest and the search incident thereto. Aplt. Br. 9, 15–16. When reviewing the denial of a motion to suppress, we review the district court’s factual findings for clear error, viewing the facts in the light most favorable to the government. United States v. Cates, 73 F.4th 795, 805 (10th Cir. 2023). A factual finding is clearly erroneous if it lacks support in the record or if “after reviewing all the evidence, we are left with a definite and firm conviction that a mistake has been made.” United States v. Johnson, 43 F.4th 1100, 1107 (10th Cir. 2022) (citation modified). We review the ultimate determination of reasonableness under the Fourth Amendment de novo. Id.

The Fourth Amendment prohibits warrantless arrests absent probable cause. Id. “Probable cause exists if facts and circumstances within the arresting officer’s

knowledge and of which he or she has reasonably trustworthy information are sufficient to lead a prudent person to believe that the arrestee has committed or is committing an offense.” Id. (citation modified). It is not a demanding inquiry; it requires only a fair probability or substantial chance of criminal activity—something more than a bare suspicion, but less than an actual showing of such activity. Id.; District of Columbia v. Wesby, 583 U.S. 48, 57 (2018). In assessing the propriety of the search, “we defer to all reasonable inferences made by law enforcement officers in light of their knowledge and professional experience distinguishing between innocent and suspicious actions.” Cates, 73 F.4th at 805 (citation modified).

The district court found that Mr. Mayberry was “standing alone in an alley in an area known for drug trafficking and was seen to engage in a hand-to-hand transaction with Ms. Esteves moments before she sold fentanyl to Officer Selby.” Order at 6–7. The district court credited Officer Mullen’s testimony that he “saw Ms. Esteves approach Mr. Mayberry with an open hand, engage in some sort of hand-to-hand transaction, and then return with a closed fist containing several fentanyl pills.” Id. at 5. It also found that the wire recording corroborated that testimony, as the officers aired Mr. Mayberry’s description to their colleagues as soon as the drug deal was complete. Id. The officers’ belief that “they saw [Mr. Mayberry] participate in a hand-to-hand transaction with Ms. Esteves moments before they purchased drugs from her” supported probable cause to arrest Mr. Mayberry. Id. Acknowledging Mr. Mayberry’s testimony in his own defense, the district court ultimately concluded that while it “may cast some doubt” on the government’s

version of events, it did not remove the “fair probability” that Mr. Mayberry was involved in illegal drug trafficking. Id. at 6–7. The district court’s findings are supported by evidence and are not clearly erroneous.

Mr. Mayberry argues that the testimony from Officer Selby and Officer Mullen was so inconsistent and contradictory that it cannot support a finding of probable cause. Aplt. Br. at 18–19, 21; Aplt. Reply Br. at 2. Officer Selby’s testimony does appear to be incorrect on certain points, such as the identity of the person who told him not to worry about being robbed, and whether Ms. Esteves was alone during the encounter. Order at 5. But these points are at best collateral and do not undercut the basis for the court’s finding of probable cause—that both officers watched Mr. Mayberry “participate in a hand-to-hand transaction with Ms. Esteves moments before they purchased drugs from her.” Order at 5. Moreover, we need not resolve the issue of Officer Selby’s credibility because the district court found that even if it were to disregard Officer Selby’s testimony entirely, Officer Mullen’s testimony, as corroborated by the wire recording, provided a sufficient basis to find that probable cause existed for the arrest. Id.

Mr. Mayberry also argues that the officers were physically too far away from the exchange to know with certainty that Mr. Mayberry handed narcotics to Ms. Esteves. Aplt. Br. at 8, 19–21. This argument is unavailing. Officer Mullen testified that he observed Ms. Esteves and Mr. Mayberry throughout the transaction, and that Mr. Mayberry was about 10 to 15 feet away from him. II Supp. R. 63–65, 67. And the district court credited the officers’ testimony that they “believed they

saw [Mr. Mayberry] participate in a hand-to-hand transaction with Ms. Esteves[.]” Order at 5. We see no reason to disturb these factual findings.

Moreover, probable cause does not require “metaphysical certitude or proof beyond a reasonable doubt”—rather, it is “a matter of probabilities and common sense conclusions, not certainties.” United States v. Martin, 613 F.3d 1295, 1302 (10th Cir. 2010) (citation modified). Officer Mullen testified that moments after he witnessed the hand-to-hand exchange between Ms. Esteves and Mr. Mayberry, Ms. Esteves returned with a clenched fist and handed Officer Selby fentanyl pills in exchange for money. II Supp. R. 67–68. That is sufficient for probable cause.<sup>2</sup>

Mr. Mayberry argues that we should follow United States v. Drakeford, 992 F.3d 255 (4th Cir. 2021). Aplt. Reply Br. at 3–4, 7–8. In Drakeford, the Fourth Circuit reversed the district court’s finding of reasonable suspicion based on an officer’s “conclusory” testimony that a handshake he witnessed was “consistent with” a hand-to-hand drug transaction. 992 F.3d at 264–65. There, the officer testified that he “never witnessed drugs or money change hands, and his testimony did not provide any details about the handshake that allows [the court] to view th[e] . . . handshake as suspicious.” Id. at 264. Putting aside any issues of waiver, Drakeford is inapposite because here the hand-to-hand interaction between Ms. Esteves and Mr. Mayberry

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<sup>2</sup> The district court noted the similarities between United States v. Jackson, 806 F. App’x 645 (10th Cir. 2020), and this case. Order at 5–6. Although Mr. Mayberry seeks to distinguish it, the testimony and other evidence adduced at the suppression hearing indicate a controlled buy observed by officers, which, as explained, meets the threshold required for probable cause.

occurred in the context of a controlled buy witnessed by two officers and corroborated by a wire recording. Order at 5.

Taking the district court's findings and viewing them in the light most favorable to the government, we agree that Mr. Mayberry's arrest was supported by probable cause and therefore reasonable under the Fourth Amendment. And because his arrest was justified by probable cause, the officers validly searched him incident to arrest. Thus, the district court did not err in denying the motion to suppress.

AFFIRMED.

Entered for the Court

Paul J. Kelly, Jr.  
Circuit Judge